IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the 2021 Redistricting Cases (Matanuska-Susitna, S-18328) (City of Valdez, S-18329) (Municipality of Skagway, S-18330) (Alaska Redistricting Board, S-18332)	)	Supreme Court No. S-18332 (S-18328, S-18329, S-18330, S-18332 consolidated)

Trial Court Case No. 3AN-21-08869CI

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

ALASKA REDISTRICTING BOARD'S PETITION FOR REVIEW

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Filed in the Supreme Court of the State of Alaska this _____ day of March, 2022.

MEREDITH MONTGOMERY, CLERK
Appellate Courts

By:_____
Deputy Clerk

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§ 6. District Boundaries

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.

§ 10. Redistricting Plan and Proclamation

(a) Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.

(b) Adoption of a final redistricting plan shall require the affirmative votes of three members of the Redistricting Board. *[Amended 1998]*

§ 11. Enforcement

Any qualified voter may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting. Application to compel the board to perform must be filed not later than thirty days following the expiration of the ninety-day period specified in this article. Application to compel correction of any error in redistricting must be filed within thirty days following the adoption of the final redistricting plan and proclamation by the board. Original jurisdiction in these matters is vested in the superior court. On appeal from the superior court, the cause shall be reviewed by the supreme court on the law and the facts.

Notwithstanding section 15 of article IV, all dispositions by the superior court and the supreme court under this section shall be expedited and shall have priority over all other matters pending before the respective court. Upon a final judicial decision that a plan is invalid, the matter shall be returned to the board for correction and development of a new plan. If that new plan is declared invalid, the matter may be referred again to the board. *[Amended 1998]*

Editor's Note: The Division of Elections publishes maps and district descriptions resulting from the Proclamation of Redistricting by the Alaska Redistricting Board, April 25, 2002.

I. PETITION FOR REVIEW

The Alaska Redistricting Board ("Board") petitions this Court for immediate review. On February 15, 2022, Anchorage superior court Judge Thomas Matthews issued his decision on five challenges to the 2021 redistricting plan. Judge Matthews invalidated House District 3 and 4 despite concluding that the districts are compact, contiguous, relatively socio-economically integrated, and as near as practicable to 1/40th of the State's total population, as required by Art. VI, Section 6, of the Alaska Constitution. Judge Matthews also invalidated Senate District K even though it is comprised of two contiguous and socio-economically integrated house districts. Because these election districts comply with the Alaska Constitution, the trial court's preference for different districts resulted from a misguided expansion of Article VI inconsistent with settled law.

Judge Matthews adopted novel applications of Article VI, Section 10 and Alaska's equal protection clause, and ordered the Board to change its redistricting plan on remand. Absent immediate appellate review, the Board will lose its right to appeal. The districts in the new redistricting plan on remand will either trigger new lawsuits or no party will challenge the new districts and it will become the final redistricting plan.[1] If the former occurs, the Board will be defending in the superior court a new plan that no longer includes House Districts 3 and 4 and Senate District K discussed in this petition. If the latter occurs, the new remanded redistricting plan will become final. Either way, the version of the redistricting plan invalidated by the trial court will become moot and the Board will have

[1] Alaska Const. art. VI, sec. 11.

lost its right to appeal these erroneously stricken districts.

Given the novel constitutional rulings below, the potential that these rulings could escape appellate review, the public significance of redistricting, the harm to the Alaskan people through the insertion of the easily politically manipulated public-hearings rule announced below, and the gravity of the superior court's errors, immediate review is appropriate under Appellate Rule 402(b)(1)-(d). This Court should grant the Board's petition so that the Board does not lose its right to appeal the legality of these challenged election districts. This Court should ultimately affirm the Board's constitutional plan and allow Alaskans to focus their attention on the next elections free of the legal limbo created by the needless remand order below.

II. SUMMARY OF THE ARGUMENT

Over the course of 90 days in 2021, the Board reapportioned Alaska's forty house districts and twenty senate districts in compliance with the substantive requirements for election districts contained in Article VI of the Alaska Constitution. The Board was aware and followed the redistricting decisions of this Court in reapportioning all of Alaska's election districts. During the flurry of an incredibly expedited trial below, Judge Matthews ignored decades of this Court's precedent regarding the proper deference courts are to afford decisions of the Board, that courts are not permitted to add requirements to the plain language of the Alaska Constitution, and that all areas within the Municipality of Anchorage are socio-economically integrated with each other. This appeal seeks to correct these errors.

Judge Matthews held below that the Board's unanimous approval of House

District 3—a house district that the court concluded is compact, contiguous, relatively socio-economically integrated, and properly populated—was entitled to no deference because a dozen more members of the public wanted something different than what the Board ultimately selected. Because a small majority of the public wanted a less-compact house district that gerrymandered Skagway into a district with the downtown portion of the City and Borough of Juneau while placing the portion of the Borough closest to Skagway in another district, Judge Matthews held the Board was required to follow this public testimony. This ruling is contrary to this Court's precedent that judges are not permitted to second-guess constitutional districts or the wisdom of a redistricting plan.

Judge Matthews arrived at this conclusion through his novel interpretation of Article IV, Section 10 that ignores this Court's stated order of operations for interpreting the Alaska Constitution. Section 10 states, in relevant part, "The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board." Instead of simply reading this provision's plain terms and holding, as prior courts have, that it requires the Board to conduct multiple public forums where the public can comment, Judge Matthews went much further. Among other things, he went back to the minutes of Alaska's Constitutional Convention to decipher what the founders thought about public comment. This is a curious methodology, particularly as applied to Senate District K, given that Alaska's founders and voters who ratified the Constitution did not think that the public should have *any* say about senate districts. As originally written, Alaska's senate districts were "frozen," meaning they were set by the Constitution

and did not change.[2] If Alaska's founding fathers were as concerned about adherence to public testimony as the trial court concluded, why did the Constitution omit any opportunity for public comment on senate districts?

As to Senate District K, Judge Matthews erred by not applying this Court's decision in *In re 2001 Redistricting Cases*, which held that Muldoon, Eagle River, and JBER, were all socio-economically integrated and were properly in a house district together. The trial court ignored the multiple times this Court has rejected political attempts to constitutionalize the different parts of Anchorage for partisan gain, and reached back to passing dicta in this Court's caselaw to hold that Muldoon and Eagle River neighborhoods were different "communities of interest." The trial court also found an equal protection violation without ever identifying a politically salient class affected by Senate District K.

The Board seeks to uphold this Court's prior precedents and have these erroneous rulings reversed.

III. STATEMENT OF CASE

A. Introduction

Redistricting in Alaska is a task of "Herculean proportions."[3] "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

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[2] *Wade v. Nolan*, 414 P.2d 689, 690 & n.2 (Alaska 1966).

[3] *See In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (quoting *Egan v. Hammond,* 502 P.2d 856, 865-66 (Alaska 1972)).

10 of the Alaska Constitution."[4] The Board is permitted only 90 days to perform its task.[5] Redistricting is guided by a handful of sentences in the state constitution, plus case law developed by this Court over the past several decades, involving cases both before and after a significant 1998 constitutional amendment that created a new process for redistricting in Alaska.[6]

In 2021, the Board committed itself to adopting a redistricting plan that appropriately balanced Alaska's constitutional requirements for forty compact, contiguous, and relatively socio-economically integrated house districts, plus twenty senate districts, each consisting of two contiguous house districts.[7] Despite the challenges of a global pandemic and a delayed U.S. Census, the Board engaged in a robust, transparent public process utilizing newly available technology to allow the public to draw and submit their own maps, submit testimony, and attend hearings.[8]

Five plaintiff groups sued the Board over its redistricting plan, asserting broad

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4 *See id.*

5 Alaska Const. art. VI, sec. 10.

6 *See generally* Alaska Const. art. VI, sec. 10; *Hickel v. Southeast Conference*, 846 P.2d 38, 42-51 (Alaska 1992) (surveying pre-1998 amendment Alaska Supreme Court redistricting caselaw and Voting Rights Act law); Gordon S. Harrison, *The Aftermath of In re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 Alaska L. Rev. 51, 60-63 (2006).

7 Alaska Const. art. VI, sec. 6.

8 *See* Exc. 623-24, 626-27 (Torkelson Aff. ¶¶ 41-42, 44-45); Exc. 423-25 (Alaska Redistricting Board website capture of Public Hearing Tour, listing dates, locations, and linking State Public Notice system for formal notice of hearings); Exc. 419 (Board Meeting Information including links to public notices for meetings); Exc. 236 (Statement of NAACP of Anchorage, Alaska Branch President: "I want to express my profound gratitude to the Board for carefully considering public comments on draft plans, civil rights considerations including the impact of minority voters in East Anchorage, and ultimately choosing the most Constitutional House districts for Anchorage. This is the most transparent, non-partisan redistricting process in Alaska history, and your work honors the letter and spirit of the law that Alaska voters established by Constitutional amendment.").

constitutional claims and technical Open Meetings Act violations.[9] The superior court compressed pretrial proceedings into a short period over the winter holidays.[10] The court's pretrial orders precluded dispositive motions and required the Board to produce hundreds of thousands of pages of communications to and from the Board and its staff.[11] The court ruled that the Board was not entitled to discovery into the bias and motivations of plaintiffs challenging the plan, including plaintiffs' communications with their affiliated political organizations and/or elected officials.[12] This matter went to trial between January 21 and February 11.[13] The superior court issued its decision four days later.[14]

The superior court's decision shows that the Board's hard work paid off.[15] In a first in Alaska redistricting history, the reviewing court did not strike a single election district as incompatible with the Alaska Constitution's substantive requirements found in Article VI, Section 6.[16] The court ruled that all of the challenged house districts were sufficiently compact, contiguous, relatively socio-economically integrated and as near as practicable to the ideal population of 1/40th of the State's population.[17] The court further ruled that

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9 Exc. 941.

10 Exc. 443-48, Exc. 449-58; Exc. 459-62; Exc. 483-89; Exc. 681-83.

11 *See* Exc. 445 ("The Court will permit no motions for summary judgment."); Exc. 461 (ordering production of all non-privileged communications of the Board and staff).

12 *See* Exc. 484; Exc. 671-80.

13 *See id.*

14 *See* Exc, 484 ("[T]he superior court's decision is due by February 15, 2022.") (original emphasis removed).

15 Exc. 795 (holding against Section 6 challenge Senate District K), Exc. 826-61 (holding against Section 6 challenges House Districts 25-30, and 36), Exc. 870 (holding against Section 6 challenge House Districts 37-39), Exc. 876 (holding against Section 6 challenge House Districts 3 and 4).

16 *Id*.

17 Exc. 826-61 (holding against Section 6 challenges House Districts 25-30, and 36),

the challenged senate district was comprised of two contiguous house districts, as mandated by Article VI, Section 6.[18]

Despite the Board's adherence to the Constitution, the trial court struck down House Districts 3 and 4, and Senate District K based on newly announced process and duties that Judge Matthews added to the Constitution for the first time.[19] This appeal seeks to remedy those erroneous rulings and to put into effect the Board's constitutional redistricting plan so that the future of redistricting in Alaska does not become merely a contest of partisan political resources, as opposed to a statewide map that is the best for all of Alaska.

B. Factual and Procedural Background

The trial court invalidated House Districts 3 and 4, and Anchorage Senate District K on the basis that they were constructed and approved by the Board in violation of Article VI, Section 10 and the due process clause of the Alaska Constitution, [20] which Judge Matthews recognized must overlap.[21] The superior court also held that Senate District K violated Alaska's equal protection clause because, in Judge Matthews's eyes, it paired two Anchorage neighborhoods that are separate "communities of interest."[22] Because the remainder of the Board's work was upheld below, only House Districts 3 and 4 and Senate

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Exc. 870 (holding against Section 6 challenge House Districts 37-39), Exc. 876 (holding against Section 6 challenge House Districts 3 and 4).

18 Exc. 795 (holding against Section 6 challenge Senate District K).

19 Exc. 891-96 (stating new Section 10 rule).

20 Exc. 891-900 (invalidating House Districts 3 and 4) and Exc. 901 (invalidating Senate District K).

21 Exc. 884 (noting overlap between Section 10 and Due Process interests).

22 Exc. 806-826.

District K are discussed below.

Governor Dunleavy appointed Budd Simpson of Douglas and Bethany Marcum of Anchorage to the Alaska Redistricting Board.[23] Senate President Cathy Giessel appointed John Binkley of Fairbanks to the Board.[24] House Speaker Bryce Edgmon appointed Nicole Borromeo of Anchorage to the Board.[25] Chief Justice Joel Bolger appointed Melanie Bahnke of Nome to the Board.[26]

Several members of the Board are life-long Alaskans, and the Board brings over 200 collective years of experience in and across Alaska.[27] The Board elected John Binkley as its chair.[28] Binkley is a third-generation Alaskan and riverboat captain.[29] Born and raised in Fairbanks, Binkley and his wife started a tug and barge business on the Lower Yukon in St. Mary's, Alaska in 1977.[30] Binkley lived in Bethel from 1978 through 1990, and was elected to represent a Bethel-centered house district and then a senate district that covered 225,000 square miles, included 74 different communities, and 11 different school districts.[31] In 1990, Binkley moved back to Fairbanks, and has since served on the board

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23 Exc. 308; Exc. 580 (Simpson Aff. ¶ 7).

24 Exc. 308.

25 Exc. 308.

26 Exc. 308.

27 Exc. 505-08 (Binkley Aff. ¶¶ 3-10); Exc. 579-580 (Simpson Aff. ¶¶ 3-6); Exc. 527-28 (Bahnke Aff. ¶¶ 2-5); Exc. 544-46 (Borromeo Aff. ¶¶ 2-7); Exc. 572-73 (Marcum Aff.¶¶ 2-6).

28 Exc. 508 (Binkley Aff. ¶ 12).

29 Exc. 505 (Binkley Aff. ¶ 3).

30 Exc. 506 (Binkley Aff. ¶ 4).

31 Exc. 506 (Binkley Aff. ¶¶ 4-5).

of the Alaska Railroad, ran for governor, and started the Alaska Cruise Association.[32]

Member Melanie Bahnke was born in Nome and raised in Savoonga on St. Lawrence Island.[33] She has lived in Nome since 1995, and among other things, is President of Kawerak, Inc., a nonprofit corporation that the Bering Straits Native Association organized after passage of ANCSA to serve the 20 federally recognized tribes of the area.[34]

Member Nicole Borromeo was born and raised in McGrath.[35] Borromeo is a member of the Alaska Bar.[36] After clerking for an Alaska superior court judge, Borromeo was hired as the General Counsel of the Alaska Federation of Natives and was eventually elevated to Executive Vice President and General Counsel.[37] Borromeo serves, among other things, as the chairman of the board of directors of MTNT, Limited, the ANCSA village corporation for McGrath, Takotna, Nikolai, and Telida.[38]

Member Bethany Marcum has been an Anchorage resident for 26 years.[39] She has served in the military for 20 years, and has lived in various neighborhoods throughout the Municipality of Anchorage and has traveled extensively in Alaska for work and military exercises.[40] Marcum has served in the Air National Guard since 2008, originally stationed

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32 Exc. 506-07 (Binkley Aff. ¶¶ 6-8).
33 Exc. 527 (Bahnke Aff. ¶ 2).
34 Exc. 527 (Bahnke Aff. ¶ 4).
35 Exc. 544 (Borromeo Aff. ¶ 2).
36 Exc. 544 (Borromeo Aff. ¶ 2).
37 Exc. 544-45 (Borromeo Aff. ¶¶ 3-4).
38 Exc. 545 (Borromeo Aff. ¶ 5).
39 Exc. 572 (Marcum Aff. ¶ 2).
40 Exc. 572 (Marcum Aff. ¶ 3).

at Kulis Air National Guard Base and now at Joint Base Elmendorf Richardson.[41]

Member Budd Simpson has lived in the City and Borough of Juneau and practiced law in Alaska since 1977.[42] Through his law practice, Simpson has traveled extensively throughout Southeast Alaska to nearly every community that dots the coastlines of Alaska's Panhandle.[43] Since the late 1970s, Simpson and his wife have owned property in Haines, Alaska, and have traveled to Haines via the Alaska Marine Highway System ferries hundreds of times.[44] Simpson served as the City Attorney for the City and Borough of Haines for 15 years.[45] As an avid boater, he has traveled extensively through Alaska's inside passage and other ocean waterways of Alaska's Panhandle.[46]

1. The Board Adopts House Districts 3 and 4 After Public Hearings and Testimony in Southeastern Alaska

With regard to House Districts 3 and 4, Board Member Budd Simpson of Juneau took the lead in drafting the Southeast Alaska house districts.[47] House Districts 1-4 of the Final Plan, as shown below, encompass the house districts for Southeast Alaska.[48]

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41 Exc. 573 (Marcum Aff. ¶ 4).

42 Exc. 579-580 (Simpson Aff. ¶¶ 2-3).

43 Exc. 579-580 (Simpson Aff. ¶ 3). The only community with a significant population in Southeast Simpson has not visited is the Metlakatla Indian Reservation.

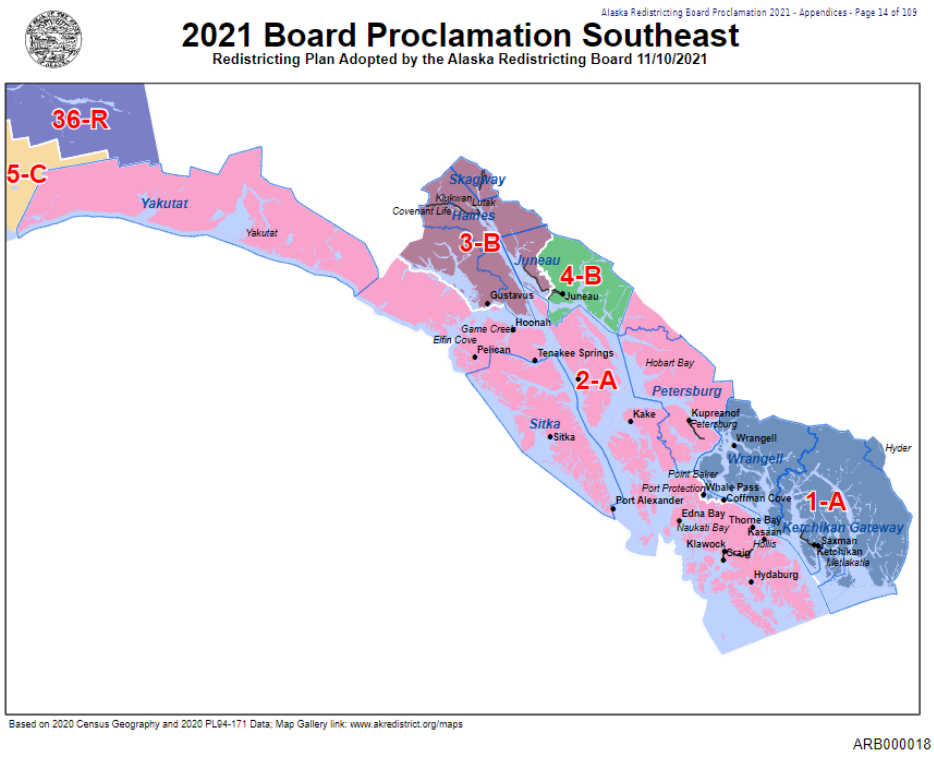
44 Exc. 580 (Simpson Aff. ¶ 5).

45 Exc. 579 (Simpson Aff. ¶ 3).

46 Exc. 580 (Simpson Aff. ¶ 4).

47 Exc. 580 (Simpson Aff. ¶ 8).

48 Exc. 321.



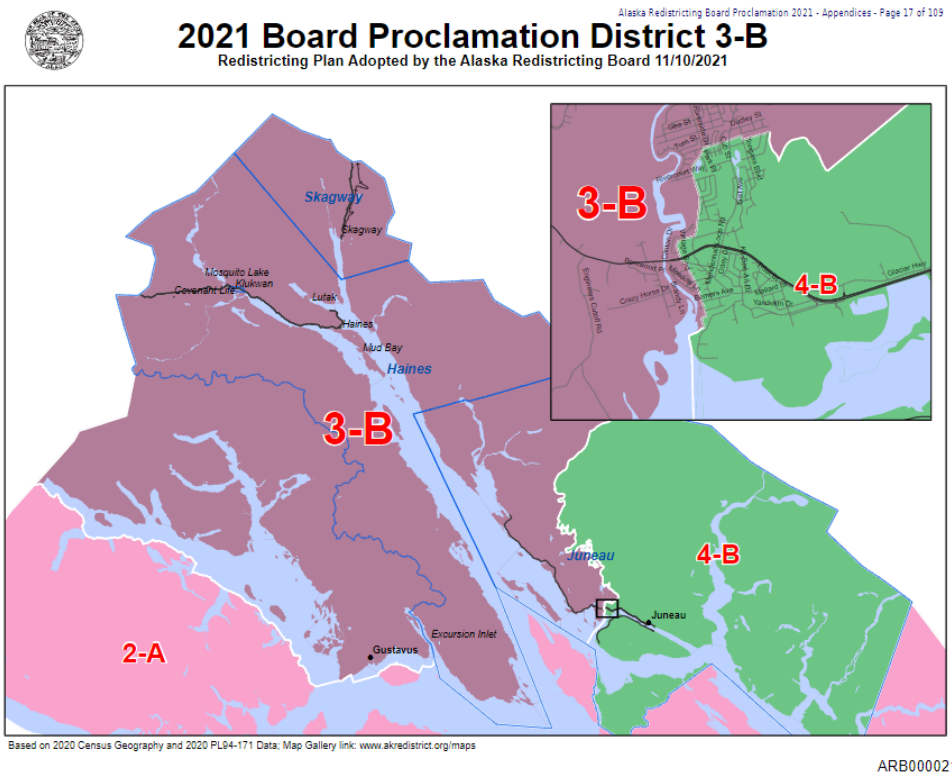
The Southeast Alaska districts were adopted unanimously by the Board.[49]

While one Board member noted that the weight of public testimony tipped in favor of keeping Skagway and downtown Juneau districted together as they were in the 2013 Proclamation, she ultimately voted in favor of Member Simpson's House Districts 3 and 4 because they were obviously more compact than the 2013 Districts 33 and 34.[50] As adopted by the Board, the entire Municipality and Borough of Skagway ("Skagway") is included in House District 3, as shown below, along with the entire Haines Borough, Gustavus, and the northern portion of the City and Borough of Juneau:[51]

49 Feb. 3, 2022 Trial Tr. at 1865:7-12.

50 Feb. 3, 2022 Trial Tr. at 1865:7-12.

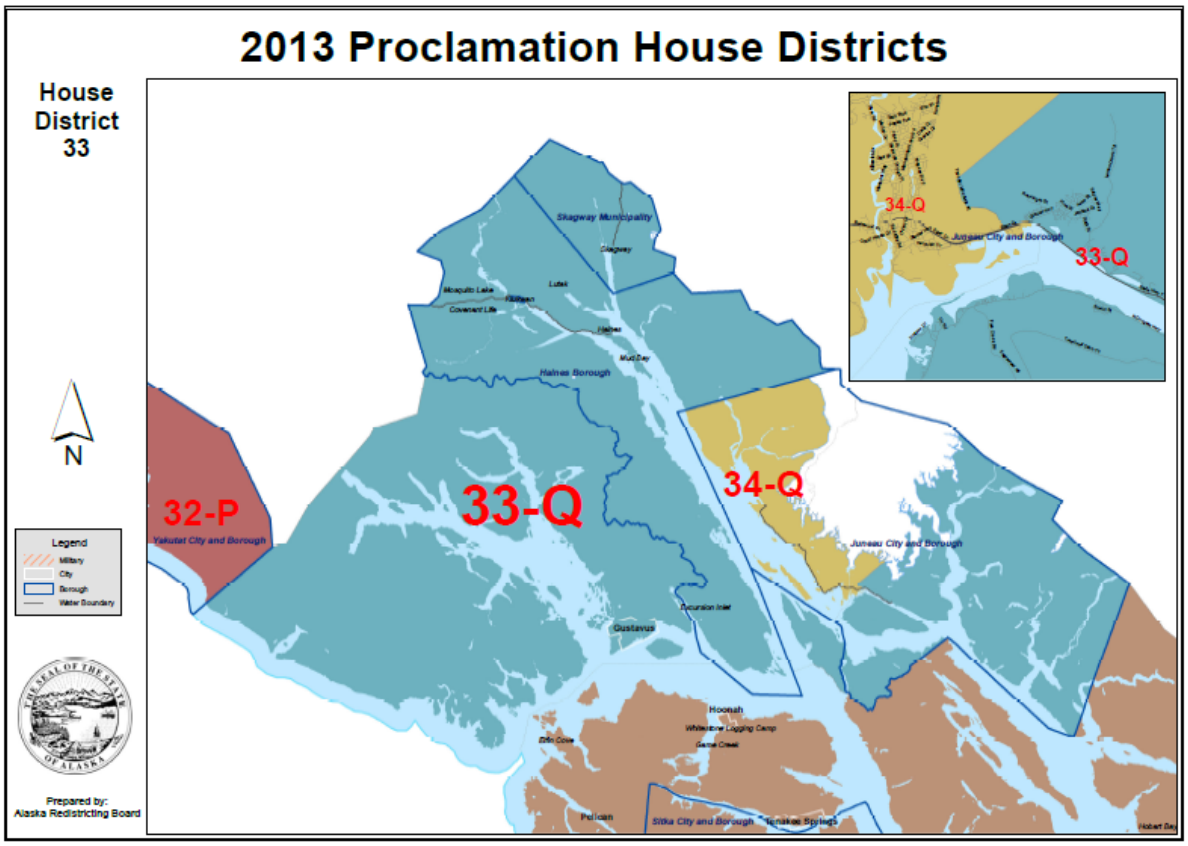
51 Exc. 324.



The Board's approach is more compact than the districts drawn in 2013, when Skagway was paired with the downtown portion of Juneau in a "Pacman" shaped district that used a water connection to bypass significant population on the north side of Juneau.[52] Below is the former 2013 Proclamation house districts for the same area[53]:

52 Feb. 3, 2022 Trial Tr. at 1850:3-16.

53 Exc. 008.



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Member Simpson testified that House District 3 from the 2021 plan was more compact than the 2013 House District 33.[54] The other Board members agreed and unanimously adopted House Districts 3 and 4.[55] Because Skagway is socio-economically integrated with the City and Borough of Juneau, Simpson drew House District 3 in a manner to maximize compactness by placing Skagway with the portion of Juneau closest to it and not skipping around the northern end, as was done in 2013.[56] He also testified that House District 3 included all of the Alaska Marine Highway System ferry terminals—the

54 Exc. 590-91 (Simpson Aff. ¶ 25); Feb. 3, 2022 Trial Tr. at 1864:20-1865:6.

55 Feb. 3, 2022 Trial Tr. at 1865:7-17.

56 Feb. 3, 2022 Trial Tr. at 1850:3-16.

main means of transportation between Juneau, Skagway, Haines, and Gustavus.[57] Member Simpson, and other members of the Board, rejected Skagway's premise that it should not be in a district with residents of the northern portion of Juneau because those residents do not appreciate the cruise ship business like downtown Juneauites do.[58]

As Member Borromeo testified, the Board considered Skagway's request and rejected it in favor of a more-compact option.[59] Indeed, the Board adopted multiple proposed plans that placed Skagway in a house district with downtown Juneau.[60] The Board heard both sides of this issue and ultimately went with the better, more-compact option.[61]

In striking Districts 3 and 4, the trial court emphasized public testimony stating a preference for Skagway to be paired with downtown Juneau.[62] The trial court overlooked that there was substantial contrary testimony, which recognized that it made more sense—given the Alaska Constitution's requirements that house districts be compact—to place Skagway in a district with the portion of Juneau closest to Skagway and not to reach around the northern part of town so that Skagway could be with downtown.[63] The record shows

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57 Exc. 589 (Simpson Aff. ¶ 23).

58 Feb. 3, 2022 Trial Tr. at 1854:8-16 (Simpson Redirect); Exc. 511 (Binkley Aff. ¶ 20).

59 Exc. 491-92 (Dep. of N. Borromeo, at 76:15-77:9) (explaining that to increase socio-economic integration as desired by Skagway, the district Skagway desired sacrificed compactness and contiguity).

60 *See* Exc. 156 (Board v.3); Exc. 158 (Doyon Coalition); Exc. 159 (Senate Minority Coalition).

61 Feb. 3, 2022 Trial Tr. at 1865:7-17

62 Exc. 896-900.

63 Exc. 170-71 (Frank Bergstrom submission: "Please accept my wholehearted support for Board version #3, which places Haines and Skagway with 'north' Juneau. This district

there were 23 public comments in favor of keeping the 2013 house districts with Skagway with downtown Juneau, and 11 comments in favor of placing Skagway in the more-compact district with the northern portion of Juneau.[64] The trial court also implied that Member Simpson, a longtime and well-respected Alaskan attorney, was motivated by some improper personal agenda and had a "myopic focus" on compactness.[65] But Member

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would include my residence and best represents the continuity of physiography, culture, and socio-economic conditions found in the region…. Socio-economic differences also support version #3. The Lynn Canal (and northern Chatham Strait) includes … the Kensington … mine[], the workforce for which resides mostly in north Juneau, Haines, and Skagway."); Exc. 195 (Eleanor F. Davenport submission: "I support Board Map Version # 3 in which Haines and Skagway are combined with Juneau's 'valley' area. I have lived in the Juneau 'Valley' for over 2 decades , AND then was subsequently a 10 year resident of Skagway. I know these communities intimately. It is my belief that the economic, socio-economic profiles and interests of these communities are aligned and make sense to organize into a Legislative District. I've been in the retail and visitor industry in Alaska for nearly 40 years, and have followed local and statewide legislative issues closely. I can see far more cohesion and support among these 'neighborhoods' than trying to create strange doughnut districts that correspond to population alone."); Exc. 204 (Tyler Rose submission: "I am writing to you in support of the Redistricting Boards' proposed plan to place Haines and Skagway with North Juneau. My comments are limited to the Northern Lynn Canal aspect of this discussion, where as a long time resident I see a natural alignment with North Juneau given the closer geographical, commercial, and regional transportation linkages for Skagway and Haines, as opposed to that of downtown Juneau."); Exc. 016 (Former Juneau Mayor Ken Koelsch submission: "What was a big surprise to me is how the map was drawn in the last redistricting. It never looked right and I never understood the rationale for looping Haines and Skagway into downtown Juneau for House representation. Haines and Skagway are located at the head of Lynn Canal, closer geographically by far to Juneau District 34's Lynn Canal precinct and other Valley precincts than they are to downtown Juneau. When the ferry sails for Haines and Skagway, it does not leave from downtown Juneau docks. It leave[s] from a ferry terminal on the 'north' end of town. There is a good possibility that the ferry terminal could be moved in the future to Cascade Point which is even closer to Haines and Skagway. Catamaran traffic also between Haines, Skagway, and Juneau utilizes Auke Bay in the Valley. Also located on that 'north' end of town is the dock where shuttles take Juneau workers to the Kensington Mine. When I was Mayor, several residents of Haines were also employed by the Kensington which one can see on the east (mainland) side side [sic] when sailing Lynn Canal for Haines or Skagway. The majority of employees that work in either the Greens Creek or Kensington mines that live in Alaska reside in the Valley area of Juneau or Haines or Skagway. Please consider drawing a map that makes geographic sense and recognizes the Haines and Skagway and the more rural 'northern' Juneau Valley precinct connections.").

64 *See* App. A.

65 Exc. 899 (discussing how House Districts 3 and 4 were approved by the Board and stating "[n]either member Borromeo's deference to the *personal preferences of Member*

Simpson's testimony reflected that his only "agenda" was that he found Skagway to be geographically closer and in a more compact house district when districted with the portion of Juneau closest to Skagway,[66] and that drawing District 3 to include the ferry system infrastructure linking the communities in that district made more sense than it did to draw an odd shaped district combining downtown Juneau,[67] which is dominated by government workers, with the communities to the north that have different economic priorities.[68]

2. The Board Adopts Senate District K After Public Hearings and Testimony in Anchorage

With regard to Senate District K, it appears that in the haste of this litigation the trial court adopted a misleading, incorrect portrayal of the actual process and events as advanced by the East Anchorage plaintiffs.[69] On September 9, 2021, the Board adopted two proposed redistricting plans, neither of which contained proposed senate pairings.[70] Nine days later

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Simpson, nor Member Simpson's myopic focus on the single criteria of compactness constitute reasonable explanations for ignoring public testimony.").

66 Feb. 3, 2022 Trial Tr. at 1850:3-16 (Member Simpson explaining why he rejected the 2013 arrangement of the Skagway-Juneau house district: "So in the former version, what's now labeled 3B, came down Lynn Canal, much like it does now, but it then wraps around the – the western part of Juneau and then loops back up into the downtown area. And the Mendenhall Valley and northern end of Juneau is what could be called a doughnut hole or, you know, sort of an island surrounded by the other part of Juneau, then that simply never made sense to me.").

67 *Id*.

68 Exc. 585-86 (Simpson Aff. ¶ 17).

69 The East Anchorage plaintiffs' legal theory regarding Senate District K evolved over time. At the outset of the case, the East Anchorage plaintiffs alleged that the Board adopted Senate District K (comprised of a South Muldoon and Eagle River House District) without ever proposing it or discussing it during public session. *See* Exc. 438, ¶¶ 38-41; *see also* Exc. 465-66. When the transcription of the November 8, 2021 Board meeting showed that Member Marcum proposed and the Board discussed every conceivable grouping of Anchorage's 16 house districts to make up its 8 senate districts, the East Anchorage plaintiffs focused their arguments on showing that residents who live near Muldoon in the Municipality of Anchorage are a different "community of interest" than those who live in Eagle River. *See* Exc. 719-736.

70 Exc. 765 ("Neither v.1 or v.2 contained proposed senate pairings."); *see also* Exc.

on September 20, 2021, the Board adopted six proposed plans, including four third-party plans that each contained proposed senate pairings.[71] It is customary for the Alaska Redistricting Board to adopt third-party maps as proposed maps for the purposes of the public outreach tour.[72] One of the proposed plans adopted by the Board on September 20 included a senate pairing of Muldoon with Eagle River in proposed senate district J.[73]

After September 20, the Board took each of these plans around Alaska in a public hearing "roadshow" to gather public comment.[74] After this public hearing tour, the Board met back in Anchorage to create its final redistricting plan. On November 5, a majority of the Board voted to approve a forty-district house map for Alaska.[75]

The Board reconvened on November 8-10, 2021, for the purpose of adopting senate pairings and finalizing the Board's proclamation of redistricting.[76] On November 8, the Board started with public testimony from individuals and groups,[77] including plaintiffs Yarrow Silvers and Felisa Wilson, who expressed their preferences for separate east Anchorage and Eagle River senate districts.[78] Member Marcum proposed options for

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017-074 (Board Composite v.1) and Exc. 075-130 (Board Composite v.2).

71 Exc. 766-67 ("The Board then voted to replace v.1 and v.2 with versions 3 and 4, respectively, and to adopt the plans submitted by the Senate Minority Caucus, the Doyon Coalition, AFFER, and AFFR as proposed plans to take on its outreach tour. Each of the third-party plans included proposed senate pairings.").

72 Jan. 31, 2022 Trial Tr. 1416:13-20 (Ruedrich Cross).

73 Exc. 153-54.

74 Exc. 768-769.

75 Exc. 770-71.

76 Exc. 221-33.

77 Exc. 240-64.

78 Exc. 221-24.

senate pairings in public session, including her reasoning for various combinations of pairings.[79] The Board engaged in public discussion regarding the pairing of the senate districts presented by Marcum.[80]

On November 9, 2021, Member Marcum moved the Board to accept her proposed senate pairings for the house districts within the Municipality of Anchorage, and the Board adopted those pairings by a 3-2 vote.[81] The Board voted to pair House Districts 21 and 22 to create Senate District K, and voted to pair House Districts 23 and 24 to create Senate District L.[82] Both of these senate districts were consistent with proposals Member Marcum had made the prior day on the record in a public meeting.[83]

IV. STANDARD OF REVIEW: THE TRIAL COURT ERRED IN FAILING TO AFFORD THE BOARD DEFERENCE AND SUBSTITUTING ITS JUDGMENT FOR THAT OF THE BOARD

In invalidating House Districts 3 and 4, and Senate District K, Judge Matthews drastically overstepped the judiciary's limited scope of review and usurped the Board's proper role by refusing to grant the Board any deference.[84] The Board asks this Court to affirm that it is the Board, not courts, that reapportions the Alaska Legislature, and it is the

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79 Exc. 577 (Marcum Aff. ¶ 17); *see also* Exc. 223 (November 8 Meeting Minutes of Public Testimony: "Alaskans for Fair and Equitable Redistricting representative, Randy Ruedrich, recommended the following Senate pairings . . . Districts 21 and 22, and Districts 23 and 24.").

80 Exc. 577 (Marcum Aff. ¶ 17).

81 Exc. 226.

82 Exc. 297-98.

83 Exc. 286 at 191:9-17; Exc. 264-290 (discussing Anchorage senate pairing options).

84 *Groh v. Egan*, 526 P.2d 863, 866 (Alaska 1974); *accord Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1357-58 (Alaska 1987); *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (both quoting *Groh*).

Board's judgment, not the testimony of a handful of citizens, that determines house and senate districts, subject to the constitutional factors established in Article VI, Section 6.[85]

The Board is an "independent entity"[86] created by the Alaska Constitution. Under Article VI, Section 11, courts review a redistricting plan only for "error."[87] Since 1974, this Court has reiterated the judiciary's *limited* scope of review.[88] The Court must determine whether the plan is rational, and not arbitrary.[89] During the last redistricting cycle in 2011, this Court again explained the limited scope of judicial review: "We may not substitute our judgment as to the sagacity of a redistricting plan for that of the Board, as the wisdom of the plan is not a subject for review."[90]

This Court's deference to the Board is consistent with other courts that acknowledge that it is improper for the judiciary to substitute its judgment for the body entrusted to redistrict.[91] The fundamental choices involved in redistricting are political and legislative,

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85 *Groh*, 526 P.2d at 866; *accord Kenai*, 743 P.2d at 1357-58; *Carpenter*, 667 P.2d at 1214 (both quoting *Groh*).

86 *In re 2011 Redistricting Cases*, 274 P.3d 466, 466 n.2 (Alaska 2012).

87 Alaska Const. art. VI, sec. 11 ("Any qualified voter may apply to the superior court . . . to correct any error in redistricting.").

88 *Groh*, 526 P.2d at 866 ("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."); *accord Kenai*, 743 P.2d at 1357-58; *Carpenter*, 667 P.2d at 1214 (both quoting *Groh*).

89 *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012) (quoting *Kenai*, 743 P.2d at 1357).

90 *Id.* (internal citations omitted).

91 *See e.g. In re Reapportionment of the Colorado General Assembly*, 828 P.2d 185, 189 (Colo. 1992) ("The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court.") (internal quotes omitted); *accord In re Stephan*, 775 P.2d 663, 670 (Kan. 1989); *Wolpoff v. Cuomo*, 600 N.E.2d 191, 194 (N.Y. 1992); *Hartung v. Bradbury*, 33 P.3d 972, 980-81 (Or. 2001); *In re Reapportionment Plan for the Pennsylvania General Assembly*, 442 A.2d 661, 667 (Pa. 1981); *In re*

typically committed to the legislature, redistricting board, or commission.[92] Redistricting legal standards should not be "so difficult to satisfy that the reapportionment tasks is recurringly removed from legislative hands and performed by … courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan."[93]

Judge Matthews ignored this standard of review and afforded the Board's decision and process no deference.[94] Instead, Judge Matthews crafted a new constitutional standard that finds no basis in the text, structure, history, or traditions of reapportionment.[95]

V. ARGUMENT

A. The Trial Court Erroneously Invalidated House Districts 3 and 4, and Senate District K Through Application of a Novel Rule Inconsistent with the Plain Language of Article VI, Section 10[96]

The trial court invalidated House Districts 3 and 4, even though the Districts met the Alaska Constitution's criteria of compact, contiguous, relatively socio-economically integrated, and populated as near as practicable to the ideal quotient of 1/40 of the State's

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Reapportionment of Towns of Hartland et al., 624 A.2d 323, 327 (Vt. 1993).

92 *See Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) ("[T]he apportionment task, dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process." (internal quotes and citations omitted)); *accord Fonfara v. Reapportionment Commission*, 610 A.2d 153, 162 (Conn. 1992).

93 *Gaffney*, 412 U.S. at 749.

94 Exc. 901 ("On remand, the Board must either redraw these districts to incorporate the reasonable requests supported by the clear weight of public testimony, or the Board must offer an explanation as to why it believes the constitution, federal law, or other traditional redistricting criteria make it impossible to achieve those results.").

95 Exc. 884, Exc. 901.

96 Exc. 884.

population.[97] To reach this result, Judge Matthews announced new terms that added new constitutional duties for the Board to meet based on the trial court's interpretation of Article VI, Section 10.[98] This novel interpretation of Section 10 handcuffs the Board to draw election districts that are based on the wishes of a small majority of those who testify, so long as those districts would be constitutional, even if the Board determines there are better, more-compact districts that could be drawn in compliance with the constitution.[99]

The text of Article VI, Section 10 does not support the new majority-public-testimony rule adopted by Judge Matthews, and neither does that provision's history. In 1998, Alaska voters ratified a constitutional amendment overhauling the redistricting process.[100] The amendment placed the duty of reapportionment with the independent Alaska Redistricting Board.[101] The principle, publicly expressed objectives of the amendment's sponsors were to reconcile the constitution with the current state of election and redistricting laws, remove redistricting from the governor's office, place that task with an entity that was less responsive to "political influence," and prevent Alaska courts from

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97 *See* Exc. 875-76 ("This Court thus finds no violation of any criteria in Article VI, Section 6.").

98 Exc. 901 ("On remand, the Board must either redraw these districts to incorporate the reasonable requests supported by the clear weight of public testimony, or the Board must offer an explanation as to why it believes the constitution, federal law, or other traditional redistricting criteria make it impossible to achieve those results.").

99 Exc. 896-900.

100 *See In re 2001 Redistricting Cases*, 2002 WL 34119573, *1 n.1 (Alaska Sup. Ct. Feb. 1, 2002) ("An Amendment to Article VI of the Alaska Constitution, effective January 3, 1999 (the '1998 Amendment'), changed the composition and responsibilities of the Board."); *see also* Gordon S. Harrison, *The Aftermath of In re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 Alaska L. Rev. 51, 60-63 (2006).

101 *In re 2011 Redistricting Cases*, 274 P.2d 466 n.2 (Alaska 2012).

drawing redistricting plans.[102]

Article VI, Section 10 is purely procedural, requiring adoption of proposed plans, hearings on proposed plans, and Board adoption of a final plan thereafter.[103] No substantive requirements for the drawing of house or senate districts are found in Section 10. Despite the straightforward text, Judge Matthews added new language and terms to the "public hearings" requirement and divined the "spirit" of the Constitution.[104]

1. The Trial Court Ignored the Plain Language of the Constitution and Instead Divined the "Spirit" of Section 10

This Court has repeatedly directed that "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. [The courts] are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result."[105] In interpreting the Constitution, a court must look "to the plain meaning and purpose of the provision and the intent of the framers."[106] Specifically, where the "meaning and intent are clear, [courts] do not apply interpretive canons; a canon of construction is only 'an aid to the interpretation of statutes that are ambiguous or that leave unclear the legislative intent.'"[107]

More fundamentally, courts should not read into the Constitution requirements that

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102 *See* Joint Sponsor Statement for HJR 44, at App. B.

103 Alaska Const. art. VI, sec. 10.

104 Exc. 896.

105 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017).

106 *Id.*; *see also Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994).

107 *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 993 (Alaska 2019) (quoting *West v. Muni. of Anchorage*, 174 P.3d 224, 229 (Alaska 2007)).

are not in the text.[108] The established "framework" for interpreting the Constitution prevents trial courts from ignoring plain meaning in favor of changing the meaning through reliance on legislative history:

> Because of our concern for interpreting the constitution as the people ratified it, we generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning. Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. Absent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision without adding missing terms to the Constitution or . . . interpreting existing constitutional language more broadly than intended by . . . the voters.[109]

Judge Matthews ignored this important principle and resorted to cannons of construction despite the plain, unambiguous terms of the Constitution. Judge Matthews rewrote Section 10's plain terms to fit the trial court's result-oriented interpretation. A simple comparison of the text of the constitution with the terms added by Judge Matthews illustrates how far afield the trial court went:

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[108] *See Hendricks-Pearce v. State, Dept. of Corrections*, 323 P.3d 30, 35-36 (Alaska 2014) ("When we interpret this statutory language we begin with the plain meaning of the statutory text. The legislative history of a statute can sometime suggest a different meaning, but the 'plainer the language of the statute, the more convincing contrary legislative history must be. Even if legislative history is 'somewhat contrary' to the plain meaning of a statute, plain meaning still controls.") (cleaned up).

[109] *Wielechowski v. State*, 403 P.3d 1141, 1146-47 (Alaska 2017) (internal quotation marks and footnotes omitted); *see also In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002) (reading "plain language" of Article IV, Section 6).

Relevant Text of Section 10	**"The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board."**
Trial Court's Interpretation of Section 10	"[T]he spirit of Article VI, Section 10, if not the plain text, compels the Board to present the public with a number of equally constitutional redistricting plans and then let the people have a say about which plan they prefer. While the Board need not respond to every single comment received, the Board must make a good-faith effort to consider and incorporate the clear weight of public comment, unless state or federal law requires otherwise. Board Members are public servants, not regional experts, so beyond the initial map-drawing phase the Board must give some deference to the public's judgment. If the Board adopts a final plan contrary to the preponderance of public testimony, it must state on the record legitimate reasons for its decision."[110]

The trial court supported his new rule by citing to a mix of aspirational statements made by the delegates to the 1956 Constitutional Convention, carefully chosen comments taken out of context in the legislative history from the 1998 amendment, and a heavy dose of inapposite federal administrative law.[111]

Applying this Court's proper interpretation framework to Section 10 leads to common sense conclusions that come from the plain meaning of the words.[112] While "public hearing" is not defined in the Constitution, the term is unambiguous and commonly used in Alaska statutes to refer to a public forum where a government body receives public comment and input on its work.[113] Obtaining public comment and input is the common,

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110 Exc. 896.

111 Exc. 885-87; Exc. 889-91.

112 *See Wielechowski*, 403 P.3d at 1146 (applying plain meaning interpretation); *Hendricks-Pearce*, 323 P.3d at 35-36 (same).

113 *See* Alaska Stat. § 47.75.040 ("The department shall conduct public hearings for the purpose of obtaining comment on the proposed state plan"); Alaska Stat. § 29.55.100(b)(3) ("hold a public hearing at which the public may comment on the proposed program and the report prepared . . ."); Alaska Stat. § 18.55.530(h) ("The governing body shall hold a public hearing on the redevelopment plan . . . At the public hearing all interested parties

logical understanding of the purpose behind a public hearing.[114] Nowhere else in Alaska law is there support that "public hearing" amounts to "public vote," "straw poll," or "mandate of the public." Other courts have consistently interpreted the phrase consistent with its plain meaning.[115]

The trial court's conclusion that the term "public hearing" incorporates a lengthy list of other requirements, including a constitutional duty to in "good faith" adopt a plan that incorporates the majority's wishes, is unreasonable. A more logical and consistent interpretation of "public hearings" is the recognition that the public could have ideas and awareness of local communities that may better inform the decisions of the Board.[116] Had the intent been to diminish Board discretion to merely tallying up public comments, the language of Section 10 would be different.

Judge Matthews's reliance on federal Administrative Procedures Act ("APA") law is even more misplaced. It should go without saying that the Alaska Redistricting Board is not a federal executive branch agency. The Board is governed by the state constitution,

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shall be given a reasonable opportunity to express their views respecting the proposed redevelopment plan."); Alaska Stat. § 15.45.195 ("Each public hearing under [the initiative, referendum, and recall statutes] shall include the written or oral testimony of one supporter and one opponent of the initiate."); *Kelly v. Zamarello*, 486 P.2d 906, 909 (Alaska 1971) (discussing public hearing in terms of the Administrative Procedures Act requiring "a public hearing in which any interested person may submit statements to the agency"). *See also* Public hearing, BALLENTINE'S LAW DICTIONARY (2010) ("A hearing or investigation by an administrative agency which is open to the public."); hearing, BLACK'S LAW DICTIONARY (19th ed. 2019) ("*Administrative law.* Any setting in which an affected person presents arguments to a decision-maker . . . In legislative practice, any proceeding in which legislators or their designees receive testimony about legislation that might be enacted.").

114 *Supra* n.112.

115 *See Buttrey v. United States*, 690 F.2d 1170, 1176 (5th Cir. 1982); *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 993 (D.D.C. 1983).

116 *See Buttrey*, 690 F.2d at 1176; *Nat'l Wildlife Fed'n*, 568 F. Supp. at 993.

not the APA.[117] Even for state executive agencies, to which the state APA applies, the Alaska Legislature passed a statute that imposes these procedural obligations upon the agencies.[118] The procedural obligations found in the APA derive from the legislature, not the constitution or judicial decree, and such laws do not apply to the independent Board.[119]

It bears pausing to discuss the "hard look" standard that Judge Matthews applied to the Board and used as a vehicle to drag federal APA caselaw into this case. The Board agrees that it must take a "hard look" at the available districting options to ensure that it is choosing election districts that are "reasonable and not arbitrary."[120] But what is "reasonable and not arbitrary" is governed by the substantive requirements found in Article VI, Section 6, not some unspoken criteria regarding "communities of interest." For example, the only substantive criteria for senate districts is that they be comprised "as near as practicable of two contiguous house districts."[121] Taking a "hard look" at senate districts within the Municipality of Anchorage, which is by law, comprised of territory that is entirely socio-economically integrated, means looking at which senate districts are touching and pairing house districts such that "as near as practicable" all senate districts

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117 *See generally* Alaska Const. art. VI.

118 *See* Alaska Stat. § 44.62.010 *et seq.*; *see also Jerrel v. State, Dep't of Nat. Res.*, 999 P.2d 138, 143 (Alaska 2000) ("Administrative agencies must comply with the APA guidelines when issuing regulations pursuant to delegated statutory authority.").

119 *See Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 342-43 (D.C. Cir. 2019) (discussing alleged violations of APA (not constitution) for arbitrary and capricious price hike that allegedly failed to consider relevant statutory objectives or provide a reasoned explanation).

120 *See Groh v. Egan*, 526 P.2d 863, 878-79 (Alaska 1974); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1363 n.17 (". . . . [A]ny distinctions between Anchorage and South Anchorage are too insignificant to constitute a basis for invalidating the state's plan as unreasonable or arbitrary."); *In re 2001 Redistricting Cases*, 47 P.3d at 1091.

121 Alaska Const. art. VI, sec. 6.

are comprised of two touching house districts. Going beyond the actual requirements of the Constitution and using the "hard look" standard to dictate new requirements is tantamount to amending the constitution by judicial decree.

An example is helpful to illustrate. House District 11 is comprised of a portion of South Anchorage.[122] The district is bounded by three other house districts: House Districts 9, 10, and 12.[123] Under the Alaska Constitution, House District 11 could paired with any one of these three. But under Judge Matthew's view, a "hard look" at which one is best to pair with House District 11 necessarily would require the Board to engage in a "super" socio-economics analysis, or some type of electoral inquiry to determine party preferences. The Board has no obligation under Article VI, Section 6 to determine which socio-economically integrated house districts are the best fit for each other to comprise a senate district. The only requirement is that they be contiguous. The hard look doctrine cannot be read in a manner that effectively amends the Constitution, and nor should it be read to render it arbitrary for the Board to follow the actual words of the Constitution.

2. Legislative History Does Not Support the Trial Court's Novel Reading of Section 10

If this Court agrees that the plain text of Section 10's "hold public hearings" requirement does not mandate the Board make a good faith effort to "incorporate the clear weight of public comment," the Court's inquiry should end there. Where the "meaning and intent are clear, we do not apply interpretive canons; a canon of construction is only

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122 *See* App. C at 1.

123 *Id*.

'an aid to the interpretation of statutes that are ambiguous or leave unclear the legislative intent.'"[124] Even if the Court does look to the legislative history of Section 10, that history does not support the trial court's new rule.

The 1998 Amendments to Article VI started as House Joint Resolution 44 ("HJR 44").[125] The original HJR 44 language introduced on January 12, 1998, required the Board to hold "at least one hearing in each judicial district" of the state.[126] This proposal did not last a month, and was stripped down to simply requiring "public hearings" before the proposal moved to the House Finance Committee.[127] The legislative history of HJR 44 contains no requirement that the Board incorporate the weight of public testimony or even hold hearings in all geographic areas of the State.

The three primary purposes of amending Article VI were to remove redistricting from the governor's office, insulate reapportionment and redistricting from the political arena through creation of the non-partisan Redistricting Board, and to prevent Alaska courts from drawing redistricting plans, as had occurred in *Hickel*.[128] During a committee

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[124] *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 993 (Alaska 2019) (quoting *West v. Muni. Of Anchorage*, 174 P.3d 224, 229 (Alaska 2007)).

[125] Gordon S. Harrison, *The Aftermath of In re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 Alaska L. Rev. 51, 60-63 nn. 54, 57 (2006) (citing House Joint Resolution 44 as the legislative enactment that placed the amendments on the ballot for ratification or rejection by Alaskans).

[126] *See* H.J. Res. 044a, 20th Leg., Reg. Sess. at p. 5 (as introduced by Reps. Porter, Mulder, Dyson, and Green on Jan. 12, 1998) (Alaska) (specifically, it read: "The board shall hold public hearings on the proposed plan *and shall hold at least one hearing in each judicial district established by law under Section I of Article IV*.") (available at: http://www.akleg.gov/PDF/20/Bills/HJR044A.PDF).

[127] *See* H.J. Res. 044b, 20th Leg., Reg. Sess. at p.5 (as offered by the House Judiciary Committee on Feb. 18, 1998) (Alaska), available at http://www.akleg.gov/PDF/20/Bills/HJR044A.PDF.

[128] *See* Minutes, H. Judiciary Comm. Hearing on H.J. Res. 044b, 20th Leg., Reg. Sess., Tape 98-11, Side A (Feb. 6, 1998) (discussing creating a system that is as politically neutral

meeting, Representative Baldwin noted the reality that the Board needed to be insulated from public pressure: "people get offended by the process because they don't get out of it what they want. . . the drawing of boundaries for local government is not done by the legislature but by a separate, independent board, because that is such a contentious issue. . . . it is the same kind of thing for reapportionment. While there have been allegations of gerrymandering and that sort of thing, it is a really tough job to try to make those lines work with what there is to work with."[129] There is nothing in the legislative history that supports the broad and expansive additional terms discovery by Judge Matthews.

3. Policy Considerations Support Adherence to the Plain Meaning of "Public Hearings" Subscribed by the 2002 Trial Court

In announcing its new interpretation of Section 10, the superior court signaled that the Board's adherence to public comment was a necessary check on the Board.[130] But the checks and balances on the Board already contained in the actual words of the constitution

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and independent as possible and avoiding a repeat of the superior court drawn interim map that occurred in *Hickel*), available at http://www.akleg.gov/basis/Meeting/Text?Meeting=HJUD%201998-02-06%2013:13:00; Minutes, H. Judiciary Comm. Hearing on H.J. Res. 044b, 20th Leg., Reg. Sess., Tape 98-44, Side B, 98-45 Side A (April 29, 1998) (discussing removal of redistricting from political arena), available at http://www.akleg.gov/basis/Meeting/Text?Meeting=SJUD%201998-04-29%2013:30:00; The judiciary is a familiar example of a constitutional body that is by design further removed from the political process and political arena. Removing judges from political election by the people, insulates the court from the political process, and empowers judges to follow the mandates of the constitution even if doing so is unpopular. *See* Michael S. Kang, *Article: De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 Wash. U. L. Rev. 667, 690 (2006). To remove something from the political arena in our government is to remove it from the process of being elected and directly accountable to the people. *See* Chambers, Henry, Jr., *Article: The Fight Over the Virginia Redistricting Commission*, 24 Rich. Pub. Int. L. Rev. 81, 82-83 (2021).

[129] *See* Minutes, H. Judiciary Comm. Hearing on H.J. Res. 044b, 20th Leg., Reg. Sess., Tape 98-12, Side A (Feb. 6, 1998) (Mr. Baldwin speaking), available at http://www.akleg.gov/basis/Meeting/Text?Meeting=HJUD%201998-02-06%2013:13:00.

[130] Exc. 893-94.

are sufficient without need for the court to infer or invent new requirements.[131] Article VI, as amended in 1998, establishes an independent Board; requires geographic diversity of its membership; places Board appointments in the hands of four different public officials from the executive, legislative and judicial branches of government; constrains the Board to strict substantive requirements for house and senate districts; places tight time limits on the Board; and requires public hearings.[132] As a further check, the Board's decisions are subject to legal review under Section 11, where the court determines if the Board performed "its duties under this article."[133] While the Constitution therefore has numerous checks and balances on the redistricting process, it does not require that the Board's plan must be consistent with the preference of a majority of people who testify at public hearings.

Contrary to the trial court's intent, its new rule will further politicize the redistricting process and be harmful to Alaskans. The following foreseeable harms will flow from the new constitutional rule and duty:

- The trial court places quantity of testimony over quality. This provides incentive for political parties, partisans, and interest groups to pack public hearings and file volumes of pre-written testimony. The rule even encourages interest groups to pay participants, as is occurring already in other states.[134] Dark money will be used to buy written testimony and will

131 Alaska Const. art. VI, sec. 11 (permitting judicial challenge of plans).

132 Alaska Const. art. VI, secs. 6, 8, 10.

133 Alaska Const. art. VI, sec. 11.

134 This is happening in Colorado and California right now. *See* Willner, David, *Comment: Communities of Interest in Colorado Redistricting*, 92 U. Colo. L. Rev. 563, 604-07 (Spring 2021) ("P]ublic hearings, the ideal democratic mechanism in theory, can often be a forum for political strategists to surreptitiously lay the groundwork for districts to be drawn in their favor. Under the guise of preserving a community of interest, partisan actors can strategize as to which districts need to be redrawn in their favor and then testify at public hearings as to some community of interest that would be protected by the

pay for the public testimony of political partisans.[135]

- The rule places power in special interest groups who mobilize partisans to attend hearings and hijack the process. With Skagway, for example, the trial court emphasized in-person testimony over written testimony, suggesting that the Board should give special treatment to those who have time and resources to appear before it.[136]

- The rule turns a task of "Herculean" proportions into an impossible task. The Board will now be required to tally and quantify public testimony in real time. It will have to endure public hearings that could go for days, as competing interest groups each try to gain an upper hand in the quantity of testimony. And instead of balancing the demands of achieving a 40-district map that is compact, contiguous, and socio-economically integrated for all Alaskans, the Board will also have to adjust map lines because 23 out of 36,000 people in Districts 3 and 4 want a Skagway-Downtown Juneau district, 15 people in Fairbanks want the Board to use a specific road as a district boundary, 20 people in Wasilla want the hospital in its district and not the Palmer district, 8 people in Spenard did not want their district to stray into downtown, and on, and on, and on.

- There is no legal standard for determining the "clear weight of public comment." If only one person testifies on a topic, is that the weight of public testimony that trumps the judgment of the five Board members?

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redrawing of the district in that fashion. . . Members of the public who testified often failed to disclose their affiliation with a party and instead presented themselves simply as members of the community or concerned citizens. One disillusioned member of Colorado's 2011 redistricting commission noted that 'much of the public testimony he heard seemed to have been manufactured by Democrats and Republicans to justify highly partisan lines.'").

[135] *See* McFadden, Alyce, CENTER FOR RESPONSIVE POLITICS, *Dark Money Groups Are Pouring Untold Millions Into 2021 Redistricting Efforts*, May 21, 2021, available at https://truthout.org/articles/dark-money-groups-are-pouring-untold-millions-into-2021-redistricting-efforts/; McFadden, Alyce, OPEN SECRETS, *How 'dark money' is shaping redistricting in 2021*, May 20, 2021, available at https://www.opensecrets.org/news/2021/05/dark-money-redistricting-reshaping-redistricting/.

[136] *See supra* n.131 at 606 (Noting this problem and quoting Arnold Salazar, a Democratic commissioner who said "Probably 99.9 percent [of public testimony received] was manufactured.").

The lower court's new rule also discriminates against small, rural communities across Alaska whose voices will be drowned out by larger communities. Residents in Huslia and Holy Cross do not have the same access to public hearings as those in Anchorage, and a "quantity over quality" rule will tip the scales in favor of urban participants by sheer volume of population.

Finally, the trial court's rule asks the Board to compromise the requirements of Section 6 in order to do the bidding of a majority of public testifiers.[137] In the case of Skagway, the Board's final house district is visually more compact than the prior district, but is not the preference of 23 public commenters.[138] In *Hickel*, this Court said that socio-economic integration could be sacrificed if it allowed for more compactness.[139] But now, despite District 3 being undeniably more compact,[140] if the public prefers a less compact district, the Board must comply.

There is no legal authority to support the superior court's runaway new hypothesis of what Section 10 should mean.

4. House Districts 3 and 4, and Senate District K Do Not Violate Section 10

Redistricting is not a popularity contest in Alaska. Section 10 places the authority to redistrict the State with the Alaska Redistricting Board.[141] Section 10 is a procedural

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137 Exc. 901.

138 *Compare* Exc. 324 (2021 plan), *with* Exc. 008 (2013 plan). *See* Feb. 3, 2022 Trial tr. at 1850:3-16; *infra* sec. IV.B.

139 *Hickel v. Southeast Conference*, 846 P.2d 38, 44-45 n.10 (Alaska 1992).

140 *Compare* Exc. 324 (2021 plan), *with* Exc. 008 (2013 plan). *See* Feb. 3, 2022 Trial tr. at 1850:3-16.

141 Alaska Const. art. VI, sec. 10.

provision; it does not speak to the composition of any house or senate district that the Board adopts.[142] The trial court's order supplants the Board's reasonable conclusion to create more-compact house districts for the City and Borough of Juneau and the Skagway, Haines, and Gustavus areas of Southeast Alaska, because 12 more people testified that they preferred the 2013 house districts.[143]

Appendix A is a table showing the public testimony breakdown regarding Skagway and Juneau. It shows that eleven (11) residents provided testimony that approved of placing Skagway with the northern portion of the City and Borough of Juneau.[144] Twenty-three (23) residents provided testimony that favored placing Skagway with the southern (downtown) portion of Juneau.[145] Two individuals were comfortable with either option.[146] The trial court's interpretation of Section 10 improperly converted a routine public disagreement into a constitutional mandate because a *twelve-person majority* preferred something other than what the Board did. If we add the unanimous vote of the five Board members to the eleven members of the public who preferred Skagway with the northern

142 Alaska Const. art. VI, sec. 10.

143 *See* infra nn. 139-40.

144 App. A.

145 Exc. 160; Exc. 164; Exc. 165; Exc. 187; Exc. 198; Exc. 203; Exc. 191;Exc. 199; Exc. 193; Exc. 197; Exc. 201; Exc. 163; Exc. 202; Exc. 200; Exc. 196; Exc. 192; Exc. 194; Exc. 161; Exc. 205; Exc. 211; Exc. 210; Exc. 214; Exc. 240-64 (Nov. 8 public testimony on senate pairings). In addition to Member Simpson, Members Binkley and Borromeo also testified to the reasons they favored districting Skagway with the northern portion of the City and Borough of Juneau. *See* Exc. 511-12 (Binkley Aff. ¶¶ 20-22); Exc. 492 (Borromeo Dep. 77:1-9). Member Binkley even explained why he did not find the testimony favoring districting Skagway with downtown Juneau persuasive. *See* Exc. 511 (Binkley Aff. ¶ 20). The judge ignored these members' testimony entirely.

146 Exc. 218 (Alex Wertheimer testimony) and Exc. 162 (John Pugh testimony).

side of Juneau, there is a seven-person majority of Alaskans that preferred Skagway with downtown instead. As a consequence of this trivial, non-scientific difference of opinion, the Board's entire state house plan is presently in legal limbo despite all 40 house districts complying with the requirements of Article VI, Section 6. This is an absurd result that places the interests of a tiny group of public testifiers over the interests of all Alaskans in the certainty of a final redistricting plan.

As to Senate District K, the trial court ruled that it violated Section 10 for the same reason—it did not adopt a senate district that incorporated the "loud and clear" public testimony that wanted "Muldoon and Eagle River separate."[147] For the same reasons discussed above in regards to House Districts 3 and 4, this Court must reverse this ruling. Nothing in Section 10 requires the Board to submerge its own judgment "under the weight of public testimony" to create inferior districts.

The superior court also determined that Section 10 was violated because the Board (1) "failed to hold public hearings on their senate pairings," (2) failed to provide the public a "meaningful opportunity" to comment on the Board's "proposed plans," and (3) failed to take "public comment on the Senate pairings after the House map is finalized[.]"[148] All of these rulings are error.

First, as noted above, the Board held 25+ public hearings across Alaska on all of its proposed plans, including the four proposed plans that included proposed senate

147 Exc. 901.

148 Exc. 802-805.

districts.[149] The public had ample opportunity to comment on senate districts during the Board's ambitious public-hearing tour.[150] *Second*, the same public-hearing process provided the public a meaningful opportunity to comment on senate districts.[151] Indeed, even before the Board adopted proposed plans, it was allowing public testimony and the East Anchorage plaintiffs were advocating against senate districts that combined Muldoon with any area other than East Anchorage.[152] During the Board's first meeting where it began to draw districts, Yarrow Silvers testified against the current senate districts in East Anchorage that she felt improperly bisected East Anchorage.[153] Public testifiers were permitted to comment on *any* aspect of redistricting during any of the Board's public hearings, and they did.[154] The Board did not limit public comment based on which part of redistricting the comment went to. The trial court tacitly acknowledged as much when finding there was "loud and clear" testimony.[155]

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149 Exc. 905 ("The Board embarked on a five-week public roadshow from Ketchikan to Utqiagvik, eliciting 63 hours of public testimony. The Board also held statewide teleconferences and virtual meetings, even accommodating requests for Zoom meetings from smaller communities. And throughout the entire process the Board elicited and received countless written submissions by mail, e-mail, and through the Board's website."). During these roadshows, there were countless one-on-one conversations with members of the public who attended. Feb. 03, 2022 Trial Tr. 1847:4-1848:4. Because these one-on-one conversations took place on an informal basis at these public hearings, their occurrence and substance are not part of any meeting or written record. *Cf. id.*

150 Exc. 168; Exc. 174; Exc. 189-90; Exc. 212-13; Exc. 166; Exc. 173; Exc. 169; Exc. 237; Exc. 132; Exc. 219; Exc. 185; Exc. 216; Exc. 208-09; Exc. 188; Exc. 235; Exc. 206; Exc. 172; Exc. 015; Exc. 220; Exc. 186; Exc. 207; Exc. 240-64 (Nov. 8 public testimony on senate pairings).

151 *See infra* n.145.

152 Exc. 154-155; Exc. 764.

153 Exc. 154-155; Exc. 764.

154 *See infra* n.145.

155 Exc. 901.

Third, there is nothing in Section 10 that requires the Board to take "public comment on the Senate pairings after the House map is finalized" as the trial court held.[156] Judge Rindner rejected this precise argument in *In re 2001 Redistricting Cases* because "Article VI, Section 10 requires that public hearings be held *only* on the plan or plans adopted by the Board within thirty days of the reporting of the census."[157] Judge Rindner pointed out that requiring additional hearings would discourage the Board from considering needed changes to its election districts as redistricting work progressed through the quick 90-day timeline.[158] Because the Board "provided much more than the constitutional bare minimum," there is no Section 10 violation in its adoption of Senate District K.[159]

Even if this Court agrees that the Board violated Section 10's 30-day deadline to adopt a proposed plan because none of the Board's initial plans contained senate pairings,[160] that violation was harmless error. The Board adopted four plans on September 20, 2021, that each included proposed senate districts, and it included those plans on its

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156 Exc. 906.

157 *In re 2001 Redistricting Cases*, 2002 WL 34119573 (Alaska Sup. Ct. Feb. 1, 2002) (emphasis added).

158 *Id*.

159 Exc. 905.

160 The record supports the Redistricting Boards have historically waited to pair senate districts until the end and not held public comment. *See* Exc. 167; *see also* Exc. 496-497 (Dep. Tr. Randy Ruedrich, dated Jan. 12, 2022) (Q: "And did the board's consideration of Senate pairings mirror the same timeline as past redistricting plans?" A: "Senate pairings are significantly compressed timelines. Both – every board that I've ever seen waited until the very last logical time to adopt a House map. That leaves very little time for any process. And I do not recall the '11 board having a public process of any kind when they paired districts for Senate seats." Q: "So they didn't have a meeting at all? They didn't take public testimony?" A: "I do not recall any testimony."); *see also id*. Exc. 498-499 (A: "To participate in this process – I found it very strange when the board asked for Senate pairings in August – I mean, in September. I almost refused to provide them, but in the spirit of trying to provide what was asked for, we did Senate pairings on our first map. Senate pairings have always been left to the very end . . .").

public hearing outreach tour.[161] As the superior court recognized that "all six of those plans received extensive public comment on the Board's roadshow."[162] Any hypothetical violation of Section 10 by the nine-day late adoption of additional proposed plans that did include senate pairings did not affect the public's ability to provide comment to the Board.[163] Because senate districts consist of house districts, the Board reasonably waited to finalize a house plan before tackling the senate pairings.

B. Because Senate District K Does Not Dilute the Voting Power of Any Politically Salient Class, It Does Not Violate Equal Protection

Despite this Court's holding in *In re 2001 Redistricting Cases* that Muldoon and Eagle River could be in a *house* district together,[164] Judge Matthews ruled that Eagle River and Muldoon were different "communities of interest" that could not be paired together in a *senate* district.[165] The plaintiff's argument about communities of interest was just the

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161 Exc. 148-150 (September 20, 2021 Board Meeting Minutes); *see also* Exc. 131 at 217:19-24. The superior court correctly found: "The Board embarked on a five-week public roadshow from Ketchikan to Utqiagvik, eliciting 63 hours of public testimony. The Board also held statewide teleconferences and virtual meetings, even accommodating requests for Zoom meetings from smaller communities. And throughout the entire process the Board elicited and received countless written submissions by mail, e-mail, and through the Board's website." Exc. 905.

162 Exc. 904.

163 *See Vincent by Staton v. Fairbanks Memorial Hosp.*, 862 P.2d 847, 853, n.11 (Alaska 1993) ("The fundamental test of the courts is to determine whether substantial rights of the parties were affected or the error had substantial influence.") (citing *Kotteakos v. United States,* 328 U.S. 750, 765 (1946)); *Brandon v. State Dept. of Corrections*, 73 P.3d 1230, 1236 (Alaska 2003) (recognizing application of harmless error even in agency proceedings). *Cf.* Alaska R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

164 *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002) ("House District 18 is sufficiently socio-economically integrated as a matter of law because it lies entirely within the Municipality of Anchorage.").

165 Exc. 821-822.

most-recent attempt—in a long line of efforts this Court has rejected—to constitutionalize the different neighborhoods of the Municipality of Anchorage.[166] Because Senate District K does not dilute the voting power of any Anchorage voter, and pairs two house districts wholly comprised of territory within the same municipality,[167] it cannot violate equal protection.

Article I, Section 1 of the Alaska Constitution provides "that all persons are equal and entitled to equal rights, opportunities, and protection under the law."[168] "In the context of voting rights in redistricting and reapportionment litigation, there are two basic 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."[169]

The superior court properly determined that Article VI, Section 6's requirement that house districts be as near as practicable to the ideal quotient of the state's population encapsulates the "one person, one vote" standard,[170] and that Senate District K did not

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166 *See Groh v. Egan*, 526 P.2d 863, 878-79 (Alaska 1974); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1363 n.17 (". . . . [A]ny distinctions between Anchorage and South Anchorage are too insignificant to constitute a basis for invalidating the state's plan as unreasonable or arbitrary."); *In re 2001 Redistricting Cases*, 47 P.3d at 1091.

167 Exc. 593-594 (Simpson Aff., ¶ 29) ("Both House District 21 and 22 are wholly within the Municipality of Anchorage."); Exc. 574-576 (Marcum Aff., ¶¶ 10-13 (same)); Exc. 645 (Hensel Aff., ¶ 3) ("I was retained . . . to provide my expert opinion regarding several issues involving the existence, or lack thereof, of communities of interest *within* the Municipality of Anchorage and the impact adopted senate pairings would have on these communities of interest.") (emphasis added).

168 Alaska Const. art. I, sec. 1.

169 *Kenai Peninsula Borough*, 743 P.2d at 1366.

170 Exc. 785 ("These concepts are also explicitly codified in Article VI, Section 6 of the Alaska Constitution.").

violate Section 6.[171] But Judge Matthews engaged in cascading errors in analyzing Senate District K against the "fair and effective representation" requirement of equal protection.

A senate district violates the "fair and effective representation" prong of Alaska's equal protection clause if it purposefully dilutes the voting power of a "politically salient class."[172] Residents within a municipality[173] and borough[174] are "politically salient classes" from those residing outside of those incorporated areas.[175] To adjudicate an equal protection claim based on vote dilution, the trial court must "make findings on the elements . . . including whether a politically salient class of voters existed and whether the Board intentionally discriminated against that class."[176]

1. The Trial Court Misreads *Kenai Peninsula Borough* to Avoid Identifying a Politically Salient Class Affected by Senate District K

Judge Matthews repeatedly cites *Kenai Peninsula Borough* as supporting his conclusion that Senate District K violated Alaska's equal protection clause because Muldoon and Eagle River are separate "communities of interest."[177] While *Kenai* does in

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171 Exc. 792-795 (rejecting East Anchorage's Section 6 challenges to Senate District K); *see also* Exc. 922-923 (summarizing the superior court's conclusions of law on violations).

172 *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002); *In re 2011 Redistricting Cases*, 274 P.3d 466, 469 (Alaska 2012).

173 *Kenai Peninsula Borough*, 743 P.2d at 1372-73 (voters within the Municipality of Anchorage).

174 *Hickel*, 846 P.3d at 52-53 (residents within the Matanuska-Susitna Borough).

175 *See In re 2011 Redistricting Cases*, 274 P.3d at 469 (reversing superior court's dismissal of equal protection challenge/anti-dilution challenge to senate districts that split the residents of the City of Fairbanks into different senate districts).

176 *In re 2011 Redistricting Cases*, 274 P.3d at 469 (citing *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002)).

177 Exc.784-786, 806-809, 821-823, 825.

passing use the term "communities of interest," the case does not support Judge Matthews's conclusion that neighborhoods within the same municipality are constitutionally different areas for equal protection analysis.[178]

Kenai's equal protection analysis involved a multi-member senate district, which were eliminated by the 1998 amendment to the Alaska Constitution.[179] As Judge Rindner explained in rejecting equal protection challenges to the 2001 redistricting plan, the elimination of multi-member senate districts and requirement that they be comprised simply of two contiguous house districts significantly curtailed the ability to gerrymander senate districts.[180] It is under the new structure for senate districts that current Senate District K must be analyzed.

Under the 1998 Amendment, "[e]ach senate district shall be composed as near as practicable of two contiguous house districts."[181] Since the 1998 Amendment, this Court has refined its equal protection analysis in reapportionment cases and clarified what is

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178 Exc. 809, 821.

179 *See Kenai Peninsula Borough*, 743 P.3d at 1356; Alaska Const. art. VI, sec. 4.

180 *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at 48-49 (Alaska Sup. Ct. Feb. 01, 2002) ("At the outset, this court notes that the *Kenai Peninsula Borough* case appears to be the only case in which the concept of geographical equal protection was applied. When *Kenai Peninsula Borough* was decided there were few constraints on the redistricting of senate districts other than the analysis inherent in equal protection analysis. . . . Today, in contrast, senate districts must be composed as near as practicable of two contiguous house districts. Likewise, at the time *Kenai Peninsula Borough* was decided, multi-senate districts were constitutionally permissible. Today, they are not. *See* Article VI, Section 4. Thus at the time *Kenai Peninsula Borough* was decided there were few constraints on the manner by which the senate districts could be drawn and, as a result, the opportunity to gerrymander such districts was high. The equal protection analysis used in *Kenai Peninsula Borough* appears to be an effort by the Alaska Supreme Court to restrict the then nearly unfettered ability to draw senate districts. This problem has been reduced by the 1998 Amendment to the Alaska Constitution.").

181 Alaska Const. art. VI, sec. 6.

necessary to show a violation. *In re 2001 Redistricting Cases* clarified that the right to "fair and effective representation" prohibits the Board from "intentionally discriminat[ing] against a borough or any other '*politically salient class*.'"[182] *In re 2011 Redistricting Cases* reversed the superior court's dismissal of an anti-dilution claim, holding that the superior court was required to "make findings on the elements of a voter dilution claim, including whether a *politically salient class of voters* existed and whether the Board intentionally discriminated against that class."[183]

Here, the superior court failed to make the required finding of what "politically salient class" was at issue in Senate District K. Judge Matthews avoided this requirement by borrowing *Kenai Peninsula Borough*'s vague dicta about "communities of interest."[184] The Board asks the Court to rule that *Kenai*'s reference to "communities of interest" has been refined and replaced by the 1998 constitutional amendment and this Court's adoption of the more-precise term "politically salient class."

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[182] *See In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002) (emphasis added) (citing *Kenai Peninsula Borough*, 743 P.2d at 1370-73; *see also Karcher v. Daggett*, 462 U.S. 725, 754 (1983) (Stevens, J., concurring) (explaining that group of voters must establish that it belongs to a "politically salient class" as the first element of claim of invidious discrimination); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (recognizing potentially viable equal protection challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized.").

[183] *In re 2011 Redistricting Cases*, 274 P.3d 466, 469 (Alaska 2012) (emphasis added) (holding that the superior court erred in dismissing claim that Board diluted power of voters within the City of Fairbanks, which had a population equivalent to 89 percent of a senate district, by not creating a senate district for those voters, and remanding for the superior court to "make findings on the elements of a voter dilution claim, including whether a politically salient class of voters existed and whether the Board intentionally discriminated against that class."). On remand, the Board changed the senate districts in Fairbanks to give the voters of the City of Fairbanks a senate district—Senate District A in the 2013 Proclamation Plan, *see* Exc. 007—thereby negating the dilution claim discussed above.

[184] Exc. 808-809.

The superior court's equal protection analysis leads to the following incongruous result: on the one hand, the trial court recognized that all neighborhoods within a municipality are socio-economically integrated and may be placed together in a house district under the more stringent requirements for house districts;[185] yet on the other hand, the court treated two adjoining neighborhoods of Anchorage as disparate "communities of interest" sufficiently dissimilar to prevent their inclusion in the same senate district under the simpler "two contiguous house districts" requirement for senate districts.[186] The trial court's standard is unworkable and will hamstring future Boards and encourage needless litigation.

2. Senate District K Does Not Diminish Muldoon's Voting Power and Therefore It Cannot Violate Equal Protection

Judge Matthews's equal protection analysis is defective on its face. *Sua sponte*, Judge Matthews performed a mathematical anti-dilution analysis that confused when an election district is overrepresented (not diluted) or underrepresented (diluted), used incorrect population numbers for the relevant Anchorage house districts, and used the incorrect category of population for a proper analysis (raw population vs. voting age population).[187]

The superior court mistakenly thought house districts with less population than the

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185 Exc. 865.

186 Exc. 821.

187 Exc. 823-825. There was confusion below that Judge Matthews attempted to set straight on the record, but he nevertheless misapplied the population numbers. The accurate population numbers can be found at Exc. 426-427.

ideal quotient of 18,335 were *underrepresented*.[188] That is backwards. *In re 2001 Redistricting Cases* explained that "underrepresented" districts were those with positive population deviations (with populations greater than the ideal number) and "overrepresented" districts were those with negative population deviations (with populations less than the ideal number).[189] A house district is *overrepresented* if its population is less than the ideal quotient 1/40th of the state's population, as its residents are receiving more representation in the legislature than their population technically entitles them to.[190] The trial court turned these concepts on their head.

With this flawed concept in mind, Judge Matthews then went on to use incorrect population numbers for the house districts, despite trial testimony that specifically clarified the correct populations.[191] Below are the correct house district population numbers:[192]

District	Population	Ideal Population	Population Difference from Ideal	Percentage Deviation from Ideal	Over or Under Represented
Russian Jack (HD 19)	18,239	18,335	-96	-0.52%	Overrepresented
North Muldoon (HD 20)	18,285	18,335	-50	-0.27%	Overrepresented
South Muldoon (HD 21)	18,414	18,335	+79	+0.43%	Underrepresented

188 Exc. 823-824.

189 *See In re 2001 Redistricting Cases*, 44 P.3d at 151-52 n. 22 ("In this redistricting plan, the most overrepresented district is House District 40 (the North Slope) with a -6.89% deviation. The most underrepresented district is House District 33 (Kenai Peninsula), with a +5.06% deviation.").

190 *See In re 2001 Redistricting Cases*, 44 P.3d at 151-52 n.22.

191 Jan 27, 2022 Trial Tr. at 1080-1087 (Torkelson Cross) (explaining that the original population table was not updated with new house district numbers and had to be replaced in early January 2022 with new, accurate table).

192 Exc. 426-427 (correct house district population table).

District	Population	Ideal Population	Population Difference from Ideal	Percentage Deviation from Ideal	Over or Under Represented
Eagle River (HD 22)	18,205	18,335	-130	-0.71%	Overrepresented
JBER (HD 23)	18,023	18,335	-312	-1.70%	Overrepresented
Chugiak (HD 24)	18,032	18,335	-303	-1.65%	Overrepresented

In his third dilution computation error, Judge Matthews applied the total population numbers for the house districts to conduct his equal protection analysis, when courts apply the *voting age population*.[193]

In *Kenai*, Governor Sheffield's reapportionment plan[194] included a two-member senate district[195]—Senate District E—that comprised of three house districts:[196] the Prince William Sound District, the North Kenai-South Anchorage District, and the Matanuska-Susitna District.[197] The Board stated that its desire in creating this district was to diminish

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

194 *See Kenai Peninsula Borough*, 743 P.2d at 1355 ("On February 16, 1984, Governor William Sheffield issued an Executive Proclamation of Reapportionment and Redistricting adopting the Board's proposed plan.").

195 The 1998 Amendment eliminated multi-member election districts and drastically simplified the composition of senate districts to be comprised of two contiguous house districts. *See In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at 48-49 (Alaska Sup. Ct. Feb. 1, 2002).

196 *Kenai Peninsula Borough*, 743 P.2d at 1357. A two-member senate district means that the district had two senators elected at-large to serve in the Alaska Legislature.

197 *Kenai Peninsula Borough*, 743 P.2d at 1355. The State of Alaska's Brief of Appellee further explains the house districts that comprised Senate District E: "The principal communities involved include Palmer and Wasilla from District 16, Valdez, Cordova, Seward and Whittier from District 6, and Nikiski and a portion of South

Anchorage's ability to select another senator.[198] This Court reasoned that such wrongful intent was insufficient, without more, to hold Senate District E violated equal protection.[199] The Court analyzed whether Senate District E did, in fact, disproportionally diminish Anchorage's senate representation.[200] The Court concluded it did:

> As noted above, Anchorage has a population for apportionment purposes of 42.6% of the state's total population and has received 40% of the state's senate seats; with and additional senate seat, it would have approximately 45% of the senate seats. Thus, Anchorage will either remain underrepresented by 2.6% or become overrepresented by 2.4%, depending on whether Anchorage voters can in fact win the additional seat. Put another way, strict proportionality would give Anchorage voters 8.51 senate seats, and a redistricting toward proportionality would allow them the potential to win a ninth senate seat.[201]

The Court invalidated Senate District E at step two of the equal protection analysis by finding that the Board did, in fact, disproportionately dilute the voting power of Anchorage

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Anchorage from District 7." Brief of Appellee State of Alaska, *Kenai Peninsula Borough*, at 35, Case No. S-1207 (Sept. 9, 1986) (available in the State of Alaska Law Library).

198 *Kenai Peninsula Borough*, 743 P.2d at 1372.

199 *Id.*

200 *Id.* at 1372-73.

201 *Id*. The *Kenai* decision does not make clear how the Court determined that the population of Anchorage voters within Senate District E is a minority of the total voters of the district, such that Anchorage voters did not control the election of the senators to that district. However, the State's Appellee Brief for that appeal includes a portion of the Reapportionment Board's "Final Report: Reapportionment and Redistricting Plan for the Alaska Legislature" as an appendix to the State's Brief, which shows the population numbers for the three house districts that comprised Senate District E as follows: House District 6 – Prince William Sound (population 8,753.19), House District 7 – South Anchorage and Nikiski (9,580.1), and House District 16 – Mat-Su Borough (17,692.23). *See* Brief of Appellee State of Alaska, *Kenai Peninsula Borough*, at III-26 through III-27. *See* Brief of Appellee State of Alaska, *Kenai Peninsula Borough*, at 4-5 Case No. S-1207 (Sept. 9, 1986) (explaining the inclusion of the Final Report). The Final Report also shows Senate District E had a total population of 36,025.52. *See* Brief of Appellee State of Alaska, *Kenai Peninsula Borough*, at III-28. Therefore, not even taking into account Nikiski's population in House District 7, which would lower the percentage of Senate District E controlled by Anchorage voters, Anchorage voters comprised only 26% of the population of Senate District E, and therefore could not control the election of senators in Senate District E.

residents.[202] Therefore, the Court held "the district unconstitutional under the equal protection clause of the Alaska Constitution."[203] But, the Court refused to invalidate Senate District E because the discriminatory effect was "*de minimus*."[204] Because Senate District E only disproportionally reduced Anchorage's control of senate seats by 2.6%, the Court was satisfied that a judicial declaration that Senate District E was unconstitutional was a sufficient remedy.[205]

Here, using the correct population numbers, South Muldoon (House District 21) enjoys a raw 209 person advantage and a 788 voting age person advantage over Eagle River (House District 22).[206] Pairing South Muldoon with Eagle River does not diminish South Muldoon's power to select a senator of its choosing. Senate District K *enhances* South Muldoon's voting power to elect a senator of its choosing because South Muldoon has more people than the other house district that makes up Senate District K.[207] Doing what the superior court desires—pairing South Muldoon with North Muldoon in a senate district—results in a *reduction* in South Muldoon's voting power.[208] South Muldoon (House District 21) has 129 more people than North Muldoon (House District 20).[209]

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202 *Kenai Peninsula Borough*, 743 P.2d at 1373.

203 *Id*.

204 *Id*.

205 *Id.* ("Given this circumstance we conclude that a declaration that the Board's purpose in fashioning Senate District E was illegitimate under Alaska's equal protection clause is an adequate remedy, and we will not require the Board to redraw Senate District E.").

206 The population of House District 21 (18,414) minus the population of House District 22 (18,205) equals the difference of 209.

207 *See* Exc. 426-427 (correct house district population table).

208 *See* Exc. 426-427 (correct house district population table).

209 The population of House District 21 (18,414) minus the population of House District

Senate District K gives South Muldoon (House District 21) more voting power to elect a senator of its choosing than if House District 21 was paired with North Muldoon (House District 20). The superior court failed to use the correct population numbers in its *sua sponte* analysis.[210] And had the court used voting age population instead of total population, the results would have shown South Muldoon having an even greater population advantage over Eagle River, only further highlighting the upended conclusions reached by the superior court.[211]

Judge Matthews's population analysis is also flawed because there are always slight population differences between house districts. Without identifying any politically salient class, and simply measuring population of one district against another, results in meaningless conclusions.

3. Anchorage Neighborhoods Are Not Different "Politically Salient Classes" or "Communities of Interest" for Equal Protection Analysis

This Court has never recognized neighborhoods within the same municipality to be different groups of voters for equal protection analysis, as it is "axiomatic" that all neighborhoods within a borough or municipality are "by definition socio-economically integrated."[212] Contrary to Judge Matthews's reasoning, Muldoon and Eagle River residents are not "politically salient classes" of Alaskans because they live in different areas

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20 (18,285) equals the difference of 129.

210 Exc. 824.

211 Exc. 427 (Board Trial Exhibit 1007) (showing South Muldoon has nearly 800 more voting age residents than does Eagle River).

212 *Hickel v. Southeast Conference*, 846 P.2d 38, 52 (Alaska 1992).

of the same city.[213]

The superior court cited *Kenai* in support of its conclusion that the "Muldoon community, comprised of House District 20 and 21, is a 'community of interest.'"[214] But *Kenai* dealt with the reapportionment board's purposeful dilution of the voting power of residents of a local incorporated government (the Municipality of Anchorage) by placing them in a multi-member senate district that included portions of two other boroughs (Mat-Su and Kenai Peninsula) along with Valdez and Cordova.[215] In other words, the politically salient class of voters at issue were Municipality of Anchorage voters. Nothing in *Kenai* supports that different neighborhoods within the same incorporated city are different "communities of interest."

The only discussion in *Kenai* that deals with neighborhoods cuts against that conclusion. As Judge Matthews correctly noted in another portion of his order:

> [I]n *Kenai Peninsula Borough v. State*, the Alaska Supreme Court considered whether sufficient socio-economic ties existed between North Kenai and South Anchorage. Although the evidence established ample "links between the Cities of Kenai and Anchorage," the record contained "minimal" evidence of socio-economic integration between the two satellite communities. But the Court reasoned that "both are linked to the hub of Anchorage," and any distinction between the sub-regions was "too insignificant to constitute a basis for invalidating the state's plan" as unreasonable or arbitrary.[216]

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213 Exc. 821 ("There is ample public comment, as well as testimony during trial, that Eagle River and Muldoon are respective 'communities of interest,' with little convincing information to the contrary. The Court sees that the Senate Districts ignore the Muldoon and Eagle River communities of interest with very little justification.").

214 Exc. 809.

215 *Kenai Peninsula Borough*, 743 P.2d at 1355. The State of Alaska's Brief of Appellee further explains the house districts that comprised Senate District E: "The principal communities involved include Palmer and Wasilla from District 16, Valdez, Cordova, Seward and Whittier from District 6, and Nikiski and a portion of South Anchorage from District 7." Brief of Appellee State of Alaska, *Kenai Peninsula Borough*, at 35, Case No. S-1207 (Sept. 9, 1986).

216 Exc. 875 (quoting *Kenai Peninsula Borough*, 743 P.2d at 1363 & n.17).

Yet, when it came to Senate District K, the superior court ignored its own advice and splintered Anchorage into different sub-communities.[217]

Nor does *Hickel* support Judge Matthews's decision. There, this Court found an equal protection violation because the Mat-Su Borough's geographic boundaries were disregarded to create five *house* districts that each intermingled Mat-Su Borough population with other population from outside the borough.[218] Again, this Court treated all members of the incorporated area the same and found an equal protection violation because they were being combined in districts with those *outside* the incorporated area.

Judge Matthews drastically extended this Court's equal protection case law to invalidate Senate District K. While the trial court may view Muldoon and Eagle River as constitutionally different areas, redistricting law does not. There is **no** Alaska case that supports the trial court's conclusion that neighborhoods within the same borough or municipality are politically salient classes for equal protection analysis.[219]

Tellingly, the trial court did not define what constitutes a "community of interest."[220] That is because the vague term is not found anywhere in the Alaska Constitution and is not defined in Alaska case law. Instead, and as this Court recognized in *Hickel*, Section 6's

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217 Exc. 809.

218 *Hickel*, 846 P.2d at 52-53.

219 The 2001 redistricting process, for example, resulted in Senate District C that ranged from Metlakatla to Arctic Village in the north to the lower Yukon village of Marshall in the South. *See* Exc. 006.

220 *Kenai Peninsula Borough* borrowed the term "communities of interest" from the U.S. Supreme Court case *Davis v. Bandemer*, 478 U.S. 109, 116 (1986). *See Kenai Peninsula Borough*, 743 P.2d at 1372, n.32. In 2019, the U.S. Supreme Court overruled *Bandemer* in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

socio-economic integration requirement protects voters' equal protection right to an equally powerful vote through group effectiveness.[221] Section 6 requires house districts be drawn with a socio-economically integrated populace that protects Alaskan voters' rights to fair and effective representation.[222]

Legal commentators agree that Alaska's Constitution protects "communities of interest" in redistricting through Section 6's requirement that house districts be relatively socio-economically integrated.[223] For example, the Brennan Center for Justice lists Alaska as one of twenty-four states that "address these communities of interest directly, asking redistricting bodies to consider various types of communities of interest in drawing district lines."[224] The Brennan Center cites Article VI, Section 6's requirement that house districts contain "as nearly as practicable a relatively integrated socio-economic area" as support

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221 *Hickel*, 846 P.2d at 46 ("In addition to preventing gerrymandering, the requirement that districts be composed of relatively socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote."). The "right to an equally powerful vote" is one of the two principles of equal protection protected by the equal protection clause. *See Kenai Peninsula Borough*, 743 P.2d at 1366-67 ("In the context of voting rights in redistricting and reapportionment litigation, there are two basic 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."); *Hickel*, 846 P.2d at 47 ("Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state.").

222 *Id*.

223 Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 Va. L. Rev. 461, 466 (1997) ("The constitutions of Alaska, Colorado, Hawaii, and Oklahoma require consideration of communities of interest in apportionment.") (citing Article VI, § 6's requirement that new districts contain "as near as practicable a relatively integrated socio-economic area.").

224 Brennan Center for Justice, *Communities of Interest* (available at: https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf).

for its conclusion.[225] Thus, "communities of interest" are protected in drawing the house map, and are not relevant to the task of creating senate districts.

And in other parts of its opinion, even the superior court properly acknowledged that "[a]reas within the same municipality or borough are 'by definition socio-economically integrated' with each other."[226] But, in regard to Senate District K, the trial court sidestepped this rule.[227]

The challenge to Senate District K is just the most-recent attempt in a long line of partisan efforts to splinter Anchorage into different socio-economic units for redistricting purposes. This Court has routinely rejected these attempts since *Groh* in 1974.[228] Most

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[225] Brennan Center for Justice, *Communities of Interest* (available at: https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf). Other state courts have recognized that a community of interest is analogous to a socio-economically integrated community. In California, a "community of interest" is an area of residents with common "social and economic interests." *Legislature v. Reinecke*, 516 P.2d 6, 16 (Cal. 1973) (en banc) (reapportionment of the California Legislature); *see also* Karin MacDonald and Bruce Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. Irvine L. Rev. 609, 612-13 (2013) (. . . . "community of interest has always been a territorial concept (i.e., a defined area with certain common economic, social, or cultural interests)."). Colorado law requires the consideration of "communities of interest" in its redistricting process, and court decisions interpreting that phrase make clear it is analogous to Alaska's phrase "socio-economic integration" by requiring election districts to be comprised, as much as possible, with people who share economic, living, and recreational pursuits. *See Hall v. Moreno*, 270 P.3d 961, 971 (Colo. 2012) (reciting requirement that communities of interest be preserved to the extent possible and stating that communities of interest are defined by "ethnic, cultural, economic, trade area, geographic, and demographic factors.").

[226] Exc. 875.

[227] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 42 (citing *Hickel*, 846 P.2d at 51-52).

[228] *See Groh v. Egan*, 526 P.2d 863, 878-79 (Alaska 1974) (noting that all neighborhoods within the Greater Anchorage Area Borough are socio-economically integrated and holding that significant population differences could not be supported by neighborhood differences); *Kenai Peninsula Borough*, 743 P.2d at 1363 n. 17 (". . . . [A]ny distinctions between Anchorage and South Anchorage are too insignificant to constitute a basis for invalidating the state's plan as unreasonable or arbitrary."). In *Hickel*, the Court held the same thing with regard to areas within the Mat-Su Borough: "As noted above, a borough is by definition socio-economically integrated. It is axiomatic that a district composed wholly of land belonging to a single borough is adequately integrated." *Hickel*,

pointedly, in the *In re 2001 Redistricting Cases*, this Court struck down the Board's 17 house districts within the Municipality of Anchorage, which had maximum population deviations of just under 10%, as not complying with Section 6's equal-population requirement.[229] The Board explained that these population deviations were the result of its attempt to respect "neighborhood boundaries" within Anchorage.[230] This Court rejected this explanation and reaffirmed that neighborhood differences had no impact on socio-economic integration, and each neighborhood within Anchorage was socio-economically integrated with every other neighborhood.[231] On remand, the Board redrew the Anchorage house districts, including House District 18,[232] which included Chugiak, Eagle River, Elmendorf Air Force Base,[233] Fort Richardson, Government Hill and North Muldoon.[234] A challenger who sought to keep all of Chugiak and Eagle River in a single house district challenged House District 18 on socio-economic grounds, and this Court again reminded the litigants that all portions of the Municipality of Anchorage—including Chugiak and North Muldoon—were socio-economically integrated.[235]

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846 P.2d at 52.

229 *In re 2001 Redistricting Cases*, 44 P.3d 144, 146 (Alaska 2002).

230 *Id*.

231 *Id*.

232 *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1090 (Alaska 2002).

233 Elmendorf Air Force Base and Fort Richardson merged in 2010 to become Joint Base Elmendorf-Richardson. *See* Joint Base Elmendorf-Richardson, *Joint Base Elmendorf-Richardson History* (available at: https://www.jber.jb.mil/Info/History/).

234 *See* Exc. 004-005 (House District 18 in the Alaska Redistricting Board's 2002 Amended Final Redistricting Plan); *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1090.

235 *In re 2001 Redistricting Cases*, 47 P.3d at 1090. *See also* Exc. 002 (House District 24 from the 1994 Redistricting Board's plan). House District 24 placed North and South Muldoon in the same house district with Eagle River.

Applying these teachings to the 2021 redistricting plan, South Muldoon (House District 21) and Eagle River (House District 22) are socio-economically integrated with each other because both are within the same municipality.[236] Because South Muldoon and Eagle River are socio-economically integrated, they are not separate "communities of interest" for equal protection analysis.[237] Neighborhoods are not salient political classes. It cannot be that in 2002, it was constitutional to place portions of Eagle River and Muldoon in a single *house* district because they are socio-economically integrated,[238] but in 2021, those areas of Anchorage cannot be in same *senate* district because they are different "communities of interest." The superior court's ruling overturns nearly 50 years of precedent dating back to *Groh*.

Moreover, the superior court's reasoning will profoundly complicate how senate districts are constructed within Anchorage. Nearly half of Alaska's 40 house districts are located within the boundaries of the Municipality of Anchorage, meaning partisans have much to gain if this Court reverses course and concludes that neighborhoods within Anchorage constitute different "politically salient classes."[239] Instead of senate districts wholly within this area being constitutional if they are comprised of two contiguous house

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236 *Groh v. Egan*, 526 P.2d 863, 878-79 (Alaska 1974); *Kenai Peninsula Borough*, 743 P.2d at 1363 n.17; *Hickel*, 846 P.2d at 52; *In re 2001 Redistricting Cases*, 44 P.3d at 146; *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1090 (Alaska 2002).

237 *See supra* nn.218-20.

238 *See In re 2001 Redistricting Cases*, 47 P.3d at 146.

239 *See In re 2001 Redistricting Cases*, 44 P.3d at 144 (Alaska 2002) (citing *Kenai Peninsula Borough*, 743 P.2d at 1370-73); *see also In re 2011 Redistricting Cases*, 274 P.3d 466, 469 (Alaska 2012).

districts,[240] senate district discussions will morph into a discussion of the minutiae of neighborhood characteristics. For example, the Board's redistricting plan splits Anchorage residents who live along the city's iconic Spenard Road into three house districts (House Districts 14, 16, and 17) and three senate districts (Senate Districts G, H, and I).[241] Are Spenard's residents, who are proud of their neighborhood's history and its quirky and artsy feel, a "community of interest" that must be districted in the same house and senate districts? How about the predominantly Alaska Native residents of Eklutna and the predominantly military residents of JBER? Are Eklutna and JBER different communities of interest within the Municipality of Anchorage? Are Hillside residents, who primarily rely on well and septic, a different "community of interest" from the Anchorage residents in Oceanview who use city water and sewer? This Court should reject the superior court's invitation to turn an objective Section 6 analysis into a neighborhood-by-neighborhood scrum.

This Court must reverse the superior court's misguided conclusion that different neighborhoods within the same municipality are socio-economically integrated yet are different communities of interest.[242] Since *Groh*, this Court has consistently held that

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[240] Alaska Const. art. VI, sec. 6 ("Each senate district shall be composed as near as practicable of two contiguous house districts.").

[241] *See* Exc. 335 (House District 14), Exc. 337 (House District 16), and Exc. 338 (House District 17). Those same maps show that House District 14 is a part of Senate District G, House District 16 is part of Senate District H, and House District 17 is part of Senate District I.

[242] Nor are different portions of the Municipality of Anchorage different "geographic regions" for equal protection analysis. South Muldoon (House District 21) and Eagle River (House District 22) are both wholly within the same geographic region: In *Kenai Peninsula Borough* and *Hickel*, the Court used the term "geographic group or community" to differentiate between voters within an incorporated borough and voters outside that borough. *Kenai Peninsula Borough*, 743 P.2d at 1372-73 (voters in Anchorage vs. those

neighborhoods have no constitutional role in redistricting municipal house and senate districts.

4. The Superior Court Erred in Speculating that the Board Used Secret Procedures to Adopt Senate District K

In his quest to invalidate Senate District K, Judge Matthews ignored the mountains of *undisputed* evidence that the Board proposed, discussed, and adopted Senate District K in public and that there was no evidence that the Board secretly reached agreement on Senate District K outside of a public meeting. Instead, the trial court engaged in improper speculation and concluded that 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."[243] The trial court's conclusion is contrary to the *only* evidence on the matter, and it violates this Court's longstanding rule that Alaska courts are to *presume* that government proceedings have been conducted in accordance with the law, and that a party challenging the legality of a proceeding bears the burden of proving illegality.[244]

The superior court erroneously concluded that *because* Senate District K was hotly contested by two Board members and because Member Marcum moved for its adoption

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outside Anchorage); *Hickel*, 846 P.2d at 52-53 (voters within the Mat-Su Borough vs. those outside Mat-Su Borough). Neither of these cases support the superior court's conclusion that different parts of Anchorage constitute different "geographic regions." Exc. 822.

243 Exc. 818-819.

244 *See e.g. Union Oil Co. of California v. State, Dept. of Natural Resources*, 574 P.2d 1266, 1272 (Alaska 1978) ("an administrative regulation must be accorded a presumption of validity, and the challenger of the regulation must demonstrate its invalidity."); *Kingery v. Chapple*, 504 P.2d 831, 834-35 (Alaska 1972); *Kelso v. Rybacheck*, 912 P.2d 536, 540 (Alaska 1996); *Board of Trade, Inc. v. State*, 968 P.2d 86, 89 (Alaska 1998); *Alaska Intern. Industries, Inc. v. Musarra*, 602 P.2d 1240, 1245 (Alaska 1979).

immediately after the Board exited executive session, it must have been secretly constructed.[245] That conclusion ignores the **uncontested** evidence in the record that nearly every conceivable way to pair Anchorage's sixteen house districts into eight senate districts were discussed on the record,[246] and **uncontested** testimony that there was no secret agreement amongst the Board members who adopted Senate District K.[247]

On November 8, 2021, the Board began its meeting by receiving public testimony from 29 residents concerning senate pairings.[248] At the conclusion of the public testimony at the November 8, 2021 meeting, the Board engaged in substantial public discussion of Anchorage senate pairings.[249] Member Marcum proposed pairing North Eagle River/Chugiak with Joint Base Elmendorf Richardson ("JBER"), "Eagle River is a bedroom community for many people on JBER."[250] Member Marcum went on to explain at length:

> It's my real life world experience. I've lived in East Anchorage, I've lived in Eagle River, I have been working on base for over 20 years. And it's my real world experience that there are direct connections between Eagle River, East Anchorage, and JBER. And so I strongly feel that those connections have not been considered with part of this process, and this is a way of considering that. . . we've heard repeatedly that many times people in Eagle River don't even come into Anchorage necessarily. They go directly to JBER. So I feel like it's one of those situations that we definitely should consider as part of

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245 Exc. 808-818 (describing Member Bahnke's and Member Borromeo's on-record comments opposed to Senate District K and concluding "[w]hile the Court does not make this finding lightly, it does find evidence of secretive procedures evident in the Board's consideration and deliberation of the Anchorage Senate seat pairings.").

246 Exc. 279-290 at 162-209.

247 *Infra* nn.265-67.

248 Exc. 240-264. East Anchorage plaintiffs Yarrow Silvers and Felisa Wilson testified about their preferred senate pairings at this meeting. *See* Exc. 246 and 263 at 33 and 98.

249 Exc. 279-290 (discussing senate pairings in Anchorage, including former House District 18 (final House District 21) and House District 24 (final House District 22)).

250 Exc. 282 at 174:19-20.

our map-drawing process[.][251]

During the same public meeting, Member Marcum proposed three contiguous house district options for pairing with Eagle River House District 22 (then numbered House District 24) to create Senate District K, including an option with the South Muldoon House District 21 (then numbered House District 18).[252] Member Marcum went on to elaborate:

> I want us to consider everything and make sure we've got everything on the table. So as I mentioned, I've got situation scenarios here where I put District 16 with 24, a scenario where I put District 23 with 24. The one that I think I like best, though, is the one where *District 18 is paired with District 24*, for many of the reasons that I just mentioned.[253]

The Board then continued publicly discussing pairing House District 21 (then numbered House District 18) and House District 22 (then numbered House District 24) to create Senate District K, when Chair Binkley posed "So if you do put – linked – if we did link 24 with 18, then what would that do with 23 (current House District 20)."[254] And Chair Binkley also discussed publicly with the Board that "it's interesting that [House District] 23 and 18 (now South Muldoon House District 21) seem to be the ones that go in a lot of

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[251] Exc. 283-284 at 181:19-182:13.

[252] Exc. 285 187:19-25 ("Board Member Marcum: So I looked at the districts that are contiguous to District 24, and there are three districts that are contiguous to District 24 that I took into consideration: District 16, the Abbott Loop area; District 18 with [sic] Anchorage; . . ."); Exc. 596 (Simpson Aff., ¶ 34) ("Member Marcum explained her reasons for suggesting a pairing of Eagle River and JBER in light of the strong military connections between the two, and also proposed pairing South Muldoon with Eagle River and explained her reasons for that district as well.").

[253] Exc. 286 at 191:9-17 (emphasis added); Exc. 574-575 (Marcum Aff., ¶ 12) ("Senate District K came together with a combination of House Districts 21 and 22. Pairing these two house districts allows commuters in Eagle River to share a senate district with a Muldoon neighborhood where they frequently stop for gas, have dinner, and where some attend church. This senate district also shares a portion of the Chugach State Park, a major public recreation amenity for these district residents.").

[254] Exc. 286 at 191:21-23.

different directions."[255] The Board continued to discuss the numerous proposals for the northeast corner of Anchorage during the public meeting on November 8, 2021.[256]

Members Bahnke[257] and Borromeo[258] offered their perspectives. Member Marcum also spoke at length regarding her senate pairings and even read portions of submitted public testimony:

> It is not widely known, but the Chugiak, Eagle River, and Muldoon area is home to more military, both active duty and retired, than anywhere else in the state. Residents mingle as they shop at the PX, Fred Meyer, or Carrs, exercise at Buckner Fieldhouse, play golf at Moose Run. This creates a cohesion that is important to us." [Member Marcum concludes reading the testimony] There's more, and I can keep reading it. It's actually a whole nother [sic] page. But I think – and one of the things that – one of the points that's made is that there's some historical precedent for Eagle River and parts of Northeast Anchorage to be blended together.[259]

Chair Binkley posed questions and comments,[260] as did Member Simpson.[261]

After Member Marcum's proposal of senate districts in open session, the Board entered executive session on November 8 at 5:01 p.m. to discuss likely litigation that could arise from the Board's senate pairings.[262] The Board exited executive session at 6:25 p.m. and advised the public the executive session would continue the following morning.[263]

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255 Exc. 286 at 193:9-11.

256 Exc. 285-290 at 187-206.

257 Exc. 279-280, 285-286 at 165:3-17; 165:25; 167:10-21; 188:13-16; 190:5-13.

258 Exc. 280-281, 285 at 166:2; 168:17-171:10; 189:15-22.

259 Exc. 288 at 199:1-200:5.

260 Exc. 286-287 at 191:21-23; 192:14-15; 193:6-18, 21-24; 195:18-25; 196:2-4; 202:5-9, 17-19; 204:18-24.

261 Exc. 281, 284, 286, 288 at 172:5-7; 182:16-21; 191:19; 201:4-18.

262 Exc. 292 at 215-217.

263 Exc. 292 at 217:17-24 (Chair Binkley advised the public that the Board needed some additional time in executive session and wanted to give the public a "time certain" the next morning when the Board would re-enter public session: "And so we're going to meet, continue in executive session at 9:00 tomorrow morning. But we don't want to have to have the public waiting for us all that time, so we're going to set a time certain. And even

The next morning, on November 9, the Board met at 9:00 a.m. in executive session and completed its discussion with legal counsel.[264] After completing that discussion, the Board waited until 10:30, as it had advised the public it would do the day before, to reconvene in public session.[265]

When the Board re-entered public session on the morning of November 9, Member Marcum moved to propose senate pairings for Anchorage, including her prior proposal to pair South Muldoon (then House District 18) with Eagle River (then House District 24):

> I move we accept Senate pairings for Anchorage as follows: 9 -- District 9 with District 10. District 11 with District 12. District 13 with District 14. District 15 with District 16. District 19 with District 20. Districts 23 with District 17. **Districts 18 with District 24.** And District 21 with District 22.[266]

Member Simpson seconded the motion.[267] After Chair Binkley asked if there was any discussion, the Board voted. Member Marcum's motion was approved by the Board by a vote of 3-2.[268] Two members of the Board voted against the motion.[269] The two dissenting members, who called for and were in the executive session, have never claimed that the Board came to any agreement during the executive session.

Indeed, there is no evidence that the Board formulated or decided Anchorage senate

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if we come out of public session -- public -- excuse me, executive session prior to that, we will wait to go back into public session and on the record again until 10:30.").

264 *See* Exc. 226 (Board Meeting Minutes November 9, 2021); *see also* Exc. 296-297 (Nov. 9 Meeting Tr.).

265 Exc. 226 (Board Meeting Minutes November 9, 2021).

266 Exc. 296-297 (Nov. 9 Meeting Tr.) (emphasis added).

267 Exc. 297.

268 Exc. 297-298.

269 Exc. 299-302 (Nov. 9 Meeting Tr. – Member Borromeo's statement of opposition to pairing South Muldoon with Eagle River); Exc. 303-304 (Nov. 9 Meeting Tr. – Member Bahnke's statement of opposition to pairing South Muldoon with Eagle River).

pairings in executive session. As Chair Binkley's sworn testimony established:

> Member Marcum offered a motion for Anchorage Senate Districts. As reflected in the recording and transcript, I asked if there was any discussion, and no member had anything further to state. Because we had already had a lengthy discussion on November 8 about just about every possible option for Anchorage, it appeared to me that each member had said his or her piece, and so we proceeded to vote. Both of the East Anchorage senate districts that are challenged in this litigation were described and explained by Ms. Marcum in our public meeting on November 8.[270]

Member Simpson likewise testified:

> After the public discussion on November 8, the Board entered executive session to obtain legal advice about the potential pairings that had been discussed. There were significant legal issues to discuss regarding the proposed senate pairings and the executive session lasted until the end of the day. The Board adjourned for the evening, and advised the public that executive session would continue the next morning (November 9) until 10:30 am. Based on legal advice we received during executive session, I was not willing to support some of the senate pairings that were proposed during public session.
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> After the litigation discussion was complete, the Board exited executive session on the morning of November 9. Member Marcum made some modifications to her proposed senate pairings, and moved the Board to adopt Anchorage senate pairings that did not pose the legal problems that were discussed in executive session. I voted to adopt member Marcum's proposed senate pairings, including Senate District K.[271]

The direct testimony of Executive Director Torkelson and Member Marcum corroborate Chair Binkley's and Member Simpson's testimony that Board members did not decide Senate District K in executive session.[272]

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[270] Exc. 524-545 (Binkley Aff., ¶ 55); Exc. 594 (Simpson Aff., ¶ 32) ("The chair called the question after asking if there was any discussion and hearing that there was none. The entire Board had engaged in discussion of numerous senate pairing options the day prior in a lengthy public session about Anchorage senate districts.").

[271] Exc. 596-597 (Simpson Aff. ¶¶ 35-36).

[272] Exc. 522-525 (Binkley Aff., ¶¶ 49-56) ("I disagree that the Board deliberated senate pairings in executive session or agreed on senate districts prior to our public session. We took public testimony about senate districts on November 8, and then had a work session and formal session to discuss and deliberate. After considering, discussing and debating numerous senate pairings in those public meetings, Ms. Marcum presented her motion to us in open session on November 9. The motion was approved by a majority."); *see also* Exc. 574-577 (Marcum Aff., ¶¶ 10-17); Exc. 592-597 (Simpson Aff. ¶¶ 27-36).

The East Anchorage plaintiffs did not cross-examine any Board witness at trial. They did not challenge any of the Board's direct testimony. Thus, there is no contrary evidence in the record. In speculating that the Board must have engaged a secret proceeding, the superior court simply ignored the undisputed evidence before it and embraced the plaintiffs' speculative conspiracy theory.

No amount of disagreement, accusation, or speeches by other Board members or the superior court's personal preference can change the reality that Senate District K was not the product of any secret proceedings. The superior court erred in failing to afford Senate District K the "presumption of validity"[273] and completely ignoring uncontested evidence that Senate District K was not the product of secretive proceedings.[274]

5. The Trial Court Erroneously Held that South Muldoon, a Historically Republican-Leaning District, Must be Paired in a Senate District to Promote the Election of a Democratic Senator

Judge Matthews speculated that Senate District K makes it harder for a Democratic senator to be elected to represent South Muldoon.[275] Specifically, Judge Matthews concluded that Senate District K "usurps South Muldoon's voting strength in the event it chooses to elect a Democratic senator."[276] Notably, Judge Matthews's conclusion is not

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273 *See e.g. Union Oil Co. of California v. State, Dept. of Natural Resources*, 574 P.2d 1266, 1272 (Alaska 1978); *Kingery v. Chapple*, 504 P.2d 831, 834-35 (Alaska 1972); *Kelso v. Rybacheck*, 912 P.2d 536, 540 (Alaska 1996); *Board of Trade, Inc. v. State*, 968 P.2d 86, 89 (Alaska 1998); *Alaska Intern. Indus., Inc. v. Musarra*, 602 P.2d 1240, 1245 (Alaska 1979).

274 *See infra* nn.241-67.

275 Exc. 821-822.

276 Exc. 821-822 ("The record also provides evidence of regional partisanship.").

supported by any case law.[277] Without explicitly finding that Senate District K was the product of partisan gerrymandering, Judge Matthews treats it as such and orders the re-pairing of house districts to gerrymander the area to help Democratic candidates.[278]

This Court has never recognized the viability of a partisan gerrymandering claim, and the U.S. Supreme Court recently ruled such claims non-justiciable.[279] Judge Matthews's failure to articulate standards upon which the trial court adjudicated such a claim supports the U.S. Supreme Court's conclusion that the judiciary should not wade into such claims because redistricting is inherently political.[280]

At issue in *Rucho v. Common Cause* were the partisan redistricting maps to reapportion the state legislatures of Maryland and North Carolina, which were explicitly drawn to maximize Democratic and Republican control of the state legislatures, respectively. The Court noted that it had never "struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past

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277 Exc. 821-822 ("This usurps South Muldoon's voting strength in the event it chooses to elect a Democratic Senator.").

278 Exc. 821-822.

279 *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

280 Judge Matthews spends two paragraphs discussing Rand Ruedrich's attendance at public hearings that were attended by partisans of both stripes. Exc. 810. As Ruedrich testified during his deposition, the Board adopted only two of the ten senate pairings he urged the Board to adopt. *See* Exc. 500-504 (Dep. of R. Ruedrich, at 51-55 (Jan. 12, 2022)). Ruedrich pointedly commented that two out of ten "is a batting average that wouldn't keep you on a major league team as a utility player." Exc. 504 (Dep. of R. Ruedrich, at 55:2-3). The importance of this discussion is not clear to Judge Matthews's analysis, but it does show that he was concerned with Republican participants influencing the Board members, while he does not mention in his opinion the trial testimony regarding Senate Minority Leader Tom Begich's (D – Anchorage) text-message communications to a board member seeking to influence Anchorage senate pairings. *See* Exc. 175-184.

several decades to discern judicially manageable standards for deciding such claims."[281] Because partisan considerations are inherent in redistricting, the problem with having courts adjudicate partisan gerrymandering claims is "determining when political gerrymandering has gone too far."[282]

The *Rucho* Court summarized the history of the U.S. Supreme Court's partisan gerrymandering cases—*Gaffney v. Cummings*,[283] *Davis v. Bandemer*,[284] *League of Latin American Citizens v. Perry*,[285] and *Vieth v. Jubelirer*[286]—and noted that none had articulated a "clear, manageable, and politically neutral" test upon which to adjudicate partisan gerrymandering claims.[287] The Court again reiterated that courts should not engage in the politics associated with the inherently political process.[288]

In the *In re 2001 Redistricting Cases*, Judge Rindner rejected a partisan gerrymandering claim by the Alaska Republican Party based on the Board's interaction with the democratic-party supported group Alaskans For Fair Redistricting ("AFFR") and the Board's adoption of a final map that was substantially similar to AFFR's proposed plan.[289] Judge Rindner ruled that the Republicans had not shown that any discriminatory

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281 *Rucho*, 139 S. Ct. at 2491.

282 *Rucho*, 139 S. Ct. at 2497.

283 *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

284 *Davis v. Bandemer*, 478 U.S. 109, 116-117 (1986).

285 *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006).

286 *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

287 *Rucho*, 139 S. Ct. at 2497-98.

288 *Rucho*, 139 S. Ct. at 2498.

289 *In re 2001 Redistricting Cases*, 2002 WL 34119573 (Alaska Sup. Ct. Feb. 1, 2002).

effect on their party was "supported by evidence of continued frustration of the will of a majority of voters or effective denial to a minority of voters of a fair chance to influence the political process."[290] In rejecting the claim, Judge Rindner made the same common-sense points of judicial restraint recognized by *Rucho*: "Redistricting is an inherently political process. A plan is not invalid merely because districts are drawn with a political agenda or with an awareness of the likely political consequences."[291]

Judge Matthews devoted just two paragraphs concluding that Senate District K is "evidence of" political gerrymandering.[292] In those two paragraphs the superior court acknowledged that the undisputed testimony at trial was that South Muldoon (House District 21) was a "swing district, though it does lean Republican, while Eagle River is firmly Republican."[293] Nonetheless he concluded that Senate District K, which pairs South Muldoon with Eagle River "usurps South Muldoon's voting strength in the event it chooses to elect a Democratic senator."[294] In Judge Matthews's eyes, Senate District K cracks the Muldoon "community of interest" and enhances Eagle River's voting strength.[295]

Judge Matthews engaged in precisely the improper political considerations that courts are supposed to avoid in redistricting cases. Judge Matthews cites no authority for the proposition that South Muldoon, which, according to East Anchorage's own expert

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290 *In re 2001 Redistricting Cases*, 2002 WL 34119573 (Alaska Sup. Ct. Feb. 1, 2002).

291 *Id.*

292 Exc. 821-822.

293 Exc. 821.

294 Exc. 821.

295 Exc. 822.

witness, has historically voted for Republican candidates two-thirds of recent elections,[296] must be districted to promote the election of a Democrat.[297]

Judge Matthews's analysis will have profound impacts on future Boards. This Board avoided election returns when drawing districts in Anchorage or anywhere in the state.[298] But Judge Matthews's order *requires* the Board to consider election returns and to district based on partisan goals.[299] Judge Matthews's wandering analysis also illustrates why the U.S. Supreme Court in *Rucho* held partisan gerrymandering claims non-justiciable: there is no clear, precise, and manageable rule for partisan gerrymandering claims.[300] Is it always a violation of equal protection if swing house districts are placed in a senate district with a house district that consistently elects Republicans or Democrats? After all, in the words of the superior court, such a pairing will "usurp [the swing district's] voting strength in the event it chooses to elect a [senator not from the party that the other house district routinely elects]."[301] Under the superior court's analysis, will not Republicans from South Muldoon suffer the same dilution if the Board, on remand, pairs that district with a Democrat-leaning district as the trial court directs? Recognizing these

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296 Jan. 21 Trial Trans. at 87:2 through 88:7 (Chase Hensel explaining he went back and reviewed election returns for current House District 27, which is, according to Hensel, 97% the same area as new House District 21, *see id*. at 87:2-9, and from 2014 through 2020, South Muldoon elected Democratic candidates one-third of the time, and Republican candidates two-thirds of the time.).

297 Exc. 821 (concluding that pairing South Muldoon with Eagle River "usurps South Muldoon's voting strength in the event it chooses to elect a Democratic senator.").

298 Exc. 620 (Torkelson Aff., ¶ 37).

299 Exc. 821-822.

300 *Rucho*, 139 S. Ct. at 2497-98.

301 Exc. 821.

flaws, other state supreme courts have refused to "contrive" a partisan-gerrymandering claim from the provisions of their state constitutions.[302]

The Board respectfully requests this Court reject the superior court's two-paragraph analysis and conclusion that Senate District K is an unconstitutional partisan gerrymander.[303] The superior court's analysis is unsound and will require future Boards to consider election returns when drawing election districts. No Board should be forced to consider criteria outside of Article VI, Section 6 in crafting legislative districts.

C. The Superior Court Erred with Regard to the Open Meetings Act

The trial court erred in finding any violation of the Open Meetings Act, and by reasoning in dicta that one remedy for violation of the statutory Open Meetings Act (the "OMA" or "Act") should be waiver of the attorney-client privilege.[304] Again, there is no testimony in the record that the Board made any substantive decision in executive session or otherwise in secret. The superior court relied on an inapposite Michigan case applying provisions of the Michigan Constitution, not Alaska's statutory Act.[305] The trial court "struggle[d] to find a specific action of the Board that violates of [sic] the Open Meeting Act,"[306] but just suspected there had to be a violation because two Board members had

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302 *See League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla. 2015); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802-825 (Pa. 2018); *League of Women Voters of Ohio v. Ohio Redistricting Commission*, --- N.E.3d ---, 2022 WL 354619, **6-13 (Ohio Feb. 7, 2022) (discussing Section 6(A) and 6(B) of the Ohio Constitution); *Johnson v. Wisconsin Elections Commission*, 967 N.W.2d 469, 482-488 (Wis. 2021).

303 Exc. 821-822.

304 Exc. 917-922.

305 Exc. 921 (citing to *Detroit News, Inc. v. Independent Citizens Redistricting Commission*, --- N.W.2d ---, 2021 WL 6058031 (Mich. Dec. 20, 2021).

306 Exc. 916.

colorfully opposed Senate District K during a Board meeting.[307]

Instead of finding any actual decision that violated the Open Meetings Act, the trial court accepted the plaintiffs' conspiracy theories, while ignoring the sworn testimony of three of the Board members[308] and the Executive Director,[309] as well as the video recording and minutes of the November 8 and 9 Board meetings.[310] It found secret deliberations on senate pairings took place during executive session in violation of the OMA.[311] The record does not support this finding, nor is this finding logical. As discussed above, Alaska courts presume the validity of government proceedings and actions.[312]

If an agreement on senate districts had been reached by the majority of the Board members during executive session where all the Board members were present, as alleged, why were two Board members "surprised" by the pairings?[313] Why does the November 9

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307 Exc. 299-302 (Nov. 9 Meeting Tr. – Member Borromeo's statement of opposition to pairing South Muldoon with Eagle River); Exc. 303-304 (Nov. 9 Meeting Tr. – Member Bahnke's statement of opposition to pairing South Muldoon with Eagle River).

308 Exc. 522-525 (Binkley Aff., ¶¶ 49-56) ("I disagree that the Board deliberated senate pairings in executive session or agreed on senate districts prior to our public session. We took public testimony about senate districts on November 8, and then had a work session and formal session to discuss and deliberate. After considering, discussing and debating numerous senate pairings in those public meetings, Ms. Marcum presented her motion to us in open session on November 9. The motion was approved by a majority."); *see also* Exc. 574-577 (Marcum Aff., ¶¶ 10-17); Exc. 592-597 (Simpson Aff. ¶¶ 27-36).

309 Exc. 639-640 (Torkelson Aff., ¶¶ 66-70).

310 Exc. 234 (Link to Nov. 8-9, 2021 Board Meeting Videos, Filename JRDB-20211109-0900, available at https://vimeo.com/645370438 (Nov. 8) and https://vimeo.com/645377292 (Nov. 9)).

311 Exc. 917.

312 *See e.g. Union Oil Co. of Calif. v. State, Dept. of Nat. Resources*, 574 P.2d 1266, 1271 (Alaska 1978) ("an administrative regulation must be accorded a presumption of validity, and the challenger of the regulation must demonstrate its invalidity."); *Kingery v. Chapple*, 504 P.2d 831, 834-35 (Alaska 1972); *Kelso v. Rybacheck*, 912 P.2d 536, 540 (Alaska 1996); *Board of Trade, Inc. v. State*, 968 P.2d 86, 89 (Alaska 1998); *Alaska Intern. Indus., Inc. v. Musarra*, 602 P.2d 1240, 1245 (Alaska 1979).

313 Exc. 303 (Nov. 9, 2021 Board Meeting Transcript 14:22-25, 15:12-14 (Member

meeting video recording show Board members Binkley and Simpson reaching for pens to write down the pairings being suggested by Member Marcum?[314] If the prearrangement had occurred during the preceding executive session, they would already know what the pairings were and would not need to capture the proposed pairings in writing or be studying the maps as Member Marcum announced her pairings. There was no evidence upon which the superior court could reach its contrary finding, and the superior court did not make any finding as to credibility of the testimony of the four witnesses who all testified that no agreement was reached in executive session regarding senate pairings. Absent contrary evidence or some basis to reject witness credibility, the court could not simply ignore undisputed testimony. The superior court's failure to abide by the only evidence offered on the issue is clearly erroneous.[315]

After inferring an improper agreement on senate pairings had been reached during executive session in violation of the OMA, Judge Matthews suggested that this Court should clarify its caselaw to hold that a government board's improper use of executive session to engage in attorney-client communications results in waiver of the attorney-client privilege.[316] Judge Matthews discussed how the Michigan Supreme Court in *Detroit News,*

Bahnke expressing surprise); Exc. 493-494 (Borromeo Dep. 287:13-288:16 (Member Borromeo expressing a lack of awareness of what Member Marcum would propose)).

314 Exc. 234 (Link to Nov. 9, 2021 Board Meeting Video at 1:33:55-1:35:58, Filename JRDB-20211109-0900, available at https://vimeo.com/645377292).

315 *See Brooks v. Brooks*, 733 P.2d 1044, 1052 (Alaska 1987) ("The trial court made no credibility findings and there is absolutely no indication as to what weight it accorded this evidence. In the absence of any such credibility finding the only logical inference that can be drawn is that the trial court either arbitrarily ignored or simply overlooked the undisputed evidence. In either case, this finding is clearly erroneous.").

316 Exc. 921.

Inc. v. Independent Citizens Redistricting Commission "threw open the doors to that Commission's executive session," stated that he "agree[d] with the rationale" of *Detroit News*, and concluded that "this Court would hold that an appropriate remedy for violation of the OMA would include opening the door to discussions held during executive session," called for the Board to obtain confidential legal advice.[317]

Judge Matthews misreads *Detroit News* and Alaska's OMA. *Detroit News* is not a case about the application of an open meetings act to a redistricting entity; it is a case about the open-meetings provisions of the Michigan Constitution that abrogated the commission's attorney-client privilege and its right to confidential attorney-client meetings.[318] There are no discussions in *Detroit News* about an open meetings act.[319] Alaska's OMA is not the Michigan Constitution.

Judge Matthews also misreads the OMA entirely. The only remedy for a violation of the OMA is explicitly described in AS 44.62.310(f): a court may void the decision and require the government to re-hold the meeting.[320] Just as judges may not invent new

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317 Exc. 921.

318 *Detroit News, Inc. v. Independent Redistricting Commission*, --- N.W.2d ---, ---, 2021 WL 6058031, **4, 7 and 14 (Mich. Dec. 20, 2021).

319 *Detroit News, Inc.*, at *14 ("The voters in 2018 changed the process for redistricting in Michigan. In doing so, they established safeguards to ensure that the new process would be transparent. Today, we enforce two numerous of those provisions against the Commission's attempt to operate outside of public view. We hold that the Commission's October 27 closed-session meeting violated the requirement in Const. 1963, art. 4, § 6(10) that the Commission 'conduct all of its business at open meetings.' The discussion that occurred at that meeting involved the content and development of the maps and thus constituted the 'business' of the Commission. We further hold that the Commission was required by Const. 1963, art. 4, § 6(9) to publish the seven most recent memoranda sought by plaintiffs.").

320 Alaska Stat. 44.62.310(f).

requirements of Section 10 or equal protection, Alaska courts are not free to replace statutory remedies by judicial decree.[321] Nothing in AS 44.62.310 suggests that a violation of the statutory OMA abrogates the government's attorney-client privilege. As a federal court in Ohio stated in response to an analogous argument: ". . . . [T]he Court rejects Plaintiffs' contention that Defendant waived the attorney-client privilege by failing to comply with Ohio's OMA" because, among other things, "Plaintiffs cite no authority in support of their contention that non-compliance with the OMA waives the attorney-client privilege under federal law . . . ."[322]

The Alaska Constitution mandates that the Board retain independent legal counsel: "The Board shall employ or contract for services of independent legal counsel."[323] The Board properly used legal counsel to obtain candid legal advice about its election districts. While the trial court unfortunately ignored the overwhelming and only evidence that no decisions regarding senate districts, including Senate District K, were made during the November 8 and 9 executive sessions, this Court should reaffirm that even if there is an OMA violation, the sole remedy is contained in subsection (f) of that statute and that a violation of the Act does not result in waiver of privilege. Nor does the OMA statute give trial courts discretion to announce new remedies not found in the statute. This Court should expressly disavow Judge Matthews's erroneous suggestion to engraft the Michigan

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321 *In re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002); *Revelle v. Marston*, 898 P.2d 917, 921-22 (Alaska 1995).

322 *Talismanic Props., LLC v. City of Tipp City, Ohio*, 2017 WL 2544086, *4 (S.D. Ohio June 9, 2017).

323 Alaska Const. art. VI, sec. 9.

Constitution's provisions onto Alaska's OMA.

D. The Superior Court Erred in Discovery

Given the public importance in focusing on the Board's substantive election districts, the Board has endeavored not to clutter this appeal with issues of lesser importance. However, two evidentiary and procedural rulings will be of significant importance to future Boards and are thus included below.

This Court "generally review[s] a trial court's discovery rulings for abuse of discretion."[324] It will "find an abuse of discretion when [it is] left with a definite and firm conviction after reviewing the whole record that the trial court erred in its discovery ruling."[325] However, this Court applies its "independent judgment in deciding the legal question whether the superior court weighed the appropriate factors in issuing a discovery order."[326] The superior court erred in denying the Board discovery that could have shown the partisan motivations behind the lawsuits challenging the 2021 redistricting plan, thereby prejudicing the Board.

The Board served targeted discovery requests seeking communications among plaintiffs, which most plaintiffs refused to answer at all.[327] The Board moved to compel responses and the trial court denied the motion to compel,[328] thus creating a lop-sided

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324 *Marron v. Stromstad*, 123 P.3d 992, 998 (Alaska 2005).

325 *Fletcher v. South Peninsula Hospital*, 71 P.3d 833, 844 (Alaska 2003) (brackets added; original brackets omitted) (quoting *Christensen v. NCH Corp.*, 956 P.2d 468, 473 (Alaska 1998)).

326 *Lee v. State*, 141 P.3d 342, 347 (Alaska 2006).

327 Exc. 671-680 (Order Den.. Mot. to Compel Disc. Resp.).

328 Exc. 671-680 (Order Den.. Mot. to Compel Disc. Resp.).

record where plaintiffs were free to falsely challenge the Board's motivations while concealing their own partisan agendas.

Alaska Civil Rule 26(b) sets the scope of discovery permissible in civil actions such as this. In doing so it states "[p]arties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[329] Relevance is a low burden that is to be broadly construed.[330] The Alaska Supreme Court was clear in *Ray v. Draeger* that "the credibility of witnesses is *always* a material issue,"[331] and the court of appeals has echoed this basic principle that, "the bias of a witness toward a party is always relevant to [] the case; it is never a collateral issue."[332]

Moreover, and particularly pertinent to this politically-partisan litigation, the U.S. Supreme Court has recognized that "a witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets,

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329 Alaska R. Civ. P. 26(b)(1).

330 *See Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 699 (Alaska 2014); Alaska R. Evid. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

331 *Ray v. Draeger*, 353 P.3d 806, 811 (Alaska 2015) (emphasis added).

332 *Westfall v. State*, 2004 Alas. App. LEXIS 197, *7, 2004 WL 2389893 (Alaska App. 2004); *McIntyre v. State*, 934 P.2d 770, 773 (Alaska App. 1997) ("The bias of a witness toward a party is always relevant to the jury's consideration of the case; it is never a collateral issue."); *see also Newsome v. Penske Truck Leasing Corp.*, 437 F. Supp. 2d 431, 437 (S.D. Maryland 2006) ("Production of impeachment evidence is required in the ordinary course of discovery."); *Gutshall v. New Prime, Inc.*, 196 F.R.D. 43, 45, 2000 U.S. Dist. LEXIS 11600 (W.D. Va. 2000) (finding that evidence intended only for impeachment purposes was discoverable under Rule 26(b)(1)).

is certainly probative of bias."[333] Bias evidence is plainly discoverable under Alaska Civil Rule 26(b). In this politically charged litigation, the superior court, which thought pertinent to cite to the political leanings of the Board, refused to allow the Board to discover and present evidence of the political affiliation and biases of the plaintiffs to the redistricting matters, particularly the East Anchorage Plaintiffs.

Judge Matthews's denial of this discovery became even more prejudicial given his ruling that Article VI, Section 10 requires the Board to accept the "clear weight of public comment" on election districts.[334] Particularly if Alaska courts are going to require the Board to defend its constitutional districts because they are different than what public comments want, the Board should be able to discover the partisan motives, agenda and bias of plaintiffs.

E. The Trial Court Erred in Denying the Board the Right to Put on Direct Testimony During Trial and Ignoring the Board's Pre-Filed Direct Testimony

It is no surprise that trial court's order below contains fundamental misunderstandings about the Board's processes and its adoption of house and senate districts, given the flawed pretrial and trial process the superior court implemented. Judge Matthews' erroneous conclusions that Senate District K was the result of a "secretive process" and that House Districts 3 and 4 were the result of Member Simpson's personal "myopic focus" on compactness are the result of a flawed and unusual trial procedure that

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333 *United States v. Abel*, 469 U.S. 45, 52 (1984) (discussing permissible impeachment of witness under Federal Rules of Evidence based on bias and listing expansive recognition by the Courts of Appeals).

334 Exc. 896.

precluded the Board from providing direct testimony at trial.[335] In an effort to streamline this expedited litigation, the trial court prejudiced the Board's ability to present at trial an accurate depiction of Board proceedings and decisions.

Before any parties had appeared before it, on December 15, 2021, the trial court issued a pretrial order requiring all direct testimony to be filed by affidavit and ruling that at "trial the witness shall be called only for cross examination, redirect, and recross."[336] During the short pretrial proceedings, the Board's members and executive director were deposed. Judge Matthews then allowed plaintiffs to submit those deposition transcripts in into the record,[337] and denied the Board's ability to put on any direct testimony regarding the topics discussed in those depositions. At trial, the East Anchorage plaintiffs did not call any of the Board's witnesses, thereby preventing any redirect on the topics in the deposition transcript, and Judge Matthews relied heavily on the deposition transcripts[338] in his analysis of Senate District K. Compounding the problem, Judge Matthews ignored the pre-filed direct testimony of the Board members that specifically addressed and stated that Senate District K was not decided in private or during any other "secretive proceedings"[339]

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335 Exc. 681 (Fifth Pretrial Order); Jan. 21, 2022 Trial Tr. 11:20-16:9, 22:16-26:4, 107:3-109:15 (argument regarding re-direct at trial, court's ruling not to allow it, and East Anchorage's decision after ruling not to cross any Board member).

336 Exc. 445-446 (Pretrial Order).

337 Exc. 681 (Fifth Pretrial Order); Jan. 21, 2022 Trial Tr. 11:20-16:9, 22:16-26:4, 107:3-109:15 (argument regarding re-direct at trial, court's ruling not to allow it, and East Anchorage's decision after ruling not to cross any Board member).

338 Exc. 810-812 (relying on Member Marcum's and Member Simpson's deposition transcripts); Exc. 818 (relying on Member Borromeo's deposition transcript).

339 Exc. 522-525 (Binkley Aff., ¶¶ 49-56); Exc. 574-577 (Marcum Aff., ¶¶ 10-17); Exc. 592-597 (Simpson Aff. ¶¶ 27-36).

and instead applied what he called the only "reasonable inference" that there was "some sort of coalition or at least a tacit understanding between members Marcum, Simpson and Binkley."[340] The court reached such a conclusion despite any cross-examination and any testimony rebutting the Board affidavits.

A defendant's right in a civil case to confront witnesses and evidence against it is "founded upon notions of procedural due process."[341] Alaska Civil Rule 46(b) animates this right, and governs the ordered introduction of evidence at trial by stating a plaintiff first introduces their evidence and then a defendant has a chance to put on its case. Here, the Board was denied its basic procedural due process right under the Alaska Constitution and Civil Rule 46. Judge Matthews's lopsided discussion of the evidence regarding senate pairings through citation to deposition transcripts and conclusions that are directly contrary to the Board's pre-filed direct testimony shows the resulting prejudice to the Board. The Board's hard work in crafting 40 house districts and 20 senate districts that the trial court admittedly concluded satisfied the substantive requirements of Article VI, Section 6 was severely undermined by the pretrial rulings that prevented the Board from presenting at trial accurate facts about its senate district adoption process. The Board asks this Court to hold that Judge Matthews committed reversible error by allowing the plaintiffs to submit in full deposition transcripts without giving the Board a chance to rebut the testimony

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340 Exc. 818-819.

341 *Matter of Jacob S.*, 384 P.3d 758, 764 (Alaska 2016) (citing *See In re A.S.W.*, 834 P.2d 801, 805 (Alaska 1992) (citing *Thorne v. State, Dept. of Pub. Safety*, 774 P.2d 1326, 1332 (Alaska 1989)) (determining whether due process required civil litigant be given the **right to confront** witness against him)(emphasis added).

therein at trial through some limited live re-direct.

The East Anchorage plaintiffs took particular advantage of the trial court's misguided process, opting not to cross-examine a single witness. They did so knowing that if the Board had the opportunity to explain its decisions and the judge had the opportunity to evaluate Board's credibility, the court would almost certainly find in favor of the Board. Judge Matthews's heavy reliance on deposition transcripts prejudiced the Board, as illustrated by his erroneous conclusion that Senate District K was the result of secret proceedings by Members Binkley, Marcum, and Simpson, which is contrary to the pre-filed direct testimony that Judge Matthews simply ignored. In a case that fundamentally was about whether the Board made reasoned decisions, the trial court adopted a process that did not allow it to hear directly from the Board. This was error.

VI. CONCLUSION

As to Senate District K, Judge Matthews erroneously elevated an admittedly heated intra-Board dispute about Anchorage senate pairings to constitutional dimensions. But no matter how eloquent he found the Board members who opposed Senate District K, the reality is that it is a constitutional senate district that does not dilute the voting power of any politically salient class, and it enhances South Muldoon's (House District 21) control in electing a senator of its choosing.[342] As to House Districts 3 and 4, Judge Matthews refused to defer to the Board's admittedly constitutional districts, and undeniable more-compact district for Skagway, and rewrote Article VI, Section 10 to handcuff the Board to

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

adopt whatever a majority of testifiers' desire. To the superior court, a difference of a dozen public comments in favor of Skagway's preferred, less-compact house district meant that the Board had to adopt that proposal. These rulings must be reversed.

DATED at Anchorage, Alaska, this 2nd day of March, 2022.

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APPENDIX A
Skagway Public Testimony Table

The following shows the breakdown of which public testifiers favored placing Skagway with the northern end of the City and Borough of Juneau ("North Connect"), which favored placing Skagway and downtown/southern end of the City and Borough of Juneau ("South Connect") and which were okay with both ("B") options:

Date	Name	North Connect (NC) South Connect (SC) or Both (B)	Record Cite
9/8/2021	Kathy Hosford	NC	ARB002630
9/8/2021	Fred Hosford	NC	ARB002630
9/8/2021	Ken Koelsch	NC	ARB002998
9/9/2021	Cathy Munoz	NC	ARB003268
9/24/2021	Dennis DeWitt	NC	ARB002243
9/27/2021	Alex Wertheimer	B	ARB004253
9/27/2021	John Pugh	B	ARB003464
10/7/2021	Thomas Zaruba	NC	ARB004342
10/11/2021	Scott Spickler	NC	ARB003933
10/13/2021	Fred Bergstrom	NC	ARB001924
10/27/2021	Eleanor Davenport	NC	ARB002206
10/27/2021	Tyler Rose	NC	ARB003577
11/1/2021	Connie McKenzie	NC	ARB003189
9/24/2021	Kathleen Menke	SC	ARB003211
9/27/2021	Susan Fowler	SC	ARB002393
9/29/2021	Therese Thibodeau	SC	ARB004009
10/25/2021	Alice McNamara	SC	ARB003195
10/27/2021	Jamie Bricker	SC	ARB001986
10/27/2021	Marsha Columbo	SC	ARB002145
10/27/2021	Andrew Cremata	SC	ARB002185
10/27/2021	Janalynn Hager	SC	ARB002526
10/27/2021	Cooper Hays	SC	ARB002558
10/27/2021	Ian Hays	SC	ARB002561
10/27/2021	Reba Hylton	SC	ARB002661
10/27/2021	Katelyn Jarrod	SC	ARB002885
10/27/2021	Luann McVey	SC	ARB003199
10/27/2021	Charity Pomerai	SC	ARB003452
10/27/2021	Deborah Potter	SC	ARB003456
10/27/2021	Catherine Reardon	SC	ARB003495
10/27/2021	Kristin Seier	SC	ARB003659
10/27/2021	John Walsh	SC	ARB004236
10/27/2021	Elizabeth Lavoy	SC	ARB003056
10/30/2021	Jaeleen Kookesh	SC	ARB003002
10/31/2021	Donna Leigh	SC	ARB003073
10/31/2021	Ann Mackovjak	SC	ARB003120
11/4/2021	Louis Flora	SC	ARB002378

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JOINT SPONSOR STATEMENT
FOR

HJR 44: A RESOLUTION PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF ALASKA RELATING TO REAPPORTIONMENT AND REDISTRICTING OF THE LEGISLATURE; AND PROVIDING FOR AN EFFECTIVE DATE.

The reapportionment and redistricting provisions of the Alaska Constitution have been outdated for more than 25 years. U.S. Supreme Court decisions have struck down state law provisions excluding military personnel from reapportionment population bases, and have extended the one-person, one-vote requirement of the equal protection clause of the XIVth Amendment to senate districts as well as to house districts. The Alaska Supreme Court has been inviting the legislature to amend the constitution since at least 1972 in these areas.

Alaska is only one of two states in the Union which places the reapportionment power in the office of the Governor. In the other state, Maryland, the senate has the right to ratify the governor's appointees. No such check exists in Alaska. This situation has produced reapportionment plans which have been subject to criticism of being borne in the crucible of politics, rather than creating a reapportionment plan based on bipartisan fairness and objectivity. The existing system of constitutional provisions has spawned litigation after every decennial census since statehood, the most recent of which was exceptionally contentious.

This proposal creates a five-member reapportionment board. Four members are individually appointed by the Speaker of the House, House Minority Leader, Senate President and Senate Minority Leader respectively. The fifth member, who will chair the board, is selected by the first four appointees, or in the event of deadlock, by the Chief Justice of our supreme court. While no reapportionment mechanism can be completely free of political influences, the one proposed in this legislation is intended to produce balanced, professionally drawn apportionment plans. Many other states have adopted this approach.

Probably due in part to the inherent political bias of the existing mechanism, and the delays inherent in legal challenges, the Alaska Supreme Court has had to take an increasingly activist approach in deciding reapportionment disputes. The most recent legal challenge caused two of the Justices to dissent regarding what they perceived to be an "abuse of power" by the majority of the court. The court majority sent the final reapportionment task to the superior court and special masters to rewrite the plan, rather than remand the case to the reapportionment board. The proposed changes to the constitution will remove the basis for the court to consider this kind of remedy.

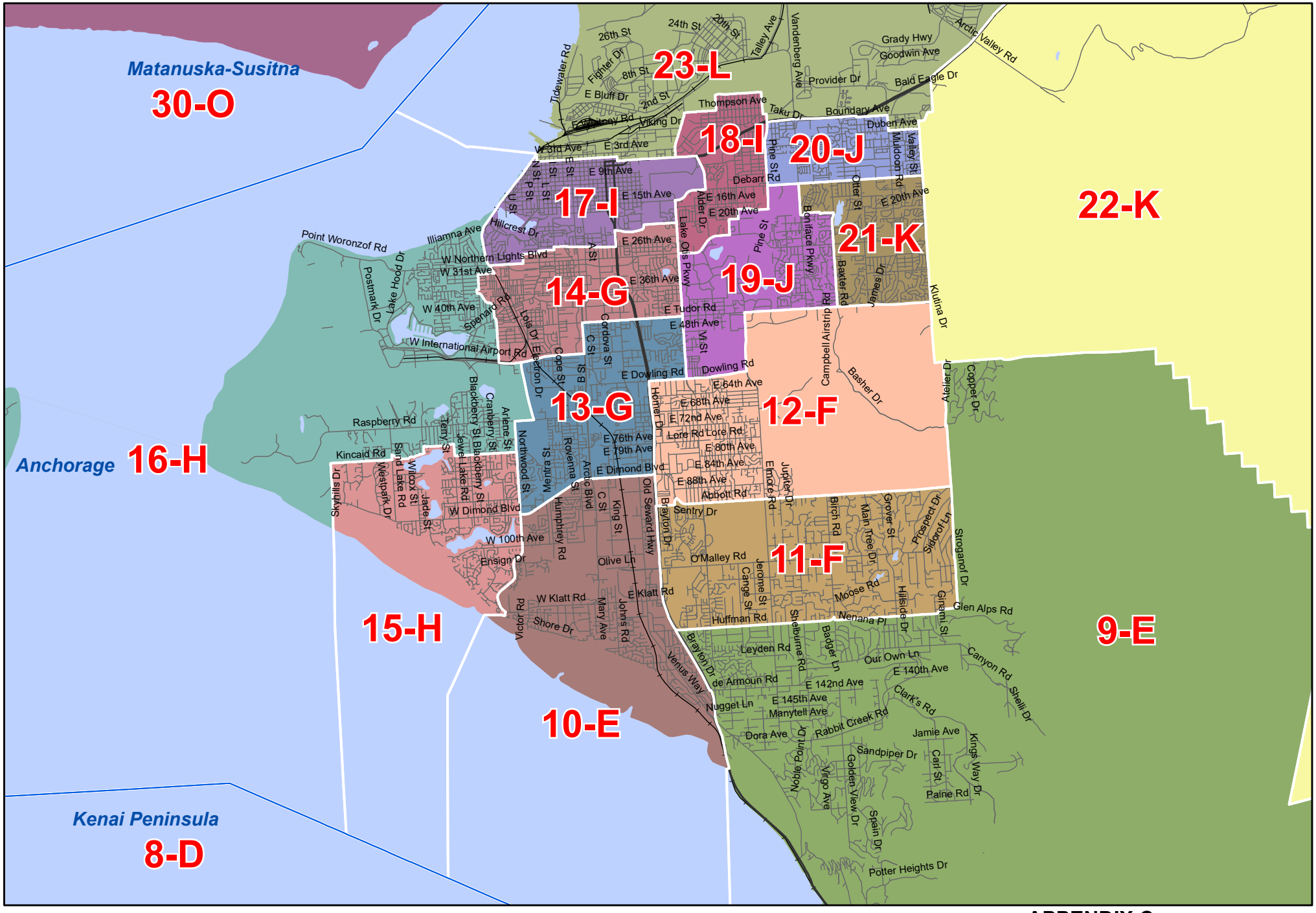
There are other changes proposed, such as clarifying that representatives and senators shall be elected from single-member districts. A more detailed analysis of other sections of HJR 44 appears in the sectional analysis, which is incorporated by reference.

Brian S. Porter
Representative Brian Porter

Eldon Mulder
Representative Eldon Mulder

2021 Board Proclamation Anchorage

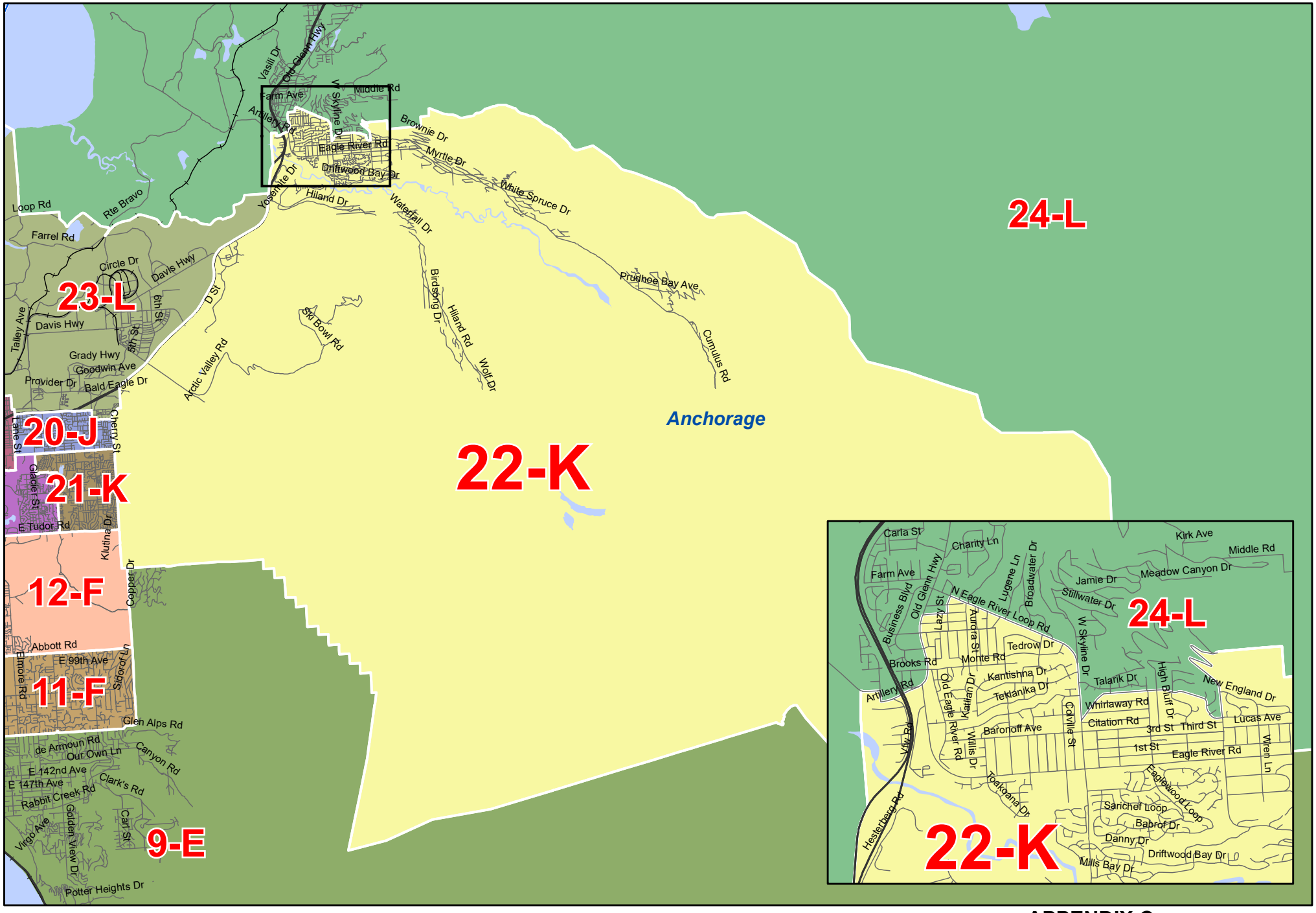
Redistricting Plan Adopted by the Alaska Redistricting Board 11/10/2021



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

2021 Board Proclamation District 22-K

Redistricting Plan Adopted by the Alaska Redistricting Board 11/10/2021



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

APPENDIX C
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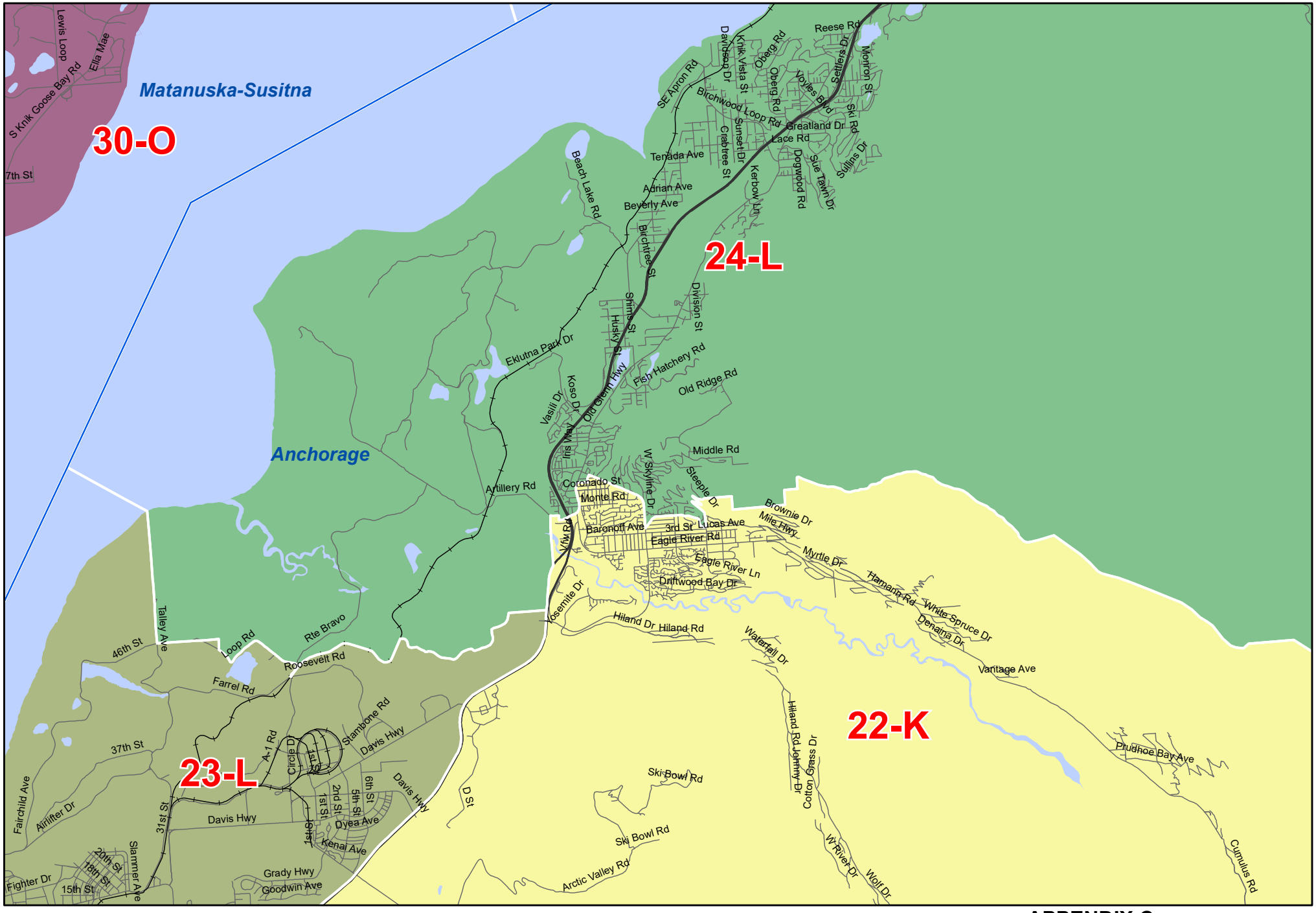
2021 Board Proclamation Eagle River

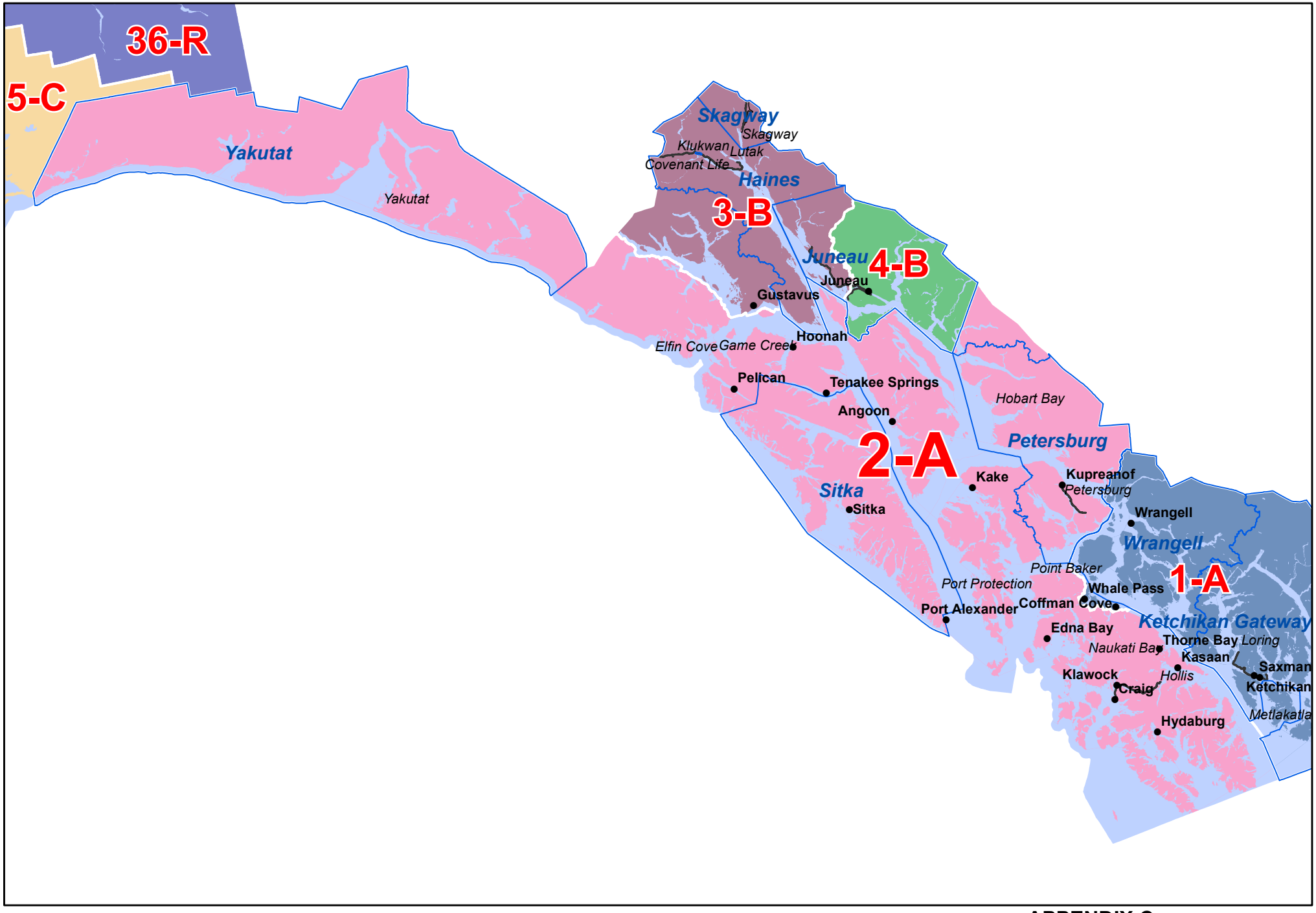
Redistricting Plan Adopted by the Alaska Redistricting Board 11/10/2021



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

2021 Board Proclamation District 2-A

Redistricting Plan Adopted by the Alaska Redistricting Board 11/10/2021



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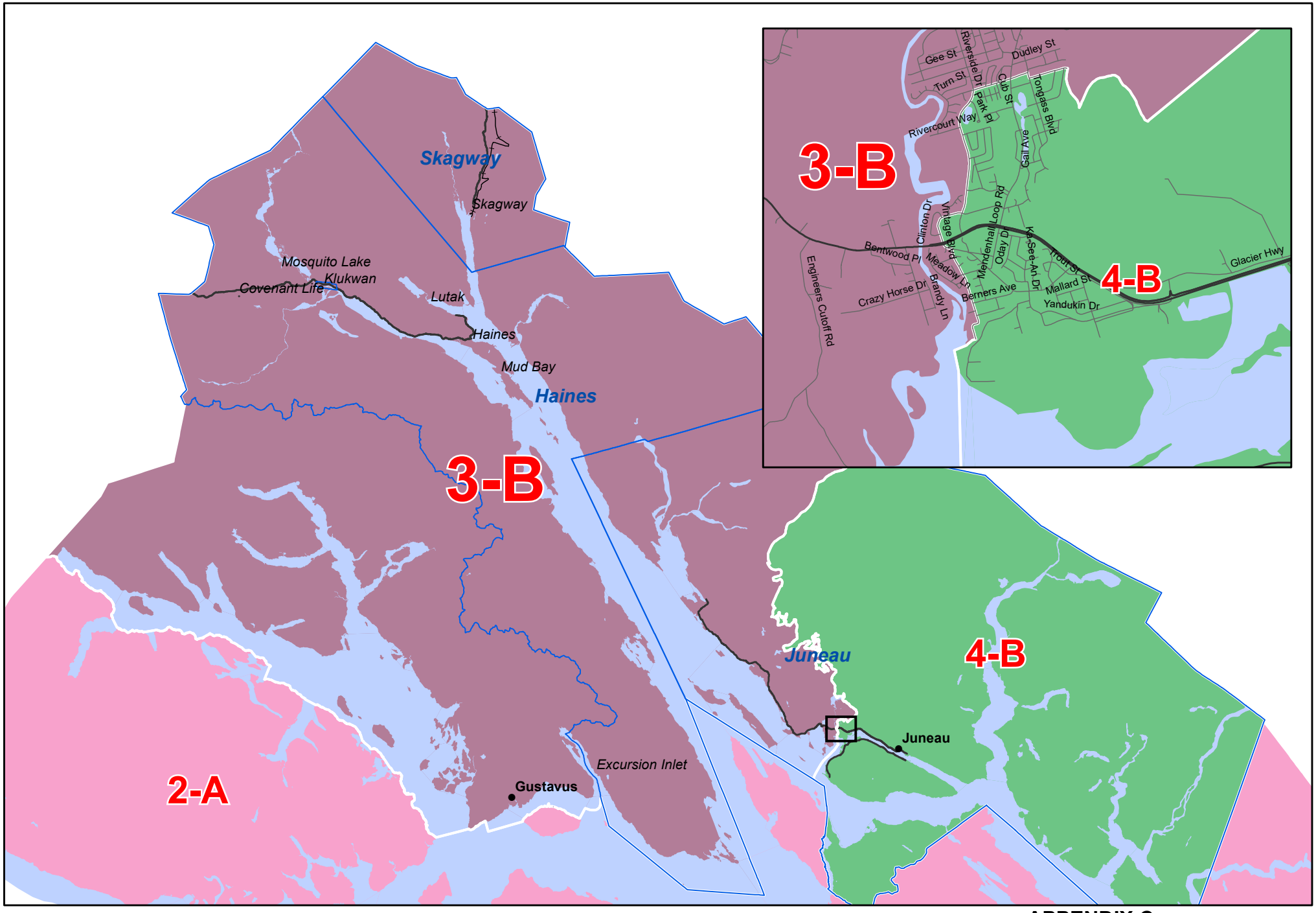
2021 Board Proclamation District 3-B

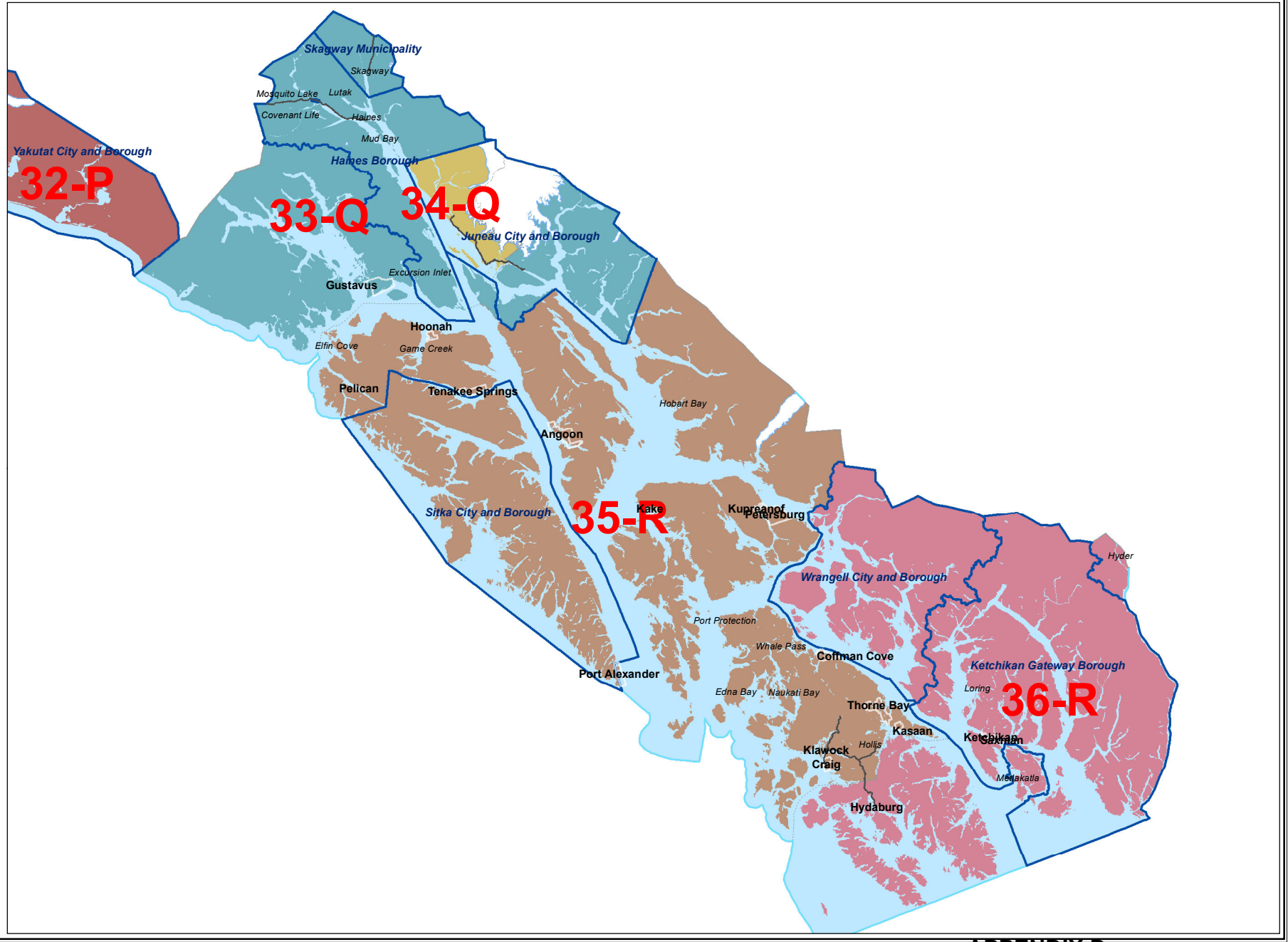
Redistricting Plan Adopted by the Alaska Redistricting Board 11/10/2021



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

2013 Proclamation House Districts

Southeast



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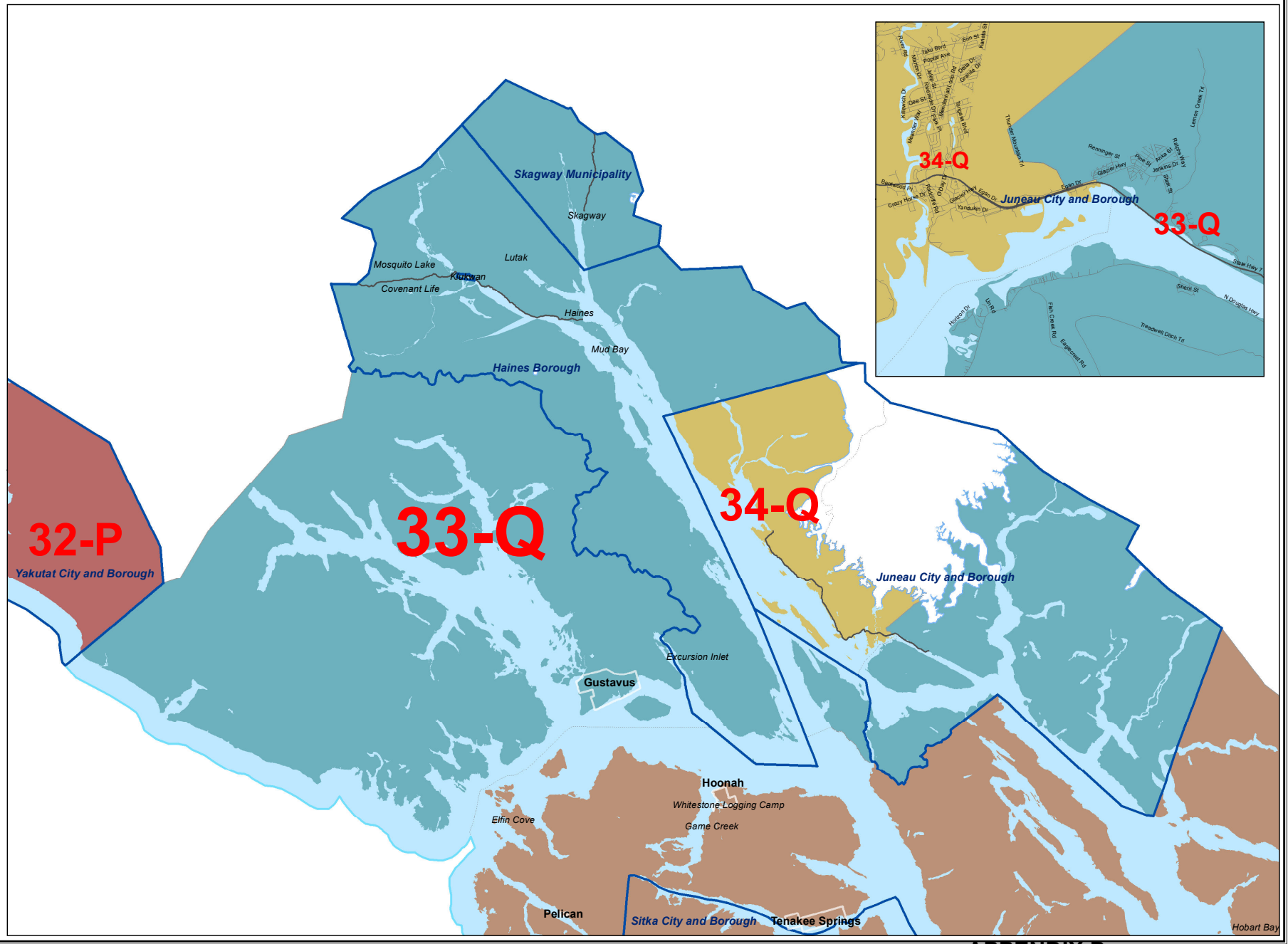
Alaska Redistricting Board

2013 Proclamation House Districts

House District 33



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