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IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Trial Court No. 3AN-21-08869CI

EAST ANCHORAGE PLAINTIFFS' RESPONSE TO PETITION FOR REVIEW BY ALASKA REDISTRICTING BOARD

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PROVISIONS PRINCIPALLY RELIED UPON

I. ALASKA CONSTITUTION, ARTICLE I

A. ART. I, SECTION 1 (INHERENT RIGHTS)

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

B. ART. I, SECTION 7 (DUE PROCESS CLAUSE)

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

II. ALASKA CONSTITUTION, ARTICLE VI

A. ART. VI, SECTION 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.

B. ART. VI, SECTION 8 (REDISTRICTING BOARD)

(a) There shall be a redistricting board. It shall consist of five members, all of whom shall be residents of the state for at least one year and none of whom may be public employees or officials at the time of or during the tenure of appointment. Appointments shall be made without regard to political affiliation. Board members shall be compensated.

(b) Members of the Redistricting Board shall be appointed in the year in which an official decennial census of the United States is taken and by September 1 of that year. The governor shall appoint two members of the board. The presiding officer of the senate, the presiding officer of the house of representatives, and the chief justice of the supreme court shall each appoint one member of the board. The appointments to the board shall be made in the order listed in this subsection. At least one board member shall be a resident of each judicial district that existed on January 1, 1999.

Board members serve until a final plan for redistricting and proclamation of redistricting has been adopted and all challenges to it brought under section 11 of this article have been resolved after final remand or affirmation.(c) A person who was a member of the Redistricting Board at any time during the process leading to final adoption of a redistricting plan under section 10 of this article may not be a candidate for the legislature in the general election following the adoption of the final redistricting plan. [Amended 1998]

C. ART. VI, SECTION 10 (REDISTRICT 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]

D. ART. VI, SECTION 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]

III. ALASKA STATUTES

A. **AS 44.62.310**. Government meetings public.

(a) All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law. Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.

(b) If permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body. The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.

(c) The following subjects may be considered in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential;

(4) matters involving consideration of government records that by law are not subject to public disclosure.

(d) This section does not apply to

(1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff;

(5) meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges, or discipline;

(6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents;

(7) meetings held for the purpose of participating in or attending a gathering of a national, state, or regional organization of which the public entity, governmental body, or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings; or

(8) meetings of municipal service area boards established under AS 29.35.450 — 29.35.490 when meeting solely to act on matters that are administrative or managerial in nature.

(e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and if, the meeting is by teleconference, the location of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.

(f) Action taken contrary to this section is voidable. A lawsuit to void an action taken in violation of this section must be filed in superior court within 180 days after the date of the action. A member of a governmental body may not be named in an action to enforce this section in the member's personal capacity. A governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting. If the court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with this section. A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. In making this determination, the court shall consider at least the following:

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

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

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

(4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;

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

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

(7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;

(8) the degree to which violations of this section were wilful, flagrant, or obvious;

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

(g) Subsection (f) of this section does not apply to a governmental body that has only authority to advise or make recommendations to a public entity and has no authority to establish policies or make decisions for the public entity.

(h) In this section,

(1) "governmental body" means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity; "governmental body" includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members;

(2) "meeting" means a gathering of members of a governmental body when

(A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity; or

(B) more than three members or a majority of the members, whichever is less, are present, the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act, and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity;

(3) “public entity” means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state; it does not include the court system or the legislative branch of state government.

B. **AS 44.62.312**. State policy regarding meetings.

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people’s right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

C. **4 AAC 59.005.** Retention and preservation of electronic records.

(a) A state agency shall establish internal procedures to comply with state archives and records management standards for creation, use, maintenance, storage, retention, preservation, and disposition of state records in an electronic format. The procedures shall

(1) integrate the management of electronic records with other records and information technology resources of the agency;

(2) identify the electronic records created, used, received, or maintained by the agency to ensure that the records appear on the agency's records retention schedule;

(3) ensure the development and maintenance of documentation of electronic records systems used by the agency that specifies the characteristics necessary for reading or processing the records, including a narrative description of the system and the physical and technical characteristics of the records;

(4) ensure the retention of the agency's electronic records until a disposition period has been approved by the state archivist, the attorney general, the commissioner of administration, and the agency head;

(5) ensure that an electronic record's content, context, and structure are evident and easily retrieved and understood;

(6) protect any confidential, privileged, proprietary, or security information;

(7) provide for the management of public records maintained on the agency's website to ensure that web content is trustworthy, complete, accessible, and durable for as long as the records retention schedule approved under this section requires;

(8) provide a security plan to prevent unintentional or unauthorized addition, modification, deletion, or corruption of electronic records and to ensure routine back-up of essential information against loss due to equipment malfunction, power interruption, human acts, and natural events;

(9) provide for the transfer of long-term and permanent electronic records from an existing system to a new system if it is evident that the existing system will become obsolete or inoperable;

(10) ensure that the agency's electronic records are durable for as long as the records retention schedule approved under this section requires; and

(11) ensure the consideration of the following factors before the selection of a storage media or the conversion of an electronic record from one media to another:

(A) the length of the retention period for the record;

(B) the maintenance necessary for the entire life cycle of the record;

(C) the cost of storing and retrieving the record;

(D) the time needed to retrieve the record;

(E) the portability of the medium, including the readability of medium by multiple manufacturers; and

(F) the transferability of the record from one medium to another.

(b) A state agency shall create, capture, maintain, and store electronic records, in accordance with the following minimum standards to the extent possible:

(1) digital images on electronic records must be in a non-proprietary image format in wide usage;

(2) scanned images on electronic records must meet the following minimum scanning densities:

(A) standard letter quality records, 200 dots per inch;

(B) photographs and other higher quality or more detailed records, 400 dots per inch;

(C) engineering drawings, 200 dots per inch;

(D) deteriorating documents, 600 dots per inch;

(3) long-term and permanent back-up and security magnetic tapes maintained or stored on-site or in a state-approved facility must be kept at a constant temperature of 62 degrees to 68 degrees Fahrenheit and a constant relative humidity of 35 percent to 45 percent;

(4) electronic records must be stored in non-magnetic containers that are resistant to impact, dust intrusion, and moisture;

(5) non-magnetic containers described in (4) of this subsection must be stored at least six feet away from magnetic field sources, including generators, elevators, transformers, loudspeakers, microphones, headphones, magnetic cabinet latches, and magnetized tools;

(6) compact disks must be stored in hard cases and not in cardboard, paper, or plastic sleeves.

(c) If the state archivist determines the electronic record as a temporary record under this chapter, the electronic record may be stored on any medium, including optical disk, that ensures the maintenance of the record until its disposal is authorized under AS 40.21 and this chapter.

(d) The state archivist may accept into the state archives analog videodiscs and compact disks used for data, digital audio playback, or document storage.

(e) Original photographs determined by the state archivist as permanent and copied onto a videodisc must be scheduled for transfer to the state archives along with a copy of the videodisc.

(f) Permanent records must be transferred by an agency to the state archives when the agency becomes inactive or whenever the agency cannot provide proper care and handling of the record. Electronic records must be transferred by an agency to the state archives on paper, microforms, magnetic tape, or an electronic format otherwise meeting the requirements of this section. If the records are transferred on magnetic tape, the transferred tapes on which the information is recorded must be new tapes. If electronic records are transferred to the state archives, documentation adequate for servicing and interpreting the records must be transferred with the electronic records.

IV. RULES

A. **Alaska R. of Civ. P. 90.8**. Expedited Applications to Compel Correction of Any Error in Redistricting Plan.

(a) Scope. This rule applies to applications to the superior court under art. VI, sec. 11, Constitution of the State of Alaska, to compel the Redistricting Board to correct any error in its redistricting plan. This rule supersedes the other civil rules to the extent that they may be inconsistent with this rule.

(b) Application.

(1) Application to compel the Redistricting Board to correct any error in redistricting must be made within 30 days following the adoption of the final redistricting plan and proclamation by the Redistricting board.

(2) Service of the application shall be made on the Redistricting Board, the Office of the Attorney General, and the Office of the Lieutenant Governor.

(c) Expedited Proceeding. Applications under this rule shall be expedited, and shall have priority over all other matters pending before the court. The date for the court's decision shall be no later than 120 days prior to the statutory filing deadline for the first statewide election in which the challenged redistricting plan is scheduled to take effect.

(d) Record. The record in the superior court proceeding consists of the record from the Redistricting Board (original papers and exhibits filed before the board and the electronic record or transcript, if any, of the board's proceedings), as supplemented by such additional evidence as the court, in its discretion, may permit. If the court

permits the record to be supplemented by the testimony of one or more witnesses, such testimony may be presented by deposition without regard to the limitations contained in Civil Rule 32(a)(3)(B). A paginated copy of the record from the Redistricting Board shall be filed in the supreme court at the same time it is filed in the superior court.

(e) Scheduling Conference. Within ten days of the application, the assigned judge shall hold a scheduling conference, which all parties must attend. Telephonic participation may be permitted at the judge's discretion. At the conference, the judge shall enter a scheduling order that addresses all matters appropriate in the circumstances of the case.

(f) Assignment. Cases shall be assigned by presiding judges and may be assigned across judicial district lines in coordination with other presiding judges and the administrative director. (Adopted by SCO 1457 effective November 15, 2001)

STATEMENT OF THE CASE

On February 15, 2022, Superior Court Judge Thomas Matthews issued Findings of Facts and Conclusions of Law ("Decision") regarding five separate applications for corrections of error in the 2021 Proclamation Plan devised by the Alaska Redistricting Board (the "Board"), including the application filed by Plaintiffs Felisa Wilson, George Martinez, and Yarrow Silvers ("East Anchorage Plaintiffs"). In their application, East Anchorage Plaintiffs alleged that the Board "shielded from public scrutiny by unlawful process and procedures, adopted arbitrary and egregiously irrational senate districts, pairing Eagle River house districts with fragments of East Anchorage communities of interest despite the starkly different and even contradictory legislative needs of these communities."[1] More specifically, East Anchorage Plaintiffs asserted that the Board's "Eagle River/East Anchorage Pairings" [2] violated the equal protection clause and due process clauses of the Alaska Constitution, as well as those dealing specifically with redistricting: Article VI, Section 10 and Article VI, Section 6.

Due to a delay in the release of decennial census data, the Civil Rule 90.8 application review process afforded the superior court a matter of weeks, rather than

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[1] First Amended Application to Compel Correction ("East Anchorage Application"), p. 1, ARB Exc. 429.

[2] Throughout this response and related pleadings, "'East Anchorage/Eagle River Pairings" refer to the pairing of House District ("HD") 23-Gov't Hill/JBER with HD 24-North Eagle River/Chugiak and HD 21-South Muldoon with HD 22-Eagle River Valley as well as the other pairings adopted by the Board impacting HD 17 through HD 24 resulting from those pairings. *See also* East Anchorage Plaintiff Application, p. 7, n.3, ARB Exc. 435.

the many months customarily alotted for this process, to reach its decision.[3] In order to accommodate this extraordinarily expedited process, the superior court exercised its discretion, including the preclusion of summary judgment motions and limiting supplements to the administrative record. Despite these limitations, the court conducted a 12-day trial for supplemental testimony. Upon conclusion of this trial, Judge Matthews considered the administrative record, as supplemented by evidence and argument presented at trial and in the parties' proposed findings and fact and conclusions of law, and issued the 171-page Decision. Judge Matthews ultimately concluded that while the Board followed the constitutional process when drawing all but one of the house districts, it failed to follow the applicable constitutional process when drawing the Senate map.[4] Judge Matthews determined that:

> In the process of redistricting, the Board is required to produce a plan and draw a map which fairly divides Alaska into [40] house seats, and [20] senate seats using criteria set forth in the Alaska Constitution. The Board must also follow a process that complies with Due Process and Equal Protection under both the U.S. and Alaska Constitutions. And it must follow the process, to the extent it is applicable, set forth in the Alaska statutes governing Open Meetings and Public Records.[5]

Applying the established standard of review articulated repeatedly in Alaska redistricting cases, Judge Matthews correctly noted that:

> Redistricting plans are reviewed in a similar manner as regulations adopted by an administrative agency, or in other words, "to ensure that

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[3] *See e.g. In re 2001 Cases*, 3AN-01-8914CI, 2002 WL 34119573 (Alaska Super. Feb. 01, 2002) . ANC EXC. 3140-3271.

[4] Findings of Fact and Conclusions of Law and Order ("Decision"), p. 2, ARB Exc. 754-755; Decision, 2.

[5] Decision, p. 1, ARB Exc. 754. *See also In re 2001 Redistricting Cases,* No. 3AN-01-8914CI, 2002 WL 34119573 (Alaska Super. Feb. 01, 2002).

> the Board did not exceed its delegated authority and to determine if the plan is 'reasonable and not arbitrary.'"[6]

Perhaps due to the unprecedentedly short trial court timeline, Judge Matthews limited his own findings to a rigid application of existing case precedent, whenever applicable. To this end, Judge Matthews noted that senate pairings need only be contiguous, or touching, to comply with Article VI, Section 6 of the Alaska Constitution and Senate District K met this constitutional requirement.[7] However, after an extensive review of the administrative record as supplemented at trial, and affording substantial deference to the Board, the judge determined that the Board's unlawful procedures during its senate pairing hearings resulted in arbitrary and irrational decisions in violation of the Equal Protection Clause, Due Process Clause and Article VI, Section 10 of the Alaska Constitution. Although Judge Matthews found that the Board was subject to and had violated the Open Meetings Act (AS 44.62.310-312) ("OMA"), the court determined that these violations did not independently justify voiding the Board's adoption of its proclaimed redistricting plan. Accordingly, the superior court remanded the East Anchorage/Eagle River pairings to the Board to cure procedural deficiencies.

Despite the judge's deference to the Board and his conservative interpretation of relevant law, the Board filed a petition for review challenging the court's remand, arguing in part that the court's finding of Board compliance of Article VI, Section 6

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[6] Decision at 26-27, *quoting from In Re 2011 Redistricting Cases* (2011 Appeal III), 294 P.3d 1032, 1037 (Alaska 2012) *quoting from Kenai Peninsula Borough v. State*, 743 P.2d 1352, 357 (Alaska 1987). ARB Exc. 779-780.

[7] Decision at 41.

precluded a finding of violation of the Due Process or Equal Protection Clauses. The Board further asserts that the Equal Protection Clause did not protect any of the East Anchorage voters, as Judge Matthews did not identify a specific "politically salient class" harmed by the Board's action; that the East Anchorage/Eagle River Pairings "enhance South Muldoon's control in electing a senator of its choosing;"[8] and that the court exceeded its authority in determining that "the Board must make a good-faith effort to harmonize both 'the greater good of the State' and the desires of each community 'to the greatest extent possible'".[9] As an overarching concern, the Board claims that the procedural protections contemplated by the court constitute "the insertion of [an] easily politically manipulated public-hearings rule" into redistricting that would harm the public.[10] Finally, the Board's Petition appeals certain trial decisions adopted by the court, suggesting that they violated the Board's due process rights by preventing the Board from redirecting its own witnesses in the absence of cross-examination.[11]

BACKGROUND

I. The Redistricting Process

Every ten years, the Board convenes to draw legislative districts for the Alaska State Senate and House of Representatives with the benefit of input received from

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8 Board Petition for Review ("Board Petition") at 76.

9 Decision, 133. ARB Exc. 886.

10 Board Petition, 1.

11 Board Petition, 72-74.

the public at constitutionally-mandated public hearings.[12] The Board is composed of five members: Board chair John Binkley ("Binkley"), and members E. Budd Simpson ("Simpson"), Bethany Marcum (Marcum"), Nicole Borromeo ("Borromeo") and Melanie Bahnke ("Bahnke"). The Executive Director of the Board is Peter Torkelson ("Torkelson"). In 2021, after the U.S. Census Bureau released its report, the Board, like its predecessors, had 90 days to adopt a final plan.[13] This delayed census report advantaged the Board by affording it a significantly longer period of time for organization, procurement, training, and preparation. To this end, the Board undertook organizational efforts between September 2020 and July of 2021.[14]

Unlike past redistricting boards, this Board relied heavily on executive sessions to evade public scrutiny and awareness of the reasons underlying the viscerally opposed, nonsensical East Anchorage/Eagle River Pairings. While the Board adopted many policies and procedures consistent with past cycles, it is in part the Board's deviation from past practices that enabled the arbitrary and unpopular East Anchorage/Eagle River Pairings. For instance, in the 2001 redistricting cycle, the superior court noted only a single executive session prior to the adoption of the plan.[15] In stark contrast, this Board routinely spent hours in executive session, often failing to provide the public with even a general topic of the session beyond "matters which are

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12 Alaska Const. art. VI, § 3.

13 Alaska Const. art. VI, § 10.

14 Decision, pp.5-21. ARB Exc. 758-774.

15 In Re 2001 Redistricting Cases Superior Court Memorandum and Order, pp.4-7. ANC EXC. 3143-3146.

confidential by law."[16] It conducted its review of executive director candidates, legal counsel, VRA consultants, and various other considerations in executive, rather than open, session.[17] Similarly, while the Board adopted an open meetings and public records policy on February 26, 2021, there was no record of formal OMA training or presentations to the Board as there had been in past proceedings.[18]

The Board's excessive use of executive sessions and its reliance on legal counsel to shield pertinent discussions from public view eroded trust in the redistricting process. As early as September 2021, Borromeo noted: "some board members are not included and are not getting the benefit of the board's counsel."[19] She proposed that "[i]f a meeting is held where staff and Mr. Singer are present, the full board should be given notice even if it is solely an administrative meeting."[20] That same month, Bahnke emphasized that "any [Board] deliberations must be on the record and that no side conversations between board members should take place that consist of map drawing and could impact the outcome of the overall map."[21] Additionally, both the

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16 *See, e.g.,* Nov. 8 Meeting Minutes*,* ARB000213-215.

17 Decision, pp. 5-21. ARB 758-774.

18 ARB000137; ARB 000420-000426; *compare with* In Re 2001 Redistricting Cases Superior Court Memorandum and Order, pp.4-7.

19 September 7-9, 2021 Board Meeting Minutes, ARB000163. "Mr. Singer" refers to Matthew Singer, counsel for the Board. ANC EXC. 27.

20 September 7-9, 2021 Board Meeting Minutes, ARB000163. ANC EXC. 27.

21 September 7-9, 2021 Board Meeting Minutes, ARB000163. ANC EXC. 27.

Alaska Democratic Party and the Native American Rights Fund submitted letters to the Board expressing concern regarding apparent violations of the OMA.[22]

At the onset, the record demonstrates that the Board's focus was on defeating inevitable challengers of the final redistricting plan. By way of example, on January 21, 2021, Board Executive Director Torkelson recommended the Board retain a Voting Rights Act ("VRA") expert able to run an "'ensemble analysis'" of the Board's plan," noting that such a consultant "would then be able to defend against an ensemble challenge during the litigation phase[,]" having "seen all the forbidden fruit data so that we aren't blindsided in a court room, and be prepared to defend ou[r] plan against a hostile ensemble style attack."[23] On March 12, 2021, the Board retained Matthew Singer of Schwabe, Williamson & Wyatt to "advise and represent the Board in legal matters"[24] and on June 21, 2021, the Board executed a contract with Federal Compliance Consulting, LLC for the "ensemble analysis."[25] Unlike in past redistricting cycles where VRA consultants frequently advised the Board in open session, the VRA consultants did not present to the Board in open session at any time during the

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22 *See* September 7, 2021 Letter from Native American Rights Fund, ARB000597-ARB000601, ANC EXC. 19-22; Aug. 26, 2021 Letter from Alaska Democratic Party, ARB001796-ARB001800 (both expressing concern regarding apparent violations of the OMA). ANC EXC. 16-18.

23 Jan. 21, 2021 email correspondence from Torkelson to Binkley and Presley, ARB00111035; Ex. 6011, p. 2. ANC EXC. 7-8.

24 Board 2021 Process Report, p. 2, ARB000006. ARB Exc. 308-314.

25 Board 2021 Process Report, p. 2, ARB000006. ARB Exc. 308-314.

process.[26] VRA consultants did, however, repeatedly attend executive sessions with the Board, including during senate pairing considerations. [27]

In its efforts to insulate the Board's process from scrutiny, the Board attempted to restrict its access to and consideration of race and political data. Its members repeatedly claimed that they would not and had not considered political incumbent information and took efforts to exclude demographic data.[28] Similarly, the Board removed race data from its matrix during its house district and senate pairing mapping sessions, asserting that it was not considering this data.[29] Subsequently, the only public discussion of this data by the Board was during the November 2, 2021 meeting when the Board's legal counsel summarized the findings of the Board's VRA consultant.[30]

Initially, the Board's overbroad use of executive sessions appeared to be ameliorated by its dedication to a more user-friendly website, its decision to take public

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[26] *See generally* Decision, pp. 5-21, ARB 758-774; *see e.g.* Nov. 2, 2021 Meeting Tr. at 70:23-78:3 (speech by attorney Singer summarizing experts' VRA findings), EXC.VDZ-0088-0231; *Compare In Re 2001 Redistricting Cases, Memorandum and Order*, p. 6.

[27] Nov. 2, 2021 Minutes at ARB000196, ANC EXC. 81; Nov. 5, 2021 Minutes at ARB000201-ARB000202, ARB000208, ANC EXC. 122-123; ANC EXC. 129; Nov. 8, 2021 Minutes at ARB000213, ARB Exc. 224; (The Board entered into executive session with its VRA consultants on numerous occasions, including on November 2, 5, 8, and 9)

[28] Binkley Depo. at 185-188, ANC EXC. 1673-1674; Simpson Depo. at 210-211, ANC EXC. 1463.

[29] *See,* Jan. 27, 2022 Board Opp. to Mot. To Amend at Ex. B, ¶ 6. ANC EXC. 2351.

[30] Nov. 2, 2021 Meeting Tr. at 70:23-78; EXC VDZ 157-165.

testimony twice at each meeting, and its ambitious public hearing schedule. On November 5, 2021, the Board heard public testimony after posting the final proposed house districts on its website and then again before adopting the house districts.[31]

II. The Board's Senate Pairings Considerations

However, the prejudice to the public from the Board's executive sessions became apparent as it moved into the senate pairing process. After finalizing house districts, the Board entered into its senate pairing process on November 8, 2021 and inexplicably altered its public process, failing to provide a draft of the Board's senate pairing proposals to the public. In contrast to its previous practice, the Board took public testimony only once at the November 8 meeting. Therefore, the public was forced to testify on senate pairings before any had actually been proposed by the Board or a Board member.[32]

The Board's decision to hear testimony before, and not after, the pairings were proposed permitted the Board to misrepresent testimony without fear of reprisal before a decision was issued. East Anchorage Plaintiff Felisa Wilson ("Wilson") testified before the Board, strongly urging it to pair Eagle River house districts together into a

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[31] Nov. 5, 2021 Board Meeting Agenda, ARB001025, ANC EXC. 121; *see also generally* Nov. 5, 2021 Board Meeting Transcript, ARB00156432, ANC EXC. 131-414.

[32] Nov. 5, 2021 Board Meeting Agenda, ARB001025, ANC EXC. 121; *see also generally* Nov. 5, 2021 Board Meeting Transcript, ARB00156432, ANC EXC. 131-414; while there were senate pairings proposed in some third-party plans adopted by the Board, these proposals involved different house districts and thus were not applicable. *See generally* Opposition to Board Motion to Dismiss, ANC EXC. 909-926; Dunsmore Aff. at ¶¶ 24-25, ANC EXC. 1027.

single senate district.[33] However, Marcum "misconstrued the words of [Wilson's] testimony to misrepresent it as in favor of pairing Eagle River house districts with JBER or Northeast Anchorage districts."[34] Wilson later testified that "[t]here was no opportunity for the public to rectify this misrepresentation of [her] testimony, nor to give further comment on the senate pairings as selected by the Board."[35] The Board did not cross-examine Wilson as to this testimony.

All together there were 196 testimonial statements related to senate pairings throughout the state. Of those, 108 were in opposition to an Eagle River/East Anchorage pairing; only six were in support of such a pairing.[36]

After taking this testimony, the Board entered executive session "for legal and other purposes related to receiving legal counsel for the Board."[37] After a lengthy executive session, the Board then entered a senate pairings work session.[38]

During the work session, members of the public attending virtually or in-person struggled to hear and see all Board members. The work session was not "on the record" and while it was televised, members routinely exited the room and conversed with members of the audience.[39] Although Board members decided early on in their process that they "would not have access to political data, that [they] would not have

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33 Wilson Aff. at ¶ 19. ANC EXC. 1033.

34 *Id.*

35 *Id.* at ¶ 21. ANC EXC. 1034.

36 *See generally* App. B to proposed Findings of Fact and Conclusions of Law.

37 Nov. 8, 2021 Meeting Minutes. ANC EXC. 421.

38 Nov. 8, 2021 Meeting Minutes. ANC EXC. 421-422.

39 D. Dunsmore Aff. at ¶ 27. ANC EXC. 1027-1028.

it on [their] computers, that [they] would not access it,"[40] on November 7, 2021-- the night before the scheduled Board meeting regarding senate pairings -- the former chair of the Alaska Republican Party, Randy Ruedrich, emailed Marcum, Simpson, and the Board-designated public testimony email address the political incumbent information for each of the Board's adopted house districts.[41] Despite Marcum's later representations to the contrary, the November 8, 2021 meeting video depicts Marcum and Simpson having a conversation during the work session expressly referencing the unredacted version of the incumbent information provided by Ruedrich. While Marcum testified at deposition that she could not hear her comments or those of Simpson when watching a video of the November 8, 2021 meeting, she conceded when watching that video that she showed Simpson the unredacted version of the email, and had a conversation with Simpson during which the incumbent information was referenced.[42]

After the work session, the Board reconvened briefly to continue its work as a body on the record. Bahnke presented her proposed senate pairings for Eagle River

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[40] Marcum Depo., p. 198, lines 1-21. ANC EXC. 1013.

[41] Ruedrich Depo., p. 14:19-15:10, ANC EXC.1714; Nov. 7, 2021 email correspondence from Ruedrich to Board, Ex. 6005. ANC EXC. 415-417.

[42] Marcum Depo., p. 215:6-217:5; 217:15-25; p. 218:1-3, 10-22. ANC EXC. 1017-1018. Despite admitting to viewing the unredacted version of incumbent information on November 8th, Marcum testified on November 9 that "I'd just state for the record, we have not been provided with any incumbent information. And in addition, we don't know who's been truncated, so I mean, I think that the proposal that you put forward is logical because we—we know that this information has not been presented to us." Nov. 9, 2021 Board Meeting Tr., p. 33, lines 19-25, ANC EXC. 687; Marcum Depo., p. 225:11-23, ANC EXC. 1019.

and East Anchorage.[43] During her presentation, Borromeo expressed support.[44] Neither Simpson nor Binkley said anything regarding these pairings presented by Bahnke.[45] They asked no questions.[46] They made no statements of scrutiny or support.[47] Marcum then began her presentation of her own Eagle River/East Anchorage senate pairings by emphasizing that she had formulated four versions of possible senate pairings for Anchorage and declaring that: "I started with one premise that I think is one of the most important premises that we have ignored throughout this process . . . and that is the very natural both physical, as well as socioeconomic connection between JBER and Eagle River . . . so that is the one thing that's common in all four of these maps."[48] Marcum's consideration of the Eagle River/East Anchorage Pairings was oriented solely from the Eagle River resident's perspective, despite repeated efforts by Bahnke and Borromeo to get the Board to acknowledge

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[43] Nov. 8, 2021 Board Meeting Tr. 164:25-171:10, ARB006660-ARB006667, ARB Exc. 238-393.

[44] Nov. 8, 2021 Board Meeting Tr. 164:25-171:10, ARB006660-ARB006667, ARB Exc. 238-393.

[45] Nov. 8, 2021 Board Meeting Tr. 164:25-171:10, ARB006660-ARB006667, ARB Exc. 279-281.

[46] Nov. 8, 2021 Board Meeting Tr. 164:25-171:10, ARB006660-ARB006667, *id.*.

[47] Nov. 8, 2021 Board Meeting Tr. 164:25-171:10, ARB006660-ARB006667, *id.*

[48] Nov. 8, 2021 Board Meeting Tr., p. 174, ARB006670, ARB Exc. 282. To the extent Marcum appears to have elevated the connection between one half of Eagle River and Joint Base Elmendorf/Richardson above the connection between both Eagle River house districts, such prioritization is suspect. JBER is adjacent to Anchorage but, as a closed community and federal military base, it is not part of the Municipality of Anchorage. Indeed, even if JBER was not a military base, its status as a closed or gated independently sufficient community would preclude annexation into Anchorage. *See generally* 3 AAC 110.090-150.

the Muldoon residents. Marcum mischaracterized Wilson's testimony, cherry-picking her comments about living in Eagle River. Marcum ignored the overall theme of Wilson's testimony, specifically disregarding Wilson's testimony in direct opposition to the East Anchorage/Eagle River Pairings.[49] At no point was Marcum's plan expressly supported by Simpson or Binkley.[50] Despite the lack of expression of clear support for either Bahnke or Marcum's plan, Binkley then declared that the Board had a "majority but not a consensus" on the Anchorage pairings.[51] In summary, Marcum stated that "Eagle River has its own two separate House districts. This actually gives Eagle River the opportunity to have more representation, so they're certainly not going to be disenfranchised by this process."[52] The Board concluded the pairings with another executive session.[53]

On the morning of November 9, 2021, the Board went directly back into executive session and did not reconvene in open session before doing so. Instead, members of the public who joined the meeting briefly saw Torkelson, who was quickly

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49 F. Wilson Aff. at ¶¶ 19-25 ("During the deliberation of the senate pairings by the Redistricting Board, Board member Bethany Marcum deliberately misconstrued the words of my testimony to misrepresent it as in favor of pairing Eagle River house districts with JBER or Northeast Anchorage districts. I could not believe what I was hearing on the video zoom livestream of this deliberation."). ANC EXC. 1033-1034.

50 Simpson defended Marcum's "plans" as reasonable, but he also never expressly supported the pairings. Nov. 8, 2021 T. 201:4-201:18, ARB006697, ARB Exc. 238-393; In his own deposition, Binkley acknowledged that while he believed the final house district plan was reasonable and lawful, he did not vote to adopt it because he did not think it was the best option. *See* Binkley Depo., ANC EXC. 1694.

51 Nov. 8, 2021 Tr. 202:5-202:9. ARB006698, ARB Exc. 289.

52 Nov. 8, 2021 Tr. 176:6-10; ARB Exc. 282.

53 ARB000208; ANC EXC. 129.

replaced by a screenshared word document reading "Executive Session in Progress."[54] No motion was made or words spoken.[55] Upon exiting executive session, the viewing public watched the Board members talk amongst themselves but could not hear their discussion as the meeting remained muted.[56] The meeting was unmuted and Binkley addressed the public, explaining that the Board had been in "kind of an extended … executive session" to address "some legal issues we've been working on."[57] Binkley spoke for only 12 seconds before he was interrupted by Marcum, who said "I'd like to move that we adopt the following senate pairings …"[58] Binkley asked Marcum to identify the map to which she was referring "for reference."[59] Despite his request, Marcum did not identify a map and instead explained she was just going to "read the senate pairings."[60] She also clarified that she would use the numbers for the current "adopted plan for Anchorage,"[61] which resulted in noted confusion by members of the public and media reports later attempting to decipher

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54 *See* video recording of Nov. 9, 2021 Meeting, at 00:00:00-00:05:00, submitted electronically.

55 *Id.*

56 *See* video recording of Nov. 9, 2021 Meeting, at 1:34:00-1:34:17.

57 *See* video recording of Nov. 9, 2021 Meeting, at 1:34:00-1:34:17.

58 *See* video recording of Nov. 9, 2021 Meeting Recording at 1:34:00-1:34:17; Nov. 9, 2021 Board Meeting Tr. p.2: 1-10. ANC EXC. 656.

59 Nov. 9, 2021 Board Meeting Tr. p.2: 12-13. ANC EXC. 666-667.

60 Nov. 9, 2021 Board Meeting Tr. p. 2: 14-16. *Id.* at 668-669.

61 Nov. 9, 2021 Board Meeting Tr. p. 2: 18-25. *Id.* at 672-679.

the Board's abrupt adoption of Marcum's pairings.[62] Only three of the pairings Marcum read were consistent with those discussed on the record the previous day. In other words, five of the eight Anchorage pairings were changed without public input, notice or discussion.[63] Simpson seconded Marcum's motion. Bahnke opposed the motion and requested a roll call vote. The motion passed 3-to-2, with Binkley, Marcum, and Simpson in favor, and Bahnke and Borromeo against.[64]

Borromeo moved to reconsider the vote, with Bahnke seconding the motion. Borromeo expressed strong opposition against the East Anchorage/Eagle River Pairings, noting that "it opens the Board up to an unfortunate and very easily winnable argument [of] partisan gerrymandering."[65] Borromeo stated that the pairing "defies logic" and is contrary to "the sound, sound legal advice [the Board] got from counsel in executive session."[66] However, before Borromeo had finished speaking, Binkley and Marcum called the question — a violation of Robert's Rules of Order, by which the members of the Board had previously agreed to abide.[67] The motion to reconsider the vote on adoption of the Anchorage senate pairings failed, with only Bahnke and

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62 *See* Buxton, Matt, Redistricting Board settles Senate pairings for all but Anchorage," Nov. 9, 2021, available at https://akmemo.substack.com/p/redistricting-board-settles-senate?r=ext0s&utm_campaign=post&utm_medium=web&utm_source=&s=r (stating that Marcum "presented a flurry of not entirely clear options"). ARB000215, ARB Exc. 226.

63 Nov. 9, 2021 Tr., pp. 2-4, at ARB007034 – ARB007036. ANC EXC. 656-658.

64 ARB000215, ARB Exc. 226.

65 ARB007040, ARB Exc. 299.

66 ARB007041, ARB Exc. 300.

67 ARB007043, ARB Exc. 302; Binkley Depo. at 198:25-199:9, ANC EXC. 1677.

Borromeo in favor of reconsideration.[68] The record suggests that even some of the Board members themselves were unclear on the Anchorage senate pairings they had just adopted.[69]

Then, the Board pivoted to consider truncation and terms of the senate election cycles.[70] Bahnke proposed that, to avoid the appearance of partisanship or knowledge as to which seats would be truncated, the Board should flip a coin to make the decision.[71] Binkley proposed alternating between the 2024 and 2022 cycles beginning with Senate District T. Simpson and Marcum supported Binkley's proposal, with Marcum specifically noting that the Board had not been presented with any incumbent information.[72] Simpson also expressly claimed that: "I don't know who these people are either" and "it's not partisan because I don't know who these people are or what party either…."[73] Binkley's method passed. Borromeo then moved to determine the sequencing for truncations beginning with Senate District A going in the 2024 cycle, but Marcum, Simpson, and Binkley voted against this motion.[74] Marcum then moved to alternate by numerical order with District A going in the 2022 cycle,

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68 ARB000215, ARB Exc. 226.

69 Simpson Depo. at 224:8-224:14 (In which Simpson states that "I don't think that I had any sense for any specific proposals for… pairings."). ANC EXC. 1466.

70 ARB000217, ARB Exc. 228.

71 ARB000217, ARB Exc. 228.

72 ARB000217, ARB Exc. 228.

73 Nov. 9, 2021 Tr. 32: 20-22, ANC EXC. 686.

74 ARB000217, ARB Exc. 228.

and the motion passed.[75] Discussions and representations regarding incumbents and term limits by Simpson and Marcum, both of whom can be seen reviewing incumbent information on the video recording of the November 8, 2021 meeting, undermines the "randomness" of the Board's senate term decisions.

III. Application for Correction of Error Proceedings

The Board's manipulation of the superior court proceedings and resulting prejudice to East Anchorage Plaintiffs illuminates the dangers inherent in the Board's tactics, and the substantial resources and expenses a party must expend to combat those tactics. These tactics not only exemplify the need for appellate guidance, as requested by Judge Matthews on the scope of the executive session privilege, but also provide further evidence of the Board's willingness to manipulate the Board's rationale to prevail in a challenge regardless of the cost.

The Board commenced their aggressive tactics fewer than 24 hours after East Anchorage Plaintiffs filed their Application. Through counsel, the Board demanded East Anchorage Plaintiffs excise any claims of a federal constitution violation from their Application, threatening to seek removal of the application to federal court.[76] This position was contrary to the state court's express jurisdiction over redistricting matters and the fact that federal constitutional claims were at issue in virtually every previous Alaska redistricting case, all of which were heard in state court.[77] The Board then extended its

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[75] ARB000217, ARB Exc. 228.

[76] *See generally* Dec. 13, 2021 Motion for Leave to Amend Application to Compel the Alaska Redistricting Board to Correct Its Senate District Pairings in Anchorage. ARB Exc. 429-442.

[77] *Id. at 4, citing Growe v. Emison,* 507 U.S. 25, 34 (1993).

threats to all other plaintiffs, and all amended their applications. Although a threat of removal would have been easily navigated with more time, no plaintiff could risk potential exclusion from the consolidated, expedited case set for trial in less than two months.[78]

Plaintiffs, also attempting to facilitate the extremely expedited application for error process, jointly moved to include additional documents that are traditionally included in an administrative record, including "all correspondence from, to, between, or among the Board, its members, its staff, and/or consultants regarding legislative apportionment resulting from the 2020 census."[79] Plaintiffs also requested all materials and documents received, reviewed or generated by the Board during its meetings and any previously undisclosed draft plans, and – importantly – that any documents withheld on claims of privilege by identified in a privilege log and be submitted to the court automatically for in camera review.[80] Plaintiffs incorrectly assumed that the Board would have substantially composed the administrative record and thus would have minimal objection to producing a record consistent with past cycles as well traditional administrative records filed by other Alaska boards in administrative appeals proceedings.[81] Instead, the Board quickly objected to Plaintiffs' motion, arguing that:

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[78] Motion for Leave to Amend Application, ARB Exc. 429-442; *See subsequent* Mat-Su Borough Notice of Filing Amended Complaint, ANC EXC. 779; Calista's Notice of Filing First Amended Complaint, ANC EXC. 790.

[79] Joint Motion to Include Certain Categories of Documents in the Administrative Record, 2; ANC EXC. 793.

[80] *Id*. at 3; ANC EXC. 794.

[81] Opposition to Joint Motion to Include Certain Categories of Documents in Administrative Record; ANC EXC.873-889.

> Movants want to invade attorney-client privilege and executive sessions, see every email on every topic, and demand a real-time record of documents reviewed during hundreds of hours of public meetings, all on the flimsy pretext of obtaining a 'full picture.'[82]

The Board's opposition referred flippantly to Plaintiffs' challenges as "gripes" and declared that Plaintiffs were intentionally attempting to "drown the Board, its staff, and counsel in discovery tasks and inhibit its trial preparation."[83] This response demonstrated the Board's lack of understanding of the proceedings and its intention to aggressively, and with unfettered gamesmanship, treat the Civil Rule 90.8 record-based appeal as a full-blown adversarial trial. Accordingly, at a pretrial conference on December 29, 2021, legal counsel for East Anchorage Plaintiffs and others reiterated that the Board was a government body that had issued a decision and that decision was under review by the judge.[84] This was not a new trial and the Board was not a private litigant.[85] The court reminded all parties that he expected counsel to collaborate and "work reasonably under the constraints" inherent to the expedited proceeding.[86]

The parties began preparing for the rapidly-impending trial in compliance with various guidelines issued by the superior court. Among these were provisions

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82 Opposition to Joint Motion to Include Certain Categories of Documents, 2-3; *id.* at 874-875.

83 Opposition to Joint Motion to Include Certain Categories of Documents, 5; *id.* at 877.

84 *See* Alaska R. Civ. P. 90.8; Dec. 29, 2021 Tr. at 37:8-38:3, ANC EXC. 941-942; 75:8-75:14, ANC EXC. 951.

85 *See* Alaska R. Civ. P. 90.8; Dec. 29, 2021 Tr. at 37:8-38:3; 75:8-75:14.

86 *See* Alaska R. Civ. P. 90.8; Dec. 29, 2021 Tr. at 37:8-38:3; 75:8-75:14.

requiring that parties pre-file affidavits setting forth the direct testimony of expert and lay witnesses in advance of trial;[87] that at trial, witnesses shall be called only for cross-examination and redirect;[88] and that weekly discovery hearings be held.[89]

Despite contrary commitment, the "administrative record" filed by the Board by the December 21, 2021 deadline did not contain substantial amounts and types of documents required by Civil Rule 90.8.[90] Even after the Board supplemented the record with additional documents, it still did not include any communications between, among, or with Board members or staff except the submission of written testimony from the public.[91] Subsequently, in its Third Pretrial Order, the court ordered that the Board "prepare in electronic form for supplementation to the parties all correspondence to or from the board members or staff, excluding only correspondence that is claimed to be protected by attorney client privilege."[92] The court clarified that "[t]he record will not be automatically amended to include such correspondence, but the parties may designate additions or specific documents as exhibits at the trial."[93] Likewise, a Fourth Pretrial Order clarified that the record would

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87 Second Pretrial Order at ¶¶ 13; 16.

88 *Id.* at ¶ 13.3

89 *Id.* at ¶ 20.2

90 *See* Alaska Redistricting Board's Dec. 21, 2021 Notice of Filing Redistricting Record, ANC EXC. 903, and Alaska Redistricting Board's Jan. 14, 2022 Notice of Supplementing Record, ANC EXC. 1861; *see also* Opposition to Joint Motion to Include Documents in Administrative Record, ANC EXC. 873-889.

91 *See* Dec. 22, 2021 Third Pretrial Order at ¶ 9, ARB Exc. 461.

92 *Id.*

93 *Id.*

be supplemented by deposition testimony and testimony at trial.[94] At its weekly discovery conferences, the court repeatedly stated that, in the event parties wished to supplement their pre-filed written testimony, they would have the opportunity to do so.[95] This directive was also repeated at the beginning of trial, with the court specifically inviting any party who believed a supplemental testimony affidavit was necessary where a witness was not cross-examined to file such a supplemental testimony affidavit.[96] No party did so.

At trial, the five cases proceeded sequentially, with the Board having the opportunity to respond after the close of each set of plaintiffs' witnesses.[97] East Anchorage Plaintiffs' case went first, on January 21, 2022.[98] On the evening before trial, the Board filed a supplemental affidavit by Torkelson purportedly in response to expert testimony filed by plaintiffs. The portion of Torkelson's supplemental testimony filed in response to East Anchorage Plaintiffs' expert witness, respected anthropologist Dr. Chase Hensel ("Dr. Hensel"), asserted for the first time that pairing North and South Muldoon together would dilute North Muldoon voters.[99] The Board's post hoc attempt to assert a new rationale justifying the East Anchorage/Eagle River

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94 Jan. 4, 2022 Fourth Pretrial Order at 4-5, ARB Exc. 483-489.

95 *See* Transcript of Jan. 21, 2022 Trial at pp. 1-26 (oral argument regarding East Anchorage Plaintiffs' Motion to Preclude Redirect in Absence of Cross-Examination); ANC EXC. 2227-2269.

96 *Id.* at 108.

97 *See* Jan. 20, 2022 Fifth Pretrial Order at 1, ARB Exc. 681-683.

98 *Id.*

99 Jan. 20, 2022 Aff. of Peter Torkelson (Supplemental Direct Testimony) at ¶¶ 34-35; ANC EXC. 2185-2186.

Pairings was egregious, especially given the total lack of support in the record and the Board's repeated refusal to provide East Anchorage with any documents regarding its race data considerations. Believing that the record spoke for itself, East Anchorage Plaintiffs moved to strike Torkelson's untimely and unhelpful affidavit.[100]

At trial, the Board elected to cross-examine only two of East Anchorage Plaintiffs' witnesses, Wilson and David Dunsmore ("Dunsmore"), inquiring primarily as to both witnesses' partisan affiliations.[101] The Board then cross-examined East Anchorage Plaintiffs' expert witness, Dr. Hensel. During this cross-examination, Board counsel displayed an exhibit, Exhibit 1007, which counsel stated was pulled from Dr. Hensel's report.[102] The exhibit, however, was not from the report, and included voting age population data that was different from the data used in Dr. Hensel's report, even though the data Dr. Hensel had used and relied upon originated from the Board.[103] East Anchorage Plaintiffs "initially objected to the exhibit but agreed to waive this

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[100] Jan. 20, 2022 Conditional Motion to Strike Paragraphs 34 and 35 of Supplemental Affidavit of Peter Torkelson; ANC EXC. 2188-2197.

[101] *See generally* Transcript of Jan. 21, 2022 Trial; ANC EXC. 2227-2269.

[102] Transcript of Jan. 21, 2022 Tr. at 70:23-78:16; ANC EXC. 2246-2248.

[103] *See generally* Transcript of Jan. 21, 2022 Trial, ANC EXC. 2227-2269; The Board denies producing the matrix with race data relied upon by Dr. Hensel, alleging East Anchorage Plaintiffs' legal counsel created the document by using the Autobound Edge System. *See also* Jan. 27, 2022 Opp. to East Anchorage Plaintiffs' Motion to Amend Application to Assert Additional Claims and Opposition to Motion to Admit Expert Affidavit. ANC EXC. 2325. While East Anchorage Plaintiffs' legal counsel submitted an affidavit dispelling this allegation, (*see* Reply in Support of Motion to Amend Application to Expand Equal Protection Claim to Include Race-Based Dilution, ANC EXC. 2383-2386), Dr. Hensel only used the chart for general population data, which is not disputed, not voting age population data. *See* C. Hensel Aff. at ¶¶ 60-62, ARB Exc. 655-656.

objection if the Board's legal counsel was expressly representing that it was just an enlargement of the chart in Dr. Hensel's report."[104] The Board could not so represent: the numbers in the Board's exhibit reflected an approximate 2% increase in minority voting age population data, and were different than the Autobound Edge screenshots relied upon in both Torkelson's supplemental affidavit and Dr. Hensel's report.[105]

After East Anchorage Plaintiffs concluded their presentation, the court ordered the Board to produce certain previously-withheld documents produced by the Board to all parties.[106] These communications further demonstrated that Board members, contrary to the Board's earlier representations, had in fact received Anchorage-specific racial data before adopting senate pairings. Further, the racial data presented by the Board in its Exhibit 1007 demonstrated that the Board appeared to have used data during its process that underestimated the diversity of the East Anchorage Community by about 2%. Observing that the Board's use of incorrect data by a margin of 2% was only relevant if the Board was suddenly asserting that this incorrect data informed its pairing selection, East Anchorage Plaintiffs promptly moved to amend their Application to expand their existing Equal Protection Clause claim.[107] East Anchorage Plaintiffs concurrently moved for admission of an affidavit from data

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104 *See generally* Transcript of Jan. 21, 2022 Trial; ANC EXC. 2227-2269.

105 Transcript of Jan. 21, 2022 Tr. at 70:23-78:16; ANC EXC. 2246-2248.

106 Jan. 25, 2022 Order Following In Camera Review. and for Production of Additional Privileged Documents for In Camera Review, ANC EXC. 2270-2278, and Jan. 25, 2022 Granting in Part ARB Motion to Reconsider Following Further In Camera Review, ANC EXC. 2279-2282.

107 *See generally* January 25, 2022 Motion to Amend Application to Expand Equal Protection Claim to Include Race-Based Dilution, ANC EXC. 2283-2293.

analysis expert Erin Barker, clarifying the error in Anchorage racial data. The Board opposed the motion, and oral argument was held on February 1, 2022.[108] Ultimately, the court denied the East Anchorage Plaintiffs' Motion to Amend, but allowed into evidence limited portions of Barker and Torkelson's affidavit—namely, those portions which present and interpret race data, but not those portions which analyze such data or could arguably be considered expert opinion evidence. The basis for the court's denial of the Motion appears to be an impression that East Anchorage Plaintiffs were not diligent in bringing the Motion, despite the fact that the Board shielded its communications, Exhibit 1007, and supplemental Torkelson affidavit from all parties until the day before trial.[109] In light of this delay, the court held that it would not permit East Anchorage Plaintiffs to argue or pursue a race-based dilution claim.[110]

All parties submitted proposed findings of fact and conclusions of law on February 9, 2022.[111] In their proposed findings and conclusions, consistent with the court's Order regarding their Motion to Amend, East Anchorage Plaintiffs incorporated and relied on the limited portions of Barker and Torkelsons' affidavits allowed by the

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108 *See generally* Transcript of Feb. 1, 2022 Tr.

109 Feb. 2, 2022 Order re East Anchorage Plaintiffs' Mot. to Amend Application to Expand Equal Protection Claim at 11; ANC EXC. 2413-2430.

110 Feb. 2, 2022 Order re East Anchorage Plaintiffs' Mot. to Amend Application to Expand Equal Protection Claim at 11; *id.*

111 Feb. 9, 2022 East Anchorage Plaintiffs' Proposed Findings of Fact at ¶¶ 174, 175; ANC EXC. 2431-2484.

court.[112] Closing arguments were held on February 11, 2022, and on February 15, 2022, the superior court issued its Decision.

STANDARD OF REVIEW

Where the superior court acts as an intermediate appellate court, the Alaska Supreme Court gives "no deference to its decision, but, instead… independently scrutinizes directly the merits of the administrative determination."[113] In other words, the Alaska Supreme Court reviews the redistricting plan de novo through the record developed by the Board and supplemented before the superior court.

Challenges, however, to the superior court's supplementation of the administrative record under Civil Rule 90.8, and the exclusion or inclusion of evidence or other procedural decisions by the superior court, are reviewed only for abuse of discretion.[114]

ARGUMENT

The Board's abrupt shift from transparency to secrecy during its consideration of senate pairings and its sudden attempt to evade public oversight led to the erosion of public trust in the redistricting process and to violations of the Due Process Clause and Equal Protection Clause as correctly recognized by Judge Matthews.

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112 Feb. 9, 2022 East Anchorage Plaintiffs' Proposed Findings of Fact at ¶¶ 174, 175; *id*.

113 *See generally Griswold v. City of Homer*, 252 P.3d 1020, 1025 (Alaska 2011) (*quoting Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough,* 865 P.2d 741, 742 n. 5 (Alaska 1993); *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.,* 746 P.2d 896, 903 (Alaska 1987)).

114 *Ray v. Draeger*, 353 P.3d 806, 810 (Alaska 2015); *Jones v. Bowie Indus., Inc.,* 282 P.3d 316, 324 (Alaska 2012).

I. The Superior Court's Substantive Decisions Were Well-Reasoned and Supported by Established Law.

A. As a public entity, the Board is required to engage in reasonable and non-arbitrary decision making by giving issues before it a "hard look."

The Board claims that the superior court erred by "articulating a new 'hard look' standard through incorporation of the inapplicable federal Administrative Procedure Act to invalidate election districts that comply with the substantive requirements for election districts contained in Article VI, Section 6."[115] The Board's position misunderstands both the superior court's reasoning and the fact that the "hard look" standard of review has been applicable to every Alaska redistricting case since *Groh v. Egan*[116] was decided in 1974.

This Court has repeatedly explained in the context of redistricting cases that "in determining whether a regulation is reasonable and not arbitrary courts are not to substitute their judgment for the judgment of the agency. Therefore review consists primarily of ensuring that the agency has taken a hard look at the salient problems and has generally engaged in reasoned decision-making."[117] Because the superior court, acting as an intermediate appellate court, is bound by an identical standard of review, this reasoning was equally applicable to Judge Matthews' decision.

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115 Board Petition at 62.

116 526 P.2d 863 (Alaska 1974).

117 *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game,* 18 P.3d 686, 690 (Alaska 2001); *see also Kenai Peninsula Borough,* 743 P.2d at 1358 *(quoting Carpenter v. Hammond,* 667 P.2d 1204, 1214 (Alaska 1983); *quoting Groh,* 526 P.2d at 866-67).

Although the Board did not conduct an adequate public hearing regarding senate pairings, the public testimony it did receive was consistent in stating that Eagle River house districts should not be paired with those in East Anchorage and provided evidence against these pairings. The testimony highlighted not only the stark differences between the legislative needs of Eagle River versus East Anchorage, but also the generally adverse attitudes residents of each community displayed at the thought of being included in the other community. Despite this overwhelming testimony, the Board chose to pair these districts in its final plan without explanation. Thus, as a "salient problem," the Board was required to take a "hard look" at the Eagle River/East Anchorage Pairings and adequately explain its reasoning for departing from the great weight of public opinion. Evaluating whether the Board gave this salient problem a "hard look" necessarily involves determining whether the Board engaged in "reasoned decision-making."[118]

As the superior court noted, Alaska's "hard look" standard is traceable to federal case law.[119] Analogizing to this law, the court noted that "in the context of 'notice-and-comment rulemaking,' the 'agency must consider and respond to significant comments received during the period for public comment'" and "an agency must 'respond to "significant points" and consider "all relevant factors" raised by the public

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[118] *In re 2001 Redistricting Cases,* 44 P.3d 141, 143 n. 5, 145 (Alaska 2002) (*quoting Interior Alaska Airboat Ass'n v. State, Bd. of Game,* 18 P.3d 686, 690 (Alaska 2001).

[119] Decision, at 136 (*citing Se. Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983) (quoting Harold Leventhal, Environmental Decision Making and the Role of the Courts, 122 U. PA. L. REV. 509, 511 (1974) (discussing *Greater Bos. Television Corp. v. F.C.C.,* 444 F.2d 841,858 (D.C. Cir. 1970))). ARB Exc. 889.

comments' to satisfy the 'hard look' standard."[120] Likewise, the court found instructive federal precedent explaining that "[a]lthough an agency need not respond to all public comments, at the very least it is 'required to respond to significant comments that cast doubt on the reasonableness of the rule the agency adopts.'"[121]

Here, Article VI, Section 10 of the Alaska Constitution explicitly directs the Board to hold public hearings on its proposed plans, presumably so that the Board can incorporate public testimony into its final plan. If the Board was free to disregard such testimony with abandon, this constitutional provision would be meaningless. The federal precedent to which Judge Matthews cites is instructive in terms of the weight the Board, as an administrative body, is required to give public testimony to satisfy the "hard look" standard. The trial court committed no error in looking to this analogous precedent for guidance in interpreting binding principles from this Court.

B. The Board's arbitrary and irrational decision violated the Due Process Clause of the Alaska Constitution.

The Alaska Due Process Clause is, in many ways, a continuation of the "hard look" standard of review consistently applied in redistricting cases. When a Board fails to take a "hard look" at a salient redistricting problem, this failure may lead to a violation of various constitutional or statutory requirements or justify remand or other

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120 Decision, at 137 (*citing Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 96, (2015)*; Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971); *cf. Moore v. State,* 553 P.2d 8, 35 n.19 (Alaska 1976)*; Carlson v. Postal Regul. Comm'n,* 938 F.3d 337, 344 (D.C. Cir. 2019) *(quoting Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35-36 (D.C. Cir. 1977)). ARB Exc. 890.

121 Decision at 137 (citing *Baltimore Gas & Elec. Co. v. United States,* 817 F.2d 108, 116 (D.C. Cir. 1987)). ARB Exc. 890.

remedies. Such a violation will not necessarily result in an independent violation of the Alaska Due Process Clause unless, as was the case here, the failure to take the "hard look" leads to an arbitrary and not reasonable decision.

Substantive due process "guards against unfair, irrational, or arbitrary state conduct"[122] and mandates that decisions of state entities must be reasonable and adequately grounded in fact and logic.[123] A violation of substantive due process occurs when state action is so unfair, irrational, or arbitrary as to "shock the universal sense of justice."[124] Similarly, trial courts have previously required redistricting boards to comply with procedural due process.[125] While procedural due process does not necessarily apply to legislative decision-making by a government body, redistricting boards have constitutionally mandated public hearings and thus the court has applied procedural due process to the Board during such hearings.[126] Here, the superior court correctly determined, and the record resoundingly supports, a finding that the Board's East Anchorage/Eagle River Pairings violated the due process clause of the Alaska Constitution.

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122 *Doe v. Dep't of Pub. Safety,* 444 P.3d 116, 125 (Alaska 2019).

123 *Id*

124 *Id.*

125 *See generally In re 2001 Redistricting Cases,* No. 3AN-01-8914CI, 2002 WL 34119573 (Alaska Super. Feb. 01, 2002).

126 *Id.*

All agencies engaged in adjudicative decision-making must articulate the reasons for their decisions, as a matter of due process.[127] The rationale for this requirement is fourfold: "[s]uch findings facilitate judicial review, insure careful administrative deliberation, assist the parties in preparing for review, and restrain agencies within the bounds of their jurisdiction."[128] Thus, the test for sufficiency of findings is functional: "do [the agency's] findings facilitate [the] court's review, assist the parties and restrain the agency within the proper bounds?"[129] In other words, findings should be "sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action."[130]

Judge Matthews afforded the Board great deference but ultimately, and accurately, found that the Board's failure to comply with process, and its resulting arbitrary and irrational decision, violated both procedural and substantive due process requirements under the Alaska Constitution, as those process requirements have

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127 *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 175 (Alaska 1993) quoting from *Kenai Peninsula Borough v. Ryherd,* 628 P.2d 557, 562 (Alaska 1981).

128 *City of Nome v. Catholic Bishop of N. Alaska*, 707 P.2d 870, 875 (Alaska 1985).

129 *South Anchorage Concerned Coalition,* 862 P.2d at 175.

130 *Fields v. Kodiak City Council,* 628 P.2d 927, 933 (Alaska 1981). Despite the court's general requirement of findings, there are cases in which the court determines that findings are unnecessary to decipher a board or commission's decision and upholds the decision in question despite the lack of findings. *See Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 940 (Alaska 2001). *See also Galt v. Stanton,* 591 P.2d 960, 962-965 (Alaska 1979). However, even in the cases where the court upholds a commission or board's decision without adequate findings, the court invariably reiterates the general findings requirement.

been applied historically in redistricting.[131] Even if the public hearing requirement is seen only as a tool of transparency rather than participation, the Board still failed in its duties to the state. The Board hid behind executive sessions, failed to publicly present pairings, and manipulated procedures to dodge the public rather than engage it. The Board's failure to take a "hard look at the salient problems" presented in the East Anchorage/Eagle River Pairings was so egregious, and its resulting decision so unreasonable and arbitrary, it served to shock the public conscious and resulted in a violation of the Alaska Due Process Clause.

The Board's claims that the judge prioritized public opinion above the Board's reasoning are simply not accurate. The judge simply found that the Board must *acknowledge* public comment and make an attempt to respond to it, or at least "significant" comments that cast doubt on the reasonableness of the Board's decision.[132]

The administrative record as supplemented during the trial court proceeding demonstrates that the Board entered into repeated executive sessions without sufficiently identifying the subject matters that would be discussed in those executive sessions. The record demonstrates that the Board had every intention—and did—undertake review, discussion, and consideration of racial and demographic data for Anchorage in executive session only, releasing only a paragraph from the Voting

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131 Decision at 52. ARB Exc. 750-941.

132 Decision at 52. ARB Exc. 802.

Rights Act consultants to the public.[133] The Board never permitted the VRA consultants to speak or present to the public, instead having presentations funneled through general legal counsel for the Board and Executive Director Torkelson.[134]

On November 9, 2021, Marcum moved to adopt Anchorage pairings, all but three of which had never been presented to the public. The only rationale ever provided to the public regarding the Eagle River/East Anchorage pairings was that there was a connection between JBER and Eagle River—but no explanation was ever provided as to why this connection was more significant than that existing between the two Eagle River districts. Further, as JBER is a gated community/military base and not part of the Anchorage municipality, it is not, by definition, socioeconomically integrated with any part of the Anchorage borough. The Board's silence on the newly submitted pairings, after an unlawfully convened and extended "executive session," and its adoption of those pairings without public comment or presentation (other than through the motion itself) was suggestive that an agreement was reached among Marcum, Simpson, and Binkley outside of the public eye.[135] This was in direct contravention of applicable Alaska law and violative of substantive and procedural due process.

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[133] ANC EXC. 68, Nov. 1, 2021 Supplemental Alaska Racially Polarized Voting Analysis for 2021 Redistricting.

[134] Nov. 2, 2021 Meeting Tr. at 70:23-78:3 (speech by attorney Singer summarizing experts' VRA findings), EXC.VDZ-0088-0231.

[135] Borromeo testified, and Binkley confirmed, that Binkley encouraged Borromeo to let someone else win a little, since she had won so much already with the adoption of the house map. ANC EXC. 1558, Borromeo Depo. pp. 45-47.

C. The Board violated the Open Meetings Act by failing to conduct non-privileged discussions and deliberations in public session and by covertly reaching a consensus regarding Anchorage senate pairings.

The constitutional provisions which speak explicitly to equal protection, due process, and redistricting are not the only authorities governing the work of the Board. In addition to its constitutional requirements, the Board is also required to comply with OMA. It did not do so.

According to the OMA, while a government unit's purpose is to "aid in the conduct of the people's business," this purpose does not result in a forfeiture of the people's sovereignty or right to determine what information they can access.[136] Further, the people have a right to be informed so that they have the power to "control … the instruments they have created."[137]

Distilled, the OMA directs that all of the Board's meetings should be open, except under the limited circumstances where executive sessions are allowed. The subjects that may be considered in executive sessions, per the OMA are: (1) information which could have an immediate adverse impact on the finances of the public entity; (2) information that could prejudice the reputation and character of a person; (3) information required to be confidential by law; and (4) information involving consideration of government records that are not subject to disclosure (i.e., confidential information).[138] The use of executive sessions is both limited to a discrete

136 AS 44.62.312.

137 *See* AS 44.62.312.

138 AS 44.62.310(c).

set of exemptions under the Act, and those exemptions "shall be construed narrowly in order to effectuate" the broader policy of the Act, which is the people's access to the people's business as done by these governmental bodies.[139]

The attorney-client privilege certainly exists and "operates concurrently with the OMA although it is not an expressed exception."[140] It is, however, a narrower privilege in the OMA context and cannot be used as a blanket protection to discuss legislative matters. This is especially true here where the Alaska Constitution expressly protects the public's right to participate in the redistricting process.[141] A broader application of the attorney-client privilege to cloak the Board's unvetted decision-making would violate the policies codified in the purpose of the Act.[142] One of the most basic tenets of the OMA, as expressly acknowledged by the legislature, is that "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created."[143] The Alaska Supreme Court has determined that:

> It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies.[144] The principles of

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139 *See* AS 44.62.312.

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

141 Alaska Const. art. IV, § 10.

142 AS 44.62.312.

143 AS 44.62.312(a)(5).

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

> confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential.[145]

The Court goes on to state that:

> [p]ublic board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.[146] … The exception is not appropriate for 'the mere request for general legal advice or opinion by a public body in its capacity as a public agency.'[147]

The Board held "work sessions" during its public hearing regarding senate pairings on November 8, 2021. In reality, the public could not meaningfully hear or understand this work session because of the use of a streaming system that obscured both the audio and visual appearance of the meeting.[148] While virtual meetings may not be a necessity in most redistricting cycles, the existence of a global and active pandemic during this redistricting cycle necessitated a virtual meeting option that the public could see, hear, and participate. This Court has previously acknowledged the

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145 *Channel 10*, 215 N.W.2d at 825.

146 *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 334 (Tenn.1984) (would impair the attorney's ability to fulfill ethical duties as an adjunct of the court); *Oklahoma Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310, 1315 (Okla.1978) (might seriously impair the ability of the public body to process a claim or conduct pending litigation); *Channel 10, Inc. v. Independent School Dist. No. 709, St. Louis County*, 298 Minn. 306, 215 N.W.2d 814, 825–26 (1974) (the machinery of justice would be adversely affected if clients were not free to discuss legal matters with their attorneys without fear of disclosure).

147 *Minneapolis Star & Tribune Co. v. The Housing & Redevelopment Authority in and for Minneapolis*, 246 N.W.2d 448, 454 (Minn.1976).

148 Findings of Fact, ¶¶ 69-87, ANC EXC.2431.

importance of protecting the public from increased exposure to COVID-19 when exercising important voting rights. In *State v. Arctic Village Council,* [149] the Alaska Division of Elections was ordered by the Alaska Supreme Court to waive witness signature requirements on election ballots because requiring voters to secure such signatures may unnecessarily expose them to increased COVID-19 exposure or require them to violate local laws to secure a witness signature during community lockdowns.[150] In other words, the public's right to participate in the political process is not diminished or eliminated by the existence of public health concerns. The Board's use of work sessions to permit Board members to congregate outside the view of the public, both when attending in-person and virtually, constitutes a violation of the public's right to be present at a meeting.[151]

In addition to the insufficiencies of the hearing in light of the pandemic, the Board's deviation from past procedures solely for the senate pairing meetings was also legally suspect under the OMA and contributed to the Board's due process clause violation. East Anchorage Plaintiffs' witnesses testified to the shift in transparency from house district meetings to those on senate pairings, whereby instead of considering expressly identified and circulated senate plans, Board members entered into pairings sessions riddled with hours-long executive sessions. [152]

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149 495 P.3d 313 (Alaska 2021).

150 *Id.*

151 ANC EXC. 1022, Dunsmore Aff. at ¶¶ 9-10.

152 *See, e.g., Id. at* ¶¶ 9-10, 24-25 ("In contrast to the house portion of the redistricting process, there was very limited opportunity for public input on senate

The Board deliberated almost entirely in executive session and off the record regarding senate pairings. Even Borromeo and Bahnke appeared to be taken by surprise when the Board reconvened on November 9, 2021 to adopt senate pairings and the other three members of the Board indicated that they had changed their approach since the previous day. Although Bahnke and Borromeo vehemently objected to the majority members' attempt to call the question while debate was ongoing, the other Board members steadfastly refused to continue debate.[153] As Board member Bahnke remarked in her closing comments on November 10, 2021, this procedural violation "resulted in a silencing or muzzling or muffling" not only of minority members of the Board, but also "of a particular segment of Alaska voters."[154]

The Board's overuse of executive sessions also violated the OMA. The Board was often vague about the purpose and scope of its executive sessions and failed to provide reasons justifying the use of the executive sessions to select senate pairings

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pairings, truncation, or term assignments. The Board never adopted senate pairings for any of the Board options made available for public testimony on the road show, and the public testimony taken at the beginning of the November 8 meeting was the only testimony taken after the adoption of the house map. There was no public testimony taken on the specific proposed senate pairings before they were adopted, truncation, term assignment, or the final redistricting proclamation … Throughout the redistricting process, the Board had a policy of taking public testimony at the beginning and end of every meeting day. During the November 8 meeting, I asked Deputy Director T.J. Presley to confirm that the Board would be continuing this practice but he referred me to the Board. I did not have an opportunity to ask the Board, through its chair or otherwise, before the pairings were adopted.")

153 ANC EXC. 666-667, Nov. 9, 2022 Board Meeting Tr. pp. 11-12.

154 ARB Exc. 231-232, Nov. 8-10, 2021 Board Meetings Minutes; ANC EXC. 674-675, Nov. 10, 2021 Board Meeting Tr. pp.21-23.

or house districts outside the public purview.[155] While East Anchorage Plaintiffs recognize that the Board generally cured its unlawful executive sessions regarding the house districts through its discussions on the record and exhaustive public testimony, the Board wholly failed to extend or apply any cures during the senate pairing proceedings.[156]

In light of this abundant evidence, the superior court's determination that the Board violated the OMA was well-founded.

D. The Board's failure to hold public hearings on any adopted senate pairing plan violated Article VI, section 10 of the Alaska Constitution.

Article VI, Section 10 requires that the Board identify a proposed redistricting plan within 30 days of receipt of census data. It also mandates that the Board hold public hearings on the proposed plan or, if no single proposed plan is agreed upon, on all plans proposed by the Board. The superior court properly found that the Board's failure to hold identify any proposed senate district plan within 30 days of receiving census data, and failure to identify any hearings on proposed senate district pairing plan, violated Article VI, Section 10 of the Alaska Constitution. In failing to identify proposed senate pairings within the required 30-day window, and in failing to hold any hearings on any senate pairing plan, the Board failed to satisfy its constitutional duties,

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[155] ANC EXC. 2485, East Anchorage Plaintiffs' Proposed Conclusions of Law at ¶¶ 25-26.

[156] Many of the plaintiffs in this consolidated action are governmental entities, subject to the OMA. None of these parties have suggested that the OMA functions to strip governmental entities of any confidentiality protections afforded by the attorney-client privilege.

resulting in a plan which did not reflect the great weight of public opinion as to the Anchorage senate pairings.

Rather than complying with the constitutionally-imposed procedure, which emphasizes the importance of public hearings in formulating the Board's final proclamation plan, the Board failed to adopt senate pairing proposals in the same manner it did house maps, failed to hold any hearings regarding any specified senate pairings proposal, and actively shut down discussion and testimony at its public meetings before November 8 regarding senate pairings. Likewise, rather than holding its deliberations regarding senate pairing proposals in public, the Board appears to have deliberated upon and received advice from counsel regarding proposed pairings that had not yet been submitted to the public in executive session.

After the Board received census data on August 12, 2021, it invited members of the public to provide proposed redistricting plans. Although the Board's own plans did not include suggested senate pairings, the third-party plans did. However, during the Board's "road show" across the state, senate pairings were not discussed, and proposed senate pairing charts were not printed and published as house district maps were. Testimony submitted to the Board is riddled with references to this significant omission: members of the public repeatedly wrote to and orally requested the Board disclose its senate pairing proposals to the public.[157]

[157] *See* December 27, 2021 Opposition to Board's Motion to Dismiss at 13, ANC EXC. at 921.

While the public was permitted to testify on November 8, 2021 during the Board's "workshopping" of the senate pairings, it did so blind, without any direction as to what the Board was considering.[158] This absence of a meaningful public hearing process is especially egregious because the Board failed to fully provide the public with any indication that it was contemplating splitting the East Anchorage and Eagle River communities of interest before the November 8, 2021 meeting. This arrangement was not reflected in any of the senate pairings provided to the Board by third parties at the beginning of its process, and was not discussed at any public hearing prior to November 8.[159]

Not only did this error in process preclude the public from meaningful involvement in the Board's decision-making process, but it also prevented the public from reacting to the work of the Board and correcting its errors before the final proclamation plan was adopted. For example, in her affidavit, Wilson states that she testified to the Board regarding her belief that Eagle River house districts should be paired together into a single senate district.[160] However, Marcum took her comments out of context and "misconstrued the words of [Wilson's] testimony to misrepresent it

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158 *See generally* (transcripts of Board meetings on Nov. 8-9, 2021), ANC EXC. 431-650, 716-743.

159 Although the Board previously argued in its Motion to Dismiss East Anchorage Plaintiffs' Article VI, Section 10 Claim Pursuant to Alaska R. Civ. P. 12(b)(6) that such a pairing was submitted with AFFER's proposed plan, the Board is mistaken. AFFER's proposal "carved out" the vast majority of Eagle River, placed it with JBER, and paired the resulting house district north into a senate district with the Chugiak/Birchwood/Peters Creek area. Third Party Proposed Plans, ARB001388-ARB001424.

160 F. Wilson Aff. at ¶ 19, ANC EXC. 1030-1036.

as in favor of pairing Eagle River house districts with JBER or Northeast Anchorage districts."[161] Wilson testified that "[t]here was no opportunity for the public to rectify this misrepresentation of [her] testimony, nor to give further comment on the senate pairings as selected by the Board."[162] Likewise, Yarrow Silvers testified in her affidavit that "[t]he Board did not provide the public with any proposed senate pairings for its consideration before the November 8, 2021 meeting, and only permitted public testimony before revealing the Board's pairing proposals, unlike the house map process which allowed testimony before the adoption of the final house map."[163]

In short, the evidence in the record overwhelmingly demonstrates that the Board failed to comply with the mandates of Article VI, Section 10 of the Alaska Constitution and did not provide the public with a proposed senate district plan within 30 days of receipt of census data, or at any time during the redistricting process before the adoption of the final senate pairings on November 9, 2021.

E. The Alaska Equal Protection Clause protects communities of interest.

The Equal Protection Clause provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[164] "In the context of voting

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161 F. Wilson Aff. at ¶ 19, *id.*

162 F. Wilson Aff. at ¶ 21, *id*.

163 Y. Silvers Aff., ¶ 36, ANC EXC. 1037-1050.

164 Alaska Const., art. 1, § 1. This constitutional provision has been interpreted by courts along lines which "resemble, but do not precisely parallel the interpretation given the federal clause." *See Hickel v. Southeast Conference,* 846 P.2d 38, 47 (Alaska 1992). The Federal Equal Protection clause provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

rights in redistricting and reapportionment litigation," this Court has held that "there are two principles of equal protection, namely that of 'one person, one vote' — the right to an equally weighted vote — and of 'fair and effective representation' — the right to group effectiveness or an equally powerful vote."[165] The former is quantitative, or purely numerical, in nature; the latter is qualitative.[166]

Both the Alaska and federal equal protection clauses impose a guarantee of fair representation which mandate overturning certain apportionment schemes that "systematically circumscribe the voting impact of specific voter groups" even where these schemes would otherwise be "mathematically palatable."[167] This principle recognizes the danger that certain groups defined by community, political, racial, or identifiable distinctions may be "fenced out of the political process and their voting strength invidiously minimized" by redistricting and reapportionment schemes which violate the Equal Protection Clause.[168]

While the United States Supreme Court has indicated that "a mere lack of proportional representation will be insufficient to support a finding of unconstitutional vote dilution,"[169] and that plaintiffs must prove a pattern of intentional discrimination against a group and discriminatory effect on that group,[170] the Alaska Equal Protection

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

166 *Hickel*, 846 P.2d 38 (Alaska 1992) (citing *Kenai Peninsula Borough*, 743 P.2d at 1366-1367).

167 *Id.* at 48-49.

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

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

170 *Id*. at 133.

Clause imposes a stricter and more protective standard than its federal counterpart.[171] Neither the federal or state equal protection clause requires that discrimination be directed at a protected class in order to run afoul of constitutional guarantees of equal protection—all that is required is that the discrimination be directed against an identifiable group, "politically salient class," or "community of interest."[172] These concepts are familiar, appearing as early as 1972 in this Court's decision in *Egan v. Hammond.*[173]

The Board asserts that the superior court erred in determining that the discrete and distinct East Anchorage and Eagle River areas constitute communities of interest, and that East Anchorage, a politically salient class, had been cracked among two senate districts in violation of state law equal protection guarantees.[174] In taking issue with this superior court finding, the Board does not identify the precedent from which it believes the superior court departed, or why it believes East Anchorage and Eagle River do not constitute communities of interest or that they do not contain or are not comprised of politically salient classes.[175] Neither the phrase "community of interest"

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

172 *See Hickel,* 846 P.2d at 77; *Kenai Peninsula Borough,* 743 P.2d at 1372; *Egan v. Hammond,* 502 P.2d 856, 894 (Alaska 1972).

173 *Id.*

174 Alaska Redistricting Board's Petition for Review at 39-4, 47-54, ANC EXC. 2070-2085.

175 *Id.*

or "politically salient class" is a term of art in Alaska or federal law. Rather, both terms simply serve as tools for courts to name and refer to identifiable groups which are alleged to have been treated differently from other groups for purposes of conducting an equal protection analysis.

The term "politically salient class" originates from a United States Supreme Court case, *Karcher v. Daggett,*[176] which explains that, as a threshold matter, plaintiffs alleging claims involving vote dilution must "prove that they belong to a politically salient class, one whose geographic distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries. [177] Elaborating on this statement, the U.S. Supreme Court writes that "[i]dentifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context."[178]

With the exception of two other federal cases from lower courts,[179] the only other jurisdiction to have utilized the term "politically salient class" is Alaska. Citing to and adopting *Karcher,* the Alaska Supreme Court in *Kenai Peninsula Borough v. State*

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176 462 U.S. 725 (1983).

177 *Id.* at 754.

178 *Id.* at 754, n. 12 (citing Clinton, Further Explorations in the Political Thicket: The Gerrymander and the Constitution 1, 38–39 (1973) (cognizable interest group with coherent and identifiable legislative policy); Note, Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence, 41 U.Chi.L.Rev. 398, 407–408 (1974) (clearly identifiable and stable group)).

179 *Cook v. Luckett,* 735 F.2d 912 (5th Cir. 1984) and *Vieth v. Pennsylvania,* 188 F.Supp.2d 532 (M.D.Penn. 2002).

reiterated that the Board "cannot intentionally discriminate against a borough or any other 'politically salient class' of voters by invidiously minimizing that class's right to an equally effective vote."[180] Although this principle was reiterated by this Court in both the 2001 and 2011 redistricting litigation, no Alaska decision has ever narrowed or abrogated the definition of "politically salient class" advanced in *Karcher.*[181] Thus, all that is necessary to demonstrate the existence of a politically salient class is an identifiable group of some kind—based on political affiliation, race, ethnicity, religion, economic status, or other characteristic—which is present within a sufficiently ascertainable geographic distribution.

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180 *In re 2001 Redistricting Cases,* 44 P.3d 141, 144 (Alaska 2002) (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 "politically salient class" as 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").

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

Similarly, the term "community of interest" has also been used by Alaska courts but not yet defined.[182] In *Egan v. Hammond,*[183] *Kenai Peninsula Borough,*[184] and *Hickel v. Southeast Conference*,[185] the Alaska Supreme Court used the term "communities of interest" to refer to identifiable areas of significance within a larger geographic setting. In *Hammond,* for example, the Court explained that districts had been drawn in "an attempt… to make the Anchorage subdivisions coincide with rough communities of interest which the Greater Anchorage Area Planning Office has defined as 'planning districts,'"[186] and in *Kenai Peninsula Borough,* the Court explained that "district boundaries which meander and selectively ignore political subdivisions and communities of interest, and evidence of regional partisanship, are… suggestive of [an illegitimate purpose in discriminating against a geographic area."[187] The *Hickel* court incorporated and approved of this statement of law. Similarly, in *Miller*

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182 *See* Mike Turzai et. al., The Protection Is in the Process: The Legislative Reapportionment Commission, Communities of Interest, and Why Our Modern Founding Fathers Got It Right, 4 U. Pa. J.L. & Pub. Aff. 353, 363–64 (2019) (explaining that "communities of interest include "[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area" and may be reflected in the cores of existing districts"); *see also* Justin Levitt, A Citizen's Guide to Redistricting, Brennan Ctr. for Justice 56 (2010), http://www.brennancenter.org/sites/default/files/analysis/a-citizens-guide-to-redistricting.pdf (explaining that many consider communities of interest to serve one of the main purposes of redistricting: grouping together people with shared interests and priorities).

183 502 P.2d 856 (Alaska 1972).

184 743 P.2d 1352 (Alaska 1987).

185 846 P.2d 38 (Alaska 1992).

186 *Hammond*, 502 P.2d at 894.

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

v. Johnson,[188] the United States Supreme Court defined "communities of interest" as groupings of people who have similar values, shared interests, or common characteristics.[189] In each of these cases, the term "community of interest" is used to refer to a different concept than political subdivisions, such as a borough or city. Communities of interest thus serve as an identifier for discrete, unique groups which may otherwise be overlooked by the political process—as the Board urges the Court to overlook the East Anchorage and Eagle River communities of interest in this case.

Disregarding this precedent, the Board asserts again on appeal that an equal protection violation cannot exist without evidence that the minority which has been discriminated against votes in a predictable, uniform manner. The Board is mistaken as a matter of law: in Alaska, geographic discrimination claims may involve racial and partisan aspects – as here – but are justiciable in their own right. However, even if the Board was correct, the "politically salient class" is also the portion of North Muldoon voters voting for a minority candidate and a similar segment of South Muldoon.

To determine whether a redistricting plan runs afoul of Alaska's guarantee of equal protection, courts look to the Alaska Supreme Court's three-step equal protection analysis.[190] The first step of this analysis is to determine the weight of the

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188 515 U.S 900, 901 (1995).

189 *See also* Glenn D. Magpantay, A Shield Becomes A Sword: Defining and Deploying A Constitutional Theory for Communities of Interest in Political Redistricting, 25 Barry L. Rev. 1, 1 (2020).

190 *See Kenai Peninsula Borough*, 743 P.2d at 1370-72.

constitutional interest that is impaired by the challenged state action. Guidance from this Court is clear: the right to a geographically equally effective vote, while not a fundamental right, is "a significant constitutional interest."[191] Where a governmental action impairs a significant individual right, the second step of the equal protection analysis requires the court to determine whether the action was taken in order to serve a legitimate and important governmental interest — in other words, where a threshold showing of impairment of a right is made, the burden shifts to the government to demonstrate that there was some legitimate and important policy consideration which necessitated the impairment of that right.[192] In the voting context, if the record demonstrates that the Board's intent was to dilute the voting power of a geographic group compared to another, that is a per se illegitimate purpose, and the equal protection challenge prevails.[193] In light of Alaska's protective equal protection jurisprudence, the Court deliberately does not require a showing of a pattern of discrimination, and does not consider *any* effect of disproportionality *de minimis* when determining the legitimacy of the Board's purpose.[194]

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191 *Braun v. Borough,* 193 P.3d 719, 731 (Alaska 2008) (citing *Kenai Peninsula Borough,* 743 P.2d at 1372).

192 *See, e.g., Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003) (where an important interest is implicated, the State's interest must be "not only legitimate but important" and "the nexus between the enactment and the important interest it serves [must] be close").

193 *Kenai Peninsula Borough*, 743 P.2d at 1371-72 (finding a senate district unconstitutional where it was the product of "intentional geographic discrimination" such that the district "tend[ed] toward disproportionality of representation and its purpose [was] therefore illegitimate").

194 *Id*.

Actual discriminatory intent need not be directly proven — rather, if there is even an appearance of an intent to dilute the voting strength of one group compared to another, then the burden will also shift to the Board to prove it had a proper purpose.[195] For example, in *Kenai Peninsula Borough,* the Alaska Supreme Court expressly held that "Senate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska Equal Protection clause."[196] Similarly, the Court has approved of and incorporated trial court dicta explaining that "[t]here is an Alaska equal protection guarantee against hodge-podge senate pairings."[197]

Discriminatory intent may also be inferred from the process followed by a governmental entity. In *Kenai Peninsula Borough*, looking to both "the process followed by the Board in formulating its decision" and to "the substance of the Board's decision," the Court found that "it [was] evident that the Board sought to prevent another Anchorage senate seat in the state legislature," thereby demonstrating that the Board impermissibly acted against "the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community."[198]

While federal courts require proof of both intentional discrimination against a politically salient group and demonstration of an actual discriminatory effect upon that

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195 *Id.* at 1372.

196 *Kenai Peninsula Borough,* 743 P.2d at 1365, n.21.

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

198 *Id.*

group to prove a prima facie equal protection violation, Alaska courts do not. Instead, the Alaska Supreme Court opted to adopt the "neutral factors test" propounded by Justice Powell in *Davis v. Bandemer.*[199] Under this standard — black letter law in Alaska — "district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation."[200] Therefore, Alaska law, by design, does not require that challengers to a redistricting plan demonstrate that a plan has a discriminatory impact on a particular class of voters in order to succeed on the merits — discriminatory intent is enough.

This precedent creates protection for the interest of communities in their "right to an equally powerful and geographically effective vote in the state legislature."[201] Notably, this right protects *community interests* — not merely interests stemming from race, political affiliation, or other suspect classes. Again, "upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation."[202]

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199 *Kenai Peninsula Borough,* 743 P.2d at 1372 (citing *Davis,* 478 U.S. 109, 161-162 (1986) (Powell, J., concurring and dissenting).

200 *Id., see also Davis,* 478 U.S. at 167 (Powell, J., concurring and dissenting).

201 *Id.*

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

F. The Eagle River/East Anchorage pairings violate the equal protection rights of the East Anchorage community of interest.

The Board's Eagle River/East Anchorage senate pairings dilute the voice and vote of East Anchorage residents. East Anchorage Plaintiffs are all residents of East Anchorage. Wilson is a resident of HD 23- Gov't Hill/JBER while Silvers and Martinez both reside in HD 21-South Muldoon. The East Anchorage communities of interest differ greatly from the Eagle River communities of interest.

The North and South Muldoon area (collectively "Muldoon") is urban—dense and diverse. The primary sphere of travel for residents of Muldoon is close to where they live.[203] Residents of the discrete East Anchorage community of interest, and the Muldoon area in particular, are demographically distinct from surrounding areas: 62% and 48% of North and South Muldoon, respectively, is comprised of self-identifying members of a minority group.[204]

In contrast, Eagle River Valley and North Eagle River/Chugiak are 76% and 75% white.[205] As Plaintiff Wilson remarked, East Anchorage "has such a rich multicultural heritage that is celebrated and in stark contrast to Eagle River."[206] HD 22- Eagle River Valley, and HD 24-Eagle River/Chugiak, are delineated by fairly intuitive boundaries. The population centers of these districts are comprised of the urban Eagle River Valley area, and the residential northern part of Eagle River and

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203 C. Hensel Aff. at ¶ 25, ARB Exc. 644-670.

204 C. Hensel Aff. at ¶ 60, ARB Exc. 644-670.

205 C. Hensel Aff. at ¶ 60, ARB Exc. 644-670.

206 F. Wilson Aff. at ¶ 15, ANC EXC. 1030-1036.

Chugiak/Birchwood areas, respectively.[207] However, both districts also include large swathes of uninhabited lands, much of which is located on JBER and designated as "an impact area perpetually closed."[208] Eagle River is physically separated from Muldoon by the Chugach Mountains: to go from Muldoon to Eagle River, one must travel through two other house districts.[209] In contrast to Muldoon residents, Eagle River residents may need to come to the Anchorage urban area to work or obtain specialized services, but orient to their immediate community through schools, worship, recreation, and shopping.[210] The Eagle River area is, for all intents and purposes, a self-sufficient community—for example, Covid-19 Health Mandate 11, issued by the State of Alaska, identified Eagle River as its own community.[211] Eagle River residents rarely need to leave the community—Eagle River has "church, shopping, farmer's markets, restaurants, and friends."[212]

The differences between East Anchorage and Eagle River manifest in myriad contexts outside of their obvious physical separation and racial compositions. East Anchorage has approximately three times as many residents below the poverty line

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207 *See, e.g.,* map of House Districts 22 and 24, ARB000014, ARB Exc. 317, EXC.VDZ-1135, MSB/Brown Exc. 226.

208 C. Hensel Aff. at ¶ 20, ARB Exc. 644-670.

209 C. Hensel Aff. at ¶ 24, ARB Exc. 644-670.

210 C. Hensel Aff. at ¶ 25, ARB Exc. 644-670.

211 C. Hensel Aff. at ¶ 27 (citing Tr. Ex. 6014), ARB Exc. 644-670.

212 F. Wilson Aff. at ¶ 16, ANC EXC. 1030-1036; S. Murphy Aff. at ¶¶ 6-16, ANC EXC. 1051-1056 (summarizing differences between Eagle River and East Anchorage communities).

as Eagle River, and utilize food stamps at much higher rates.[213] Conversely, of Chugiak and Eagle River households, 45-49% earn more than $100,000 per year, whereas only 20-36% of East Anchorage households earn above the $100,000 threshold.[214] The two communities also vote differently. HD 21-South Muldoon, is "clearly a swing district with numerous races decided by a margin of 2% or less."[215] HD 22-Eagle River Valley, in contrast, "votes solidly and predictably Republican."[216]

Distinct from both the East Anchorage and Eagle River communities, HD 23-Gov't Hill/JBER, is comprised of one of Anchorage's oldest neighborhoods, Government Hill, and much of JBER, a closed-gate community.[217]

Partisan gerrymandering is a redistricting process and outcome which "operates through vote dilution — the devaluation of one citizen's vote as compared to others."[218] Mapmakers draw district lines to "pack" and "crack" voters likely to support the disfavored party.[219] Supermajorities of the disfavored party are "packed" into relatively few districts in far greater numbers than needed for preferred candidates to prevail, and the remaining voters from the disfavored party are "cracked" among remaining districts. Regardless of whether an individual voter has been "packed" or

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213 C. Hensel Aff. at ¶ 67, Tables 3 and 4, ARB Exc. 644-670.

214 C. Hensel Aff. at ¶ 68, ARB Exc. 644-670.

215 C. Hensel Aff. at ¶ 70, ARB Exc. 644-670.

216 C. Hensel Aff. at ¶ 71, ARB Exc. 644-670.

217 *See, e.g.,* map of House District 23, ARB000013-ARB000014, ARB Exc. 316-317, EXC.VDZ-1134-1135, MSB/Brown Exc. 225-226.

218 *Rucho v. Common Cause,* 139 S.Ct. 2484, 2514 (2019) (Kagan, J., dissenting).

219 *Gill v. Whitford,* 138 S.Ct 1916, 1929-31 (2018).

"cracked," their vote carries less weight, and less consequence, than it would under a non-partisan, neutrally-drawn map.[220] In short, "the mapmaker has made some votes count for less, because they are likely to go for the other party."[221] This vote dilution inherently presents an equal protection problem, one acknowledged by the Alaska court.

Here, the Board's decision to pair Eagle River house districts with East Anchorage districts constitutes a geographic gerrymander (with partisan and racial undertones) in violation of the Alaska Constitution. These pairings impermissibly divide the discrete, diverse, and issue-driven East Anchorage community of interest for senate pairing purposes, pairing its component parts with the predominately white, majority conservative Eagle River. The impact of this pairing is to "crack" issue-driven East Anchorage voters among multiple districts, ensuring that Eagle River voters will be able to dominate elections in not one senate district — as would occur if the two Eagle River districts are paired together — but in two senate districts.

Despite repeated statements to the contrary during the Board's process, Marcum and Simpson both admitted to receiving a spreadsheet from Randy Ruedrich which provided incumbent information for the Board's final house districts, suggested senate pairings, and featured a column indicating whether an incumbent could be reelected from the new districts selected by the Board.[222] Marcum later admitted the

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220 *Id.* at 1924 (Kagan, J., concurring).

221 *Rucho v. Common Cause,* 139 S.Ct. 2484, 2514 (2019).

222 ANC EXC. 1626-1699, J. Binkley Depo., pp. 185-188 (explaining that the Board decided it would not be considering political information early on in its process and

fact that she and Simpson viewed this information during the senate pairings work session in which Marcum apparently developed her proposals pairing Eagle River house districts with those in East Anchorage. Those facts were never revealed to the public: indeed, later in the process, when discussing the senate term truncation cutoff, Marcum took it upon herself to "just state for the record [the Board has] not been provided with any incumbent information."[223] When placed in this context — particularly in light of the Board's failures in process — Marcum's statement that her pairings would provide Eagle River with the opportunity for more representation makes clear that her senate pairings were engineered as a partisan gerrymander to dilute the efficacy and strength of East Anchorage voters' community voice.

Having shown that the Board intentionally acted to dilute the efficacy of East Anchorage voters, the onus shifts to the Board to show that "its plan will lead to greater proportionality of representation."[224] The Board has not done so. The Board has not offered the testimony of any expert witness in this proceeding—despite retaining one

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desired "to follow the constitution and do it, to the greatest extent we could, apolitically"); ANC EXC. 962-1021, Marcum Depo., pp. 197-201, 206-229 (testifying that she received and viewed incumbent information despite stating on the record that the Board had "not been provided with any incumbent information"); ANC EXC. 1409-1471, Simpson Depo., pp. 210-211 (Q: "… I've read e-mails from the staff to the public saying we invite your testimony but please don't include political information. Is that consistent with what you understand the board to have solicited and invited from the public?" A: "It is, yes, we were all, at least as far as I was aware, doing our best to maintain a nonpartisan approach. We all understood the constitutional requirements and that's what we were trying to do"), pp. 218-223, 233-239 (denying reviewing incumbent information despite Marcum deposition testimony that she showed Simpson the unredacted document); *see also* Ex. 6005.

223 Marcum Depo., p. 225, ANC EXC. 1019.

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

in anticipation of this litigation—and has not otherwise attempted to meaningfully rebut or engage with East Anchorage Plaintiffs' equal protection arguments. Instead, throughout its substantive filings in this matter, the Board has attempted to undermine the credibility of the East Anchorage Plaintiffs' equal protection claims through an inaccurate characterization of them as alleged violations of the "one person, one vote" requirement.[225] The Board's position ignores every Alaska and federal case to have ever considered qualitative theories of equal protection in the redistricting context.

Indeed, an analysis of the testimony presented to the Court demonstrates that the Board's actions result in reduced proportionality of representation to East Anchorage voters from partisan, community of interest, and racial perspectives. As East Anchorage Plaintiffs' expert witness Dr. Chase Hensel testified, "[b]ecause peoples' needs arise in specific settings and must be addressed in ways that suit those settings, political representation is most effective where constituents share a sense of place."[226] This is because, as Dr. Hensel describes, discrete communities have different needs which are not interchangeable with those of other communities. This dichotomy is particularly evident when one contrasts Muldoon/Northeast Anchorage communities with Eagle River:

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225 *See* Alaska Redistricting Board's Trial Brief at pp. 83-84 (stating without citation to law or authority that "… East Anchorage's arguments do not make sense. If they believe that pairing South Muldoon with Eagle River gives Eagle River the chance to elect another senator, that logic applies to South Muldoon as well. House districts of equal population do not have advantages over other house districts with equal population. By the plaintiffs' logic, the Final Plan gives the residents along Muldoon three senators who represent their interests: Senate Districts J, K, and L. Thus, East Anchorage's equal protection claim fails as a matter of law"). ANC EXC. 1957-2044.

226 C. Hensel Aff., ¶ 32, ARB Exc. 644-670.

> Muldoon/Northeast Anchorage areas self-represent and are referred to in the language of urban community. Neighborhoods are the common socio-geographic expression of diversity in urban spaces. Cities are typically described as having a particular character; so are the neighborhoods that constitute them, wherever populations, activities, and structures make such areas distinctive. An urban sense of place is often rooted in one's neighborhood. The experience of living in an urban neighborhood closely bordered by other neighborhoods differs from living in a discretely bounded and more rural town; Muldoon, unlike Eagle River, has an integral relationship with the rest of Anchorage.[227]

Likewise, the area of Muldoon/Northeast Anchorage is astonishingly diverse in a way that Eagle River simply is not. As Dr. Hensel remarked, in East Anchorage — particularly HD 20-North Muldoon and HD 21-South Muldoon — "multiple minorities live together in an urban setting with the employment and living conditions that accompany poverty and low educational attainment."[228] In contrast, as Eagle River resident Sean Murphy testified, "Eagle River commerce continues to grow and thrive, even during the pandemic" and "Eagle River residents are generally more affluent and educated per capita than East Anchorage and … Eagle River residents have the same or very similar religious beliefs"[229] compared to the diverse origins and beliefs of East Anchorage residents.

The record reveals that the Board was aware of these fundamental differences between the two communities, but disregarded them. On November 1, 2021, the Board's VRA consultants attempted to provide the Board a written quantitative

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227 *Id.* at ¶ 48, ARB Exc. 644-670.

228 *Id.* at ¶ 61, ARB Exc. 644-670.

229 S. Murphy Aff., ¶¶ 5-16 (explaining differences between Eagle River and Anchorage communities of interest). ANC EXC. 1051-1056.

analysis examining voting patterns of Alaska Native, non-Alaska Native Minorities, and Other (non-Minority and non-Alaska native) individuals in the Anchorage area. Specifically, the Board's VRA experts focused on current legislative districts 15, 16, 17, 18, 19, 20, 23, and 25. The Board's experts reported in a written analysis:

> Unfortunately, this analysis is not possible and no reliable inferences can be made of voter behavior in this area. Ecological inference requires at least some almost homogeneous precincts in order to generate reliable estimates of a group's voting behavior. In this area, there are no precincts that are anywhere close to homogenous.[230]

Interestingly, the supplemental analysis provided by the Board's VRA consultants made no mention of the current Eagle River districts, which include HD 12, a shared Anchorage/Mat-Su Borough district with, at the time the 2013 Plan was promulgated, 7,739 residents of the Municipality of Anchorage. Although the districts identified by the VRA consultants encompassed a large portion of 2021 promulgated HD 23 and 20, it did not include the South Muldoon area, which currently is located predominately in HD 21.[231]

Despite this apparent limitation to the VRA consultants' analysis, the VRA consultants determined the Anchorage population in the analyzed district was not "homogenous" enough to generate reliable estimates of a group's voting behavior.[232] In the Proclamation itself, the Board admits that it was advised:

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[230] Nov. 1, 2021 Supplemental Alaska Racially Polarized Voting Analysis for 2021 Redistricting, ARB000113, ARB Exc. 416.

[231] Nov. 1, 2021 Supplemental Alaska Racially Polarized Voting Analysis for 2021 Redistricting, ARB000113, ARB Exc. 416.

[232] Nov. 1, 2021 Supplemental Alaska Racially Polarized Voting Analysis for 2021 Redistricting, ARB000113, ARB Exc. 416.

> While diverse minority populations exceeded 50% in some Anchorage districts, there was no available evidence to suggest that these minorities were voting as a bloc, *or being opposed by a bloc of white voters*. Without these legal preconditions being met, counsel advised the Board to avoid subordinating traditional redistricting criteria to racial considerations.[233]

Further, the Board sought precinct analysis but ignored that the 2013 promulgated precincts divided East Anchorage communities of interest such as Muldoon, misrepresenting the potential majority minority districts that could exist in East Anchorage.

While East Anchorage Plaintiffs strongly suspect the limited scope of the VRA analysis hindered their ability to complete an accurate analysis, the Board successfully limited scrutiny of this analysis by claiming "attorney-client privilege" for all correspondence and work product from its VRA consultants, limiting access and presentations directly by its VRA consultants, and prohibiting Board testimony regarding Board members' understanding of the VRA consultant recommendations shared with it. This was further exacerbated by the limitation of plaintiffs to a single expert witness, having to select between a VRA consultant and an expert qualified to examine more comprehensive geographic/community of interest-based factors.[234]

Despite the potential errors in the VRA analysis and the veil of secrecy surrounding it, even the small synopsis disclosed highlights the diversity of groups

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[233] ARB000009-ARB000010, ANC EXC. 748-749.

[234] This limitation would not have been an issue had the Board, as the boards that came before it, retained a VRA expert for the trial.

throughout Anchorage and more particularly in the districts analyzed, five of which are in East Anchorage communities of interest.

Kevin McGee, the President of the NAACP, submitted written testimony to the Board that proposed the following senate pairings:

> One Senate pairing configuration is visually obvious: Take the four House seats in East Anchorage (HDs 17,18, 19,23), and pair them into two Senate seats. Pair Downtown (HD 20) with Government Hill/JBER (HD 21), which is logical since it unites Downtown into a Senate seat, and protects minority voters' voice.
>
> Though less visually obvious, another pairing configuration also can ensure minorities' vote, and voice in the electoral process is protected. Pair HD 21/HD 19, HD 16/HD 17, and HD 23/HD 18. This configuration protects minority voters' voice at the Senate level, and logically links adjacent neighborhoods with JBER. Effectively, it ensures our most diverse neighborhoods have a real voice in three Senate districts.[235]

These pairings would have resulted in 4, not just two, majority-minority senate pairings. These proposals would have kept the Muldoon and the Eagle River communities unified and would have ensured fair and effective representation for voters of Eagle River as well as East Anchorage voters. Yet, despite the evidence demonstrating the potential dilution of the East Anchorage voter's influence over its representative, and the overwhelming submission of public testimony from both Eagle River and Anchorage residents imploring the Board to keep Eagle River and Chugiak unified, South and North Muldoon unified, and Eagle River intact, the Board majority ignored all such evidence.

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235 Nov. 8, 2021 McGee Testimony, ARB003183, ANC EXC. 3272.

An electoral practice or procedure is a violation of the VRA, according to the Board's VRA consultant, when it "minimizes or cancels out the voting strength of members of racial or language minority groups in the voting population." While the Board successfully veiled the existence and its consideration of racial data for the Muldoon community of interest and concealed the findings of its own consultants from public scrutiny and review, the record and the evidence presented at trial resoundingly remonstrates the dilution of the voice of voters in the South Muldoon district. This prohibition on vote dilution in the Act mirrors the equal protection clause of the Alaska Constitution. East Anchorage Plaintiffs have proven, through their expert testimony and submission of the 2020 census data, that House District 21 is a minority majority district, and NAACP President McGee demonstrated the minority majority districts that could exist in East Anchorage if properly paired.

The Board ignored not only evidence of dilution presented during the hearings, it ignored testimony presented on November 2, 4, 5, 8, and 9, 2021 regarding the direct harm that had occurred in the last redistricting cycle as a result of the dilutive Eagle River/East Anchorage senate pairing. As McGee explained in his testimony before the Board, Senator Bettye Davis was the first Black woman to serve in the Alaska Senate, repeatedly elected by East Anchorage voters in her districts to represent their needs.[236] Under the 2012 redistricting interim plan, the district lines

[236] ARB003183 (Nov. 8, 2021 McGee testimony), ANC EXC. 651-652; see also Nov. 2, 2021 Meeting Transcript at 113:16-115:13 (live testimony of D. Dunsmore explaining that minority voters in East Anchorage were denied the opportunity to elect Davis, the candidate of their choice, because it was paired with Eagle River), ANC EXC. 86-117; ARB00063486-7 (Nov. 4, 2021 written testimony of Matthew Moser

were redrawn and East Anchorage was paired with Eagle River.[237] Senator Davis was defeated by a Republican from Eagle River.[238] While the Board ultimately created senate pairings that undid the unfortunate pairing, Senator Davis and her historic representation of East Anchorage was lost.[239] Today, East Anchorage High is the Bettye Davis East Anchorage High School and in 2018 a summit was held in Senator Davis' honor.[240] Davis remains, in many ways, a significant figure in the East Anchorage community as recognized by McGee in his testimony before the Board.

The record further reflects that individual Board members did not believe the East Anchorage pairings were appropriate and legal. Bahnke and Borromeo were outspoken in their impression that not only were the East Anchorage/Eagle River

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reminding Board of impact of 2010 redistricting on Bettye Davis, and stating that "the process was a mess, and both confused and disenfranchised Alaska voters"), ANC EXC. 118; ARB00063533-4 (Nov. 5, 2021 written testimony of Robin Smith, explaining that Bettye Davis lost her fourth election bid primarily due to changes after the 2010 census which placed a large portion of Eagle River into her district in Anchorage), ANC EXC. 120; ARB00063617-8 (Nov. 8, 2021 written testimony of Eleanor Andrews, expressing "disgust" with the Eagle River/East Anchorage pairings, and writing that: this proposal is a transparent and unconstitutional attempt to suppress minority votes from East Anchorage, and mirrors partisan gerrymanders put forward in the 2010 redistricting cycle that targeted former Senator Bettye Davis"), ANC EXC. 653; ARB00080264 (Nov. 9, 2021 written testimony of Rozlyn Grady-Wyche, explaining that last time the Board paired Eagle River with East Anchorage, "it took Senator Bettye Davis from us and [kept us from] having a voice"), ANC EXC. 700; Feb. 9, 2021 Memorandum of Amici at 19, ANC EXC. 2835-2883.

237 *Id.*

238 *Id.*

239 *Id.*

240 Ex. 6027, Anchorage Resolution 2020-29, ANC EXC. 3; see also ARB00076039 (Nov. 4, 2021 written testimony of Liliane Ulukivaiola, an East Anchorage resident and member of the Pacific Islander Community whose children attend the diverse Bettye Davis East Anchorage High School. Ms. Ulukivaiola strongly opposed the Eagle River/East Anchorage pairing), ANC EXC. 119.

pairings inequitable, non-contiguous, and discriminatory against the East Anchorage community of interest, but they were also chosen "against the sound, sound advice … from counsel in Executive Session"[241] — in other words, the majority Board members, in adopting these senate pairings, were doing so against the advice of their retained independent counsel. Likewise, Binkley — one of the majority Board members who voted in favor of the Marcum proposed pairings — never made any statements indicating why he believed Marcum's pairings were more lawful or correct than those proposed by member Bahnke. He simply stated, at the November 8, 2021 meeting, that "[t]here's good justification from all different ways … all of these [senate pairing plans] are very justifiable, in my opinion. It's a question of what you think is the most reasonable…"[242] In short, only Marcum and Simpson — both of whom had access to incumbent information, which was concealed from the public — were openly in support of the Board's adopted senate pairings. The Board has taken no steps to supplement or clarify its record to provide additional evidence in support of the East Anchorage/Eagle River pairings.

The Board also asserts that Judge Matthews erred in his statistical analysis at pages 70 to 71 of the Decision regarding the impact of the Board's discriminatory actions against East Anchorage residents. It appears that this error arises from use of data associated with house districts prior to the Board renumbering these districts to reflect consecutive senate pairings on November 9, 2021. When the correct data is

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241 ARB007041 (transcript of Board's Nov. 9, 2021 meeting), ANC EXC.654-698.

242 ARB006691 (transcript of Board's Nov. 8, 2021 meeting). ARB Exc. 238-393.

used, the analysis proceeds as follows: Eagle River Valley and North Eagle River/Chugiak are both underpopulated, by 0.71% and -1.65%, respectively, and South Muldoon is overpopulated by 0.43%. Pairing Eagle River Valley with South Muldoon creates a deviation of -0.14%, whereas pairing both Eagle River districts creates a deviation of -1.19%.

While the Board's choice to pair Eagle River Valley with South Muldoon creates one senate district with relatively small deviation (-0.14%) and one with higher deviation (-1.71%), the senate pairings advocated by East Anchorage Plaintiffs could in fact achieve more proportional representation: 0.08% by pairing North and South Muldoon and -1.19% by pairing Eagle River Valley and North Eagle River/Chugiak.

But regardless of the deviation of the districts, the Board's assertion of error again relies on its mistaken assessment of East Anchorage Plaintiffs' claims as alleging violations of the "one person, one vote" mandate, rather than of the "fair and effective representation" component of the Equal Protection Clause. Judge Matthew's analysis of proportionality as applied to the voting age populations in the specific districts and the power of their votes remains sound and demonstrates only that any attempt to simplify the impact on the districts without considering the communities of interest at play, the "politically salient group" at issue or the contributing factors to dilution of such a group, is contrary to the purpose and scope of equal protection in the redistricting arena.

The numerical errors identified by the Board do not rebut Judge Matthews' findings that the East Anchorage community of interest has been cracked and paired with a homogeneous majority that will systematically defeat the voting power of that

group. If the Board demonstrated that this "cracking" resulted from the need to afford South Muldoon greater proportionality of representation, perhaps such an action may have been justified, but no evidence to that effect was submitted. Instead, the only evidence submitted from the Record and the post-hoc testimony of Board members was the "need" to pair JBER with North Eagle River. Further, the partisan purpose and gerrymandering that the Record expressly reflects in fact demonstrates that the Board's purpose did not promote greater proportionality in the districts for minority voters, but rather severely undermined it.

The overwhelming evidence presented at trial demonstrates that, by fragmenting the East Anchorage community of interest for senate pairing purposes, the Board acted intentionally to dilute the voting power of this geographic group in favor of voters in Eagle River. Under the Alaska Supreme Court's guidance in *Kenai Peninsula Borough*[243] and *Braun v. Borough,*[244] this is an illegitimate purpose which impairs the significant constitutional interest of East Anchorage voters to a geographically equally effective vote. Having proven this actual discriminatory intent, East Anchorage has proven that this error in the Board's proclamation plan is violative of Alaska's Equal Protection guarantee and must be corrected. The Board's secretive process in deliberating and evaluating these senate pairings, together with its decision to disregard the wealth of public testimony submitted in opposition to East Anchorage/Eagle River senate pairings, provides additional evidence from which the

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243 743 P.2d at 1372.

244 193 P.3d 719 (Alaska 2008).

court can infer an intent to discriminate against the East Anchorage community of interest.

This secretive process is evident, too, in the Board's proceedings regarding truncation. Borromeo and Bahnke advocated vocally for a truncation proceeding that would be obviously non-partisan—flipping a coin—and this procedure was rejected by the majority Board members. Instead, acting as a coalition, the majority Board members worked together to ensure that their preferred alternating sequence was agreed upon over Bahnke and Borromeo's objection. Because the rationale for this sequence was undisclosed and is not apparent from the record, the term limit proceedings must also be addressed on remand.[245]

In light of this totality of circumstances, the burden of proof shifts to the Board to justify its decision as having been taken to ensure proportionate representation.[246] The Board has not provided one piece of evidence to meet this burden. No one at any stage of this proceeding has offered an explanation as to why the splitting of two distinct, defined communities of interest was necessary to achieve proportionate representation, and no case precedent protects this unreasonable pairing when other, constitutionally palatable options are available. For these reasons, the trial court found that the decision of the Board to pair East Anchorage and Eagle River house districts into senate districts was made with an improper purpose, and has the effect of diluting the voices of voters from the East Anchorage community of interest in favor

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[245] In the event the remand is affirmed, truncations and term limits will need to be revisited due to changes in the senate districts.

[246] *See Kenai Peninsula Borough*, 743 P.2d at 1372.

of Eagle River voters. The trial court properly remanded the Board's Proclamation Plan for further proceedings to correct this error.

II. The Superior Court Committed No Error in Its Decisions Regarding Trial Procedure.

The Board's Petition challenging the superior court proceedings repeatedly and blatantly demonstrate that the Board has misconstrued the Application process, at great cost to East Anchorage Plaintiffs. The Board is, despite its efforts to avoid its obligations to the public, a government entity. When it issued its decision, that decision became subject to judicial review under Civil Rule 90.8. Despite the contortionist efforts by the Board, the discretionary standard of review applied in the Application proceedings was clearly anticipated by the courts and legislature given the administrative record requirement, the public's due process rights to appeal government decisions, and clear language affording the Court the right to supplement the record.[247] The Board's misperception of applicable law and procedure has had extremely prejudicial impacts on the parties to this case, including the court, the public, the integrity of the redistricting process, and the Board itself. The Board's focus on "winning" at all costs during this proceeding resulted in what continues to be an attempt to convert the Application challenge process into a full-blown civil trial. The Board's approach to the Application challenge process would be debilitating to many potential constitutional litigants who could not bear the costs and fees that have

[247] *See* Alaska R. Civ. P. 90.8.

resulted from the near constant attempt by the Board to exclude, minimize, and misrepresent the record and pleadings.

In fact, the Board even went so far as to assert its own due process rights in the administrative appeal proceeding, while ignoring due process rights of the public before the Board. As a prime example, the Board confuses its obligations as a governmental entity with the rights that private parties and litigants are afforded in plenary actions. The trial court proceeding in this case—essentially an administrative appeal from a final decision of a state agency—is distinguishable. The Board's actions and rationale should be apparent from its agency record, and neither principles of substantive nor procedural due process permit the Board to "explain away" deficient agency process or arbitrary decision-making before the trial court.

Due process does not entitle the Board to challenge perceived deficiencies in trial procedure on appeal. This Court has been explicit on this point—in *Kenai Peninsula Borough v. State, Dept. of Community and Regional Affairs,* the Court observed that "[t]he purpose of the Alaska due process and equal protection clauses is to protect people from abuses of government, not to protect political subdivisions of the state from the actions of… state government."[248]

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[248] 751 P.2d 14, 18 (Alaska 1988) (also observing that "[m]ost state courts exclude local government entities from state due process and equal protection guarantees") (*citing approvingly Village of Riverwood v. Department of Transp.,* 395 N.E.2d 555, 558 (Ill. 1979) (under the Illinois Constitution, municipal corporation may not assert due process claim against state); *State ex rel. Brentwood School Dist. v. State Tax Comm'n,* 589 S.W.2d 613, 615 (Mo.1979) (en banc) (school districts are not "persons" and may not charge the state with due process violations); *State ex rel. New Mexico State Highway Comm'n v. Taira*, 430 P.2d 773, 778 (N.M. 1967) (State Highway Commission not protected by due process clause); *Carl v. Board of Regents*), 577

A. The Superior Court Correctly Found That the Board was not entitled to burdensome discovery into plaintiffs' personal and/or privileged communications.

Consistent with its overarching misunderstanding of its role in the litigation and as a governmental entity, the Board asserts that it was error for the superior court to deny the Board's Motion to Compel Discovery. That motion sought to compel East Anchorage Plaintiffs to respond to the following requests for production propounded on East Anchorage Plaintiffs:

> REQUEST FOR PRODUCTION NO. 3: Please produce all Communications (including emails and/or text messages) You have sent to or received from anyone, including but not limited to individuals with the Alaskans for Fair Redistricting (AFFR) group (Joelle Hall, David Dunsmore, Robin O'Donoghue, etc.) and the Alaska AFL-CIO, that relate in any way to the 2021 redistricting process.
>
> REQUEST FOR PRODUCTION NO. 4: Please produce all emails and/or text messages You have sent or received that relate in any way to Your participation in this lawsuit. If You claim a privilege as to any such Communication, please produce a privilege log.
>
> REQUEST FOR PRODUCTION NO. 5: Please produce all Communications between or among the Plaintiffs that relate in any way to the 2021 redistricting process or the subject-matter of their lawsuit.

The Board asserted that these requests seek "basic evidence of bias and agenda that bears on … Plaintiffs' credibility."[249] East Anchorage Plaintiffs opposed the motion, arguing that such requests were overburdensome and irrelevant to the objective of

P.2d 912, 915 (Okla.1978 (state medical school admissions committee not entitled to due process or equal protection); *City of Seattle v. State*, 694 P.2d 641, 645 (Wash. 1985) (en banc) (city itself not entitled to equal protection, but has standing to assert claims of potential residents); *City of Mountlake Terrace v. Wilson*, 549 P.2d 497, 498 (Wash. App. 1976) (city may not assert due process claim against state)).

249 Board's Mot. to Compel Discovery Responses at 4, ANC EXC. 1057-1101.

the case: to correct an error by the Board in its final proclamation plan.[250] As a government entity, it is the Board's actions, not that of plaintiffs, that are under review. Additionally, East Anchorage Plaintiffs noted that, despite these objections, they had already responded in depth to other discovery requests from the Board specifically inquiring as to their partisan affiliations.[251] The superior court agreed. This is consistent with prior trial court reasoning on similar issues: in the 2001 redistricting litigation, Judge Rindner remarked in his decision that redistricting challenges are inherently political processes, but that "the constitutionality of the Final Plan is not [a]ffected by the motivations of the citizen groups that advocated for or against the plan."[252] Nothing in either Civil Rules 26 or 90.8 permits the superior court to depart from ordinary principles of relevance to allow the Board to request and receive burdensome and unnecessary discovery from Plaintiffs—citizens challenging the constitutionality of the Board's final redistricting plan—where such discovery is irrelevant to any issue in the case.

B. The Board was not entitled to conduct re-direct examination of board members in the absence of cross-examination.

On January 20, 2022, the eve of trial, Board counsel expressed via email that it intended to conduct redirect examinations of Board members even though East Anchorage Plaintiffs did not intent to cross-examine these witnesses. To preclude this

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250 *See generally* East Anchorage Pls.' Opp. to Mot. to Compel, ANC EXC. 1102-1156.

251 *Id.* at 1-2.

252 No. 3AN-01-08914CI, 2002 WL 34119573, at 51-52 (Alaska Super., Feb. 1, 2002).

unprecedented request, East Anchorage Plaintiffs promptly filed a Motion to Preclude Redirect Questioning in the Absence of Cross-Examination.[253] The court granted the motion on the record the following morning, noting that the Board's insistence on redirect examination of its own witnesses where an adverse party waived cross-examination was inconsistent with typical trial procedures and the court's pretrial orders. But even in denying the Board's request, the court reiterated that parties could move to supplement their witnesses' written testimony if they believed doing so was necessary to properly confront an opposing party's evidence. The Board did not do so. The Board has not identified any prejudice it experienced as a result of this waiver—indeed, any such prejudice would be of the Board's own creation.

C. The Superior Court properly utilized in camera review to resolve disputes involving assertions of attorney-client privilege.

The Board asserts that the superior court erred in "requiring production of attorney-client privileged communications for in camera review." East Anchorage Plaintiffs have included in its excerpt the motion practice for its Motion for Rule of Law during the trial proceeding. The superior court properly issued a detailed order resolving the Motion for Rule of Law and the issues raised by Matanuska-Susitna Borough in its Joinder.[254] In that order, the court found that the Board, as a governmental entity, is unquestionably subject to the OMA.[255] Applying *Cool Homes,*

253 ANC EXC. 2198.

254 *See generally* Jan. 18, 2022 Order re Motion for Rule of Law re Attorney Client Privilege, ANC EXC. 2045-2064.

255 *Id.* at 10-12.

Inc. v. Fairbanks North Star Borough,[256] the court then explained that the scope of the attorney-client privilege is fundamentally different for public entities than for private parties because public entities are subject to the OMA and are required to conduct their work in the eye of the public, consistent with the purpose of the Act.[257] Accordingly, both the *Cool Homes* court and the superior court in this case explained that the attorney-client privilege applies narrowly to public entities, and that it will apply "only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential."[258]

In addition to this guiding principle, the court noted that *In re Mendel*[259] provides the controlling procedure which must be followed in adjudicating claims of privilege and reviewing privileged documents.[260] This procedure is as follows:

> The trial judge should redact the attorney's mental impressions, conclusions, opinions or legal theories as well as any privileged attorney-client communications which are unrelated to the subject matter of the litigation. The court should then give the attorney the opportunity to examine the redacted records and make any arguments as to why any of the unredacted material is subject to the absolute privilege discussed in Rule 26(b)(3). Only at this point should the relevant, unprivileged information be produced.[261]

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256 860 P.2d 1248 (Alaska 1993).

257 *Id.* at 13.

258 *Id., citing Cool Homes,* 860 P.2d at 1261-62.

259 897 P.2d 68 (Alaska 1995).

260 Order re Motion for Rule of Law re Attorney Client Privilege at 16, ANC EXC. 2045-2064.

261 *Mendel,* 897 P.2d at 75.

Applying *Mendel,* the trial court reviewed the Board's privilege log and ordered for production *in camera* only those "emails addressed to specific executive sessions and meetings conducted between November 2-9, 2021" because such communications "would very likely be relevant."[262] Accordingly, the court ordered such documents be produced so that the court could determine "[w]hether they are privileged or should be disclosed."[263] These documents constituted 76 documents of the over 2,425 identified by the Board in its privilege log.[264] The Board petitioned for review of this order, and this Court denied the petition.[265] After the trial court reviewed this narrow subset of withheld communications *in camera*, and produced an order evidencing its intent to produce some of these documents to the parties,[266] the Board sought further review from the trial court pursuant to the *Mendel* procedure. The court undertook such review and issued an additional written order.[267]

In camera review is an unremarkable tool to resolve discovery disputes. In fact, courts are required to conduct in camera review to resolve disputes regarding parties' right to discovery. Such review balances the broad discovery rights afforded by Civil

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262 Order re Motion for Rule of Law re Attorney Client Privilege at 18, ANC EXC. 2045-2064.

263 Order re Motion for Rule of Law re Attorney Client Privilege at 18, *id*.

264 Jan. 22, 2022 Order Following *In Camera* Review and for Production of Additional Privileged Documents for In Camera Review at 2, ANC EXC. 2070-2278.

265 Supreme Court No. S-18303, Order: Petition for Review, Jan. 20, 2022.

266 *See generally* Jan. 22, 2022 Order Following *In Camera* Review and for Production of Additional Privileged Documents for In Camera Review, ANC EXC. 2070-2278.

267 Jan. 25, 2022 Order Granting in Part ARB Motion to Reconsider Following Further In Camera Review, ANC EXC. 2279-2281.

Rule 26 with the requirement that confidential communications be protected from intrusions.[268] It is a tool to assist the judiciary in determining when a remedy is due; it is not a remedy in and of itself. The trial court appropriately applied this tool in this case, affording the Board an extraordinarily protective approach to review its withheld documents. More is not required under Alaska law.

CONCLUSION

The reasoning underlying the superior court's decision to remand the Board's final Proclamation Plan to address its violations of the Alaska Constitution was sound and abundantly supported by existing and controlling Alaska Law. Remand is required to ensure that the voice of the public is adequately heard, and to ensure that the Board engages in the mandatory "hard look" review of its decision-making. Requiring the Board, a government entity, to comply with these procedural and substantive protections when crafting election districts will not result in any injustice—in fact, such compliance will help guarantee that voters' rights to equally geographically effective votes will not be impaired for the next ten years. For all of the reasons stated in this response to the Board's Petition for Review, East Anchorage Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and relevant motion practice during the *In Re 2021 Redistricting* process, East Anchorage Plaintiffs respectfully request that the Board's Petition for Review be denied.

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[268] *See Windel v. Matanuska-Susitna Borough,* 496 P.3d 392 (Alaska 2021) (stating that "[a] court considering whether the privilege applies to public records should conduct an in camera review and invite arguments from the holder of the privilege as to why portions of the material should be considered privileged.") (citing *Griswold v. Homer City Council,* 428 P.3d 180, 188 (Alaska 2018)).

Respectfully submitted this ____ day of March, 2022.

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

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

Trial Court No. 3AN-21-08869CI

CERTIFICATE OF SERVICE AND TYPEFACE

The undersigned hereby certifies that on the 10th day of March, 2022, a true and correct copy of the following documents, filed on behalf of the East Anchorage Plaintiffs, were served electronically on the addressees listed below, and believed to be transmitted without error from tmarshall@bhb.com at approximately 11:45 p.m.:

Response to Petition for Review;
Excerpt of Record (Volumes 1-7 via Sharefile);
Motion to Accept Overlength Response Brief; and
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Pursuant to Alaska R. App. P. 513.5(c), the foregoing has been prepared in a proportionally-spaced 12.5-point Arial typeface.

DATED this 10th day of March, 2022.

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