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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

EAST ANCHORAGE PLAINTIFFS' REPLY TO OPPOSITION TO MOTION FOR RULE OF LAW AND MOTION TO SEPARATELY CONSIDER BOARD'S PROCESS AND PROCEDURE ALLEGATIONS AT CLOSING ARGUMENT

The Alaska Redistricting Board's Opposition to the Motion for Rule of Law ("Motion") exemplifies the Board's misunderstanding of its composition as a government entity, the constitutional and statutory obligations that arise as a result of that composition, and perhaps most disturbing, the substantial harm born by plaintiffs, the Court, and the public as a result of the Board's misconceptions. The East Anchorage Plaintiffs moved for a rule of law regarding the scope of attorney-client privilege that could be applied by all the parties to ensure meaningful discovery. Similarly, the Matanuska-Susitna Borough and the other plaintiffs joined the motion for rule of law after plaintiffs received a privilege log from the Board with over 2,000 pages of allegedly privileged documents, many without

descriptions or any indication of the basis for the asserted privilege. East Anchorage Plaintiffs did not include evidence in its Motion for Rule of Law because it was not seeking a finding of a violation. Frankly, East Anchorage Plaintiffs' only goal in filing the Motion for Rule of Law was to get direction for the Board, and the plaintiffs, regarding privilege so that the Board would refrain from instructing its members not to answer simple questions regarding their reasons for adopting pairings on November 9, 2021 that differed from those proposed on November 8, 2021. Similarly, upon review of the privilege log produced by the Board, it became apparent that the need for clarification regarding the attorney-client privilege was necessary for both Board considerations as well as Board records. Again, plaintiffs sought only *in camera* review by the Court, aiming squarely, and narrowly, at accessing meaningful discovery.

In response to the East Anchorage Plaintiffs' Motion, the Board conflated many of the process issues raised in the East Anchorage Plaintiffs' Application for Correction of Errors with the narrow request for the interpretation of law posed in the Motion. The conflation of these process issues with questions regarding the scope of attorney-client privilege is not appropriate. A redistricting board's use of process, or lack thereof, has implications far beyond the Open Meetings Act; extending into the equal protection clause analysis itself.

As a result, East Anchorage Plaintiffs move the Court to separately consider process and procedure allegations at close of trial. Given the timing of the consideration, the briefing would comply with the Court's pretrial order as it would not constitute a motion for summary judgment but it would afford the Court the opportunity to consider more comprehensive briefing by the parties, ensuring that issues of process are properly

adjudicated. Further, while these issues are fundamental to fair and effective redistricting, they do not require disposition before the trial as the conduct at issue occurred before and during the Board's redistricting process, and is not impacted or altered by the trial itself. The requested approach permits the parties to brief this issue in a manner that provides both this Court and the Supreme Court with more carefully constructed legal arguments.

I. REPLY TO OPPOSITION TO MOTION FOR RULE OF LAW

The East Anchorage Plaintiffs' Motion was made, as stated in that motion, in response to repeated, uniform objections by the Board's counsel to narrowly-tailored questions seeking non-privileged information. In contravention of well-established principles of law, the Board's objections have the effect of shielding non-privileged discussions among Board members—in which counsel may or may not have been involved—regarding the Board member's understanding of general legal principles of law and the application of those principles to the Board's adoption of the senate pairings. Similarly, questions posed by East Anchorage Plaintiffs regarding a Board member's rationale for supporting, or refusing to support, pairings was protected from questioning under the attorney client privilege. As a result, Board members are essentially claiming that they made decisions regarding senate pairings due to legal advice and thus the Board's reasons for adopting the pairings cannot be shared. Ultimately, the East Anchorage Plaintiffs are left without an adequate mechanism to determine what analysis the Board and its members conducted when proposing senate pairings, considering senate pairings, and adopting such pairings. These considerations are among the most basic duties undertaken by Board members on behalf of the public once they accept their

appointments. The rationale underlying government action and whether or not that rationale is reasonable, not arbitrary, and compliant with substantive law and due process requirements is absolutely subject to public disclosure.

A. Board Member Depositions and Affidavits Reveal that the Board Discussed General Principles of Law and New Senate Pairings and that These Discussions were Not Protected by Attorney-Client Privilege

Although East Anchorage Plaintiffs' Motion is grounded in the interpretation of law and not the application of facts, the Board's repeated misrepresentation of the underlying facts compels East Anchorage Plaintiffs to respond.

The Board's Opposition asserts repeatedly, without corroboration, that "[t]he Board never entered executive session for the purpose of discussing [redistricting principles] or other general principles of law." Its sole basis for so claiming is the notion that the Board received legal advice from counsel regarding general principles of law during its public meetings.[1] Because of this, the Board argues, it could not have received similar advice during executive session. Again, the East Anchorage Plaintiffs' Motion sought guidance regarding the attorney-client privilege and not the scope of executive session. To the extent East Anchorage Plaintiffs focused on the executive session, this focus arose from the Board's use of executive session to engage in allegedly attorney-client privileged discussions during those sessions.[2] Despite the Board's attempt to restructure the East

[1] This argument by the Board appears to concede that the East Anchorage Plaintiffs are entitled to the relief sought in their Motion as the Board's counsel has, at least at times, attempted to comply with the intended and lawful scope of the attorney-client privilege.

[2] The East Anchorage Plaintiffs have asserted that the Board violated the Open Meetings Act and conducted overbroad executive sessions; allegations that will be proven at trial and are substantially supported by the record. These allegations, however, are not at the core of their Motion for Rule of Law.

Anchorage Plaintiffs' Motion as a summary judgment motion regarding the Open Meetings Act, the East Anchorage Plaintiffs' Motion seeks only a declaration from the Court that: (1) general principles of law applying to the redistricting process are not privileged; and (2) discussions or legal advice received by the Board regarding potential senate pairings before these pairings have been presented to the public are not privileged.

But even if the Board had not so conceded, their argument is unsupported by both logic and the record: the fact that the Board discussed a certain topic during public session in no way precludes discussion of the same—or additional—non-privileged topics during unwarranted and unlawful executive sessions. Indeed, the Board member depositions and affidavits at issue in this matter reveal that the Board did, in fact, appear to engage in such discussions of non-privileged information during executive session.

In addition to the facts articulated in the initial Motion, the East Anchorage Plaintiffs highlight the following testimony for the Court:

- Paragraphs 35-36 from the Affidavit of Budd Simpson, attached hereto as Exhibit D, explaining that the Board entered executive session "to obtain legal advice about the potential pairings that had been discussed" before these senate pairings had been presented to the public for hearing and comment.

- Pages 226-230 from the Deposition of Budd Simpson, attached hereto as Exhibit E, in which Board member Simpson relies on materials from the Board's VRA consultant in executive session in support of his understanding that the Board's house and senate districts were legal, but is precluded by counsel from testifying as to the substance of this analysis. This discussion by the Board's counsel includes a concession

that the Board used "VRA as a shorthand for that and any other constitutional issues regarding voting rights," including, presumably, a discussion of general principles of law. *Id*. at pp. 229-230.

- Pages 224-226 from the Deposition of Melanie Bahnke, attached hereto as Exhibit F, in which Board member Bahnke is categorically precluded by the Board's counsel on grounds of attorney-client privilege from testifying as to whether the Board discussed general principles of law or senate pairings that had not yet been adopted or proposed to the public.

- Pages 279-285 from the Deposition of John Binkley, attached hereto as Exhibit G, in which Board member Binkley is precluded by the Board's counsel from testifying as to the general criteria that the Board's legal counsel and analysts had provided the Board to guide the Board's analysis as to its work.

This concrete and unambiguous testimony establishes that Board members discussed non-privileged information during executive session. While such discussions violate the Open Meetings Act, they also, and most importantly for purposes of the Motion for Rule Law, do not constitute attorney-client privileged communications.

B. Legal Advice Regarding Public Action by a Government Actor is Not the Same as Legal Advice Regarding Private Action by a Private Person

As the East Anchorage Plaintiffs asserted in their Motion, to the extent communications between a private party and his, her or its attorney trigger privilege regarding that party's reasons for taking action, this same scope of privilege does not necessarily extend to the Board. The Board is not a person. When it acts, it acts on behalf of the public and the public has a right to understand why the Board has taken such action on its behalf. As a government actor, the Board is constitutionally and

statutorily mandated to take the action at issue on behalf of and in the interests of the public; It cannot use the attorney-client privilege to hide its reasons for doing so. To the extent the Board is suggesting this level of transparency causes the Board harm, East Anchorage Plaintiffs emphatically counter that the harm to the public of permitting the Board to conceal its reasons for taking actions on the public's behalf is far graver. Further, the limited scope of the rule of law sought by East Anchorage Plaintiffs did not trigger the harms the Board fears.

II. REPLY TO BOARD'S OPEN MEETINGS ACT ALLEGATIONS

A. The Board is Unquestionably Bound by the Open Meetings Act

While East Anchorage Plaintiffs reiterate that the scope of the attorney-client privilege is *not* reliant upon the use of the privilege in executive session or the Board's novel Open Meetings Act defenses, the Board's interpretation of the scope of the Open Meetings Act and its application to the Board is wholly misplaced and ignores well-established law and the plain meaning of the Open Meeting Act itself. Further, the Board's assertions regarding the scope of the attorney-client privilege unacceptably abrogate the intent and purpose of the Open Meetings Act and risks placing actions of the Board and other neutral and impartial government entities outside the scope of judicial review.

In its Opposition, the Board asserts that it is not bound by the Open Meetings Act because it is an "independent Redistricting Board created by constitutional amendment in 1998."[3] Purporting to be "an independent entity that is not part of the executive, legislative, or judicial branches of government," the Board claims that it is an "open

[3] Alaska Redistricting Board's Opposition to East Anchorage Plaintiffs'' Motion for Rule of Law ("Opposition") at 17-18.

question" as to whether the Open Meetings Act applies to the Board.[4] Although the Board cites to a case holding that the Alaska Legislature's violation of the Open Meetings Act is non-justiciable,[5] the Board provides no such authority holding—or even implying—that the Act does not apply to legislatively- or constitutionally-created Boards. This is because no such authority exists.

To the contrary, the plain language of the Open Meetings Act, precedent from the Alaska Supreme Court, and the Board's own public meeting policy demonstrate concretely that the Board is bound by the Open Meetings Act. First, the Open Meetings Act applies to every "governmental body" of a "public entity." "Public entity" is defined to include entities of the state, the University of Alaska, and all political subdivisions, including boards, commissions, agencies, municipalities, school districts, public authorities and corporations, and other governmental units of the state and political subdivisions of the state."[6] As a board of the State of Alaska, the Alaska Redistricting Board falls squarely within the scope of the Open Meetings Act. But even if the definition of "public entity" applicable to the Act did not specifically include state boards, the Alaska Redistricting Board would still fall within the "catch-all" provision at the end of this definition—the Board is unquestionably a governmental unit of the state and/or a political subdivision of the state.

It bears noting that this interpretation is consistent with the spirit and intent of the Act itself: as AS 44.62.312(a) eloquently explains, it is the policy of the State of Alaska

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4 *Id.*

5 *Id.* at 17 (citing *Abood v. League of Women Voters of Alaska,* 743 P.2d 333, 335-39 (Alaska 1987)).

6 Alaska Statute 44.62.310(h)(3).

that governmental bodies "exist to aid in the conduct of the people's business," and it is the policy of the State that "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created." The Alaska Redistricting Board exists to group people together to ensure that their right to suffrage, to effective representation, and to participate in the political process is fully and fairly realized under the framework established by both state and federal law for a ten-year period. If the policies underlying the Open Meetings Act are meaningfully implicated in the actions of a typical state entity, they are even more critically at play where, as here, the entity in question is likewise tasked with ensuring that a population may "retain control over the instruments" of their representation in state government.

Second, the Open Meetings Act was passed in 1959[7] and substantially amended to resemble its current form in 1994[8]—significantly predating the 1998 legislative action which amended the Alaska constitution to create the Redistricting Board. At the time when the Board was created, the legislature was well aware of the laws governing meetings of Alaska governmental entities, including Boards. Had the legislature wished to exempt the Board from the formalities and substantive procedures required by the Open Meetings Act, it could have done so. It did not.

Third, contrary to the Board's statement in its opposition that Alaska courts have never determined whether the Open Meetings Act applies to the Board, the Open Meetings Act was in fact at play in both the 2001 and 2011 redistricting litigation. In the 2001 litigation, the plaintiffs contended that the Board violated the Open Meetings Act by,

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7 SLA 1959, art VI, ch. 1, ch. 143, § 1.

8 SLA 1994, ch. 69, §§ 2-8.

in part, meeting with representatives from a local consulting group and legal counsel in meetings closed to the public and those not aligned by political party with the Board members involved in these meetings.[9] In adjudicating these Open Meetings Act issues and determining that a violation of the Act occurred, the superior court noted that "[t]he Alaska Supreme Court has ruled that the Board must comply with the Open Meetings Act."[10] Although the Board appealed the superior court's determination that the Board violated the Act, the Board did not appeal the superior court's determination that the Open Meetings Act applied to the Board. In fact, on appeal, the Alaska Supreme Court noted that the public interest required the Board to comply with the Open Meetings Act, though the Court found that no remedy was appropriate for the Board's violations of the Act.[11]

Likewise, in 2011, the plaintiffs alleged that the Board again violated the Open Meetings Act by going off the record to confer with the former head of the Alaska Republican Party as to which incumbent Senators should have to stand for reelection and by conducting a serial communication outside the eye of the public.[12] Again, the superior court adjudicated this claim under the contours of the Open Meetings Act, stating unequivocally that "[u]nder the Open Meetings Act the Board's work is, with limited exceptions, to be conducted in open session."[13] No party appealed the superior court's

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

10 *Id., citing Hickel v. Se. Conf.,* 846 P.2d 38, 57 (Alaska 1992), as modified on reh'g (Mar. 12, 1993).

11 *In re 2001 Redistricting Cases,* 44 P.3d 141, 147 (Alaska 2002).

12 *In re: 2011 Redistricting Cases*, No. 4FA-11-2209CI, 2013 WL 6074059, at *30 (Alaska Super. Nov. 18, 2013).

13 *Id.* at 31.

determination that the Open Meetings Act applies to the Board. Thus, the Board's 11th-hour attempt to dispute that the Open Meetings Act applies to itself in this action is both wildly inconsistent with its prior positions and inconsistent with well-established case law. Indeed, the vast majority of jurisdictions around the country are in accord that redistricting entities are bound by some form of open meetings legislation (though courts, the Alaska Supreme Court included, have certainly found redistricting entities have not violated such acts).[14]

Finally, even if the Board is not bound by the Open Meetings Act under the plain language of the legislation or in accordance with binding precedent, the Board would still be required to comply with its terms because of its own policies and procedures to do so.

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[14] *See, e.g., Detroit News, Inc. v. Indep. Citizens Redistricting Comm'n,* No. 163823, 2021 WL 6058031 (Mich. Dec. 20, 2021) (explaining that obtaining legal advice with respect to validity of proposed redistricting plans is part of the "business" of the Independent Citizens Redistricting Commission for state legislative and congressional districts, within meaning of state constitutional provision requiring Commission to conduct all of its business at open meetings, and thus, common-law attorney-client privilege and common-law attorney work-product protection, which are repugnant to the constitutional open-meetings requirement, must give way; Commission's core business is the development and adoption of redistricting plans, Commission is not charged with drawing illegal maps and it necessarily must draw legal ones, and maps are essentially legal products, with their content and construction determined by law); *In re Colorado Indep. Cong. Redistricting Comm'n*, 2021 CO 73, ¶ 6, 497 P.3d 493, 498 (stating that Colorado redistricting commission is subject to open meetings requirements under state law); *State ex rel. Montgomery v. Mathis,* 231 Ariz. 103, 115, 290 P.3d 1226, 1238 (Ct. App. 2012) (holding explicitly that although a redistricting entity was constitutionally created to be removed from the political process this did not preclude a finding that the entity is subject to the Arizona open meetings law because the law does not purport to inhibit or interfere with the redistricting process); *Ajamian v. Montgomery Cty.,* 99 Md.App. 665, 675, 639 A.2d 157, 161 (1994); *Mun. Council of City of Newark v. Essex Cty. Bd. of Elections,* 259 N.J. Super. 211, 212, 611 A.2d 1157, 1157 (Law. Div. 1992); *Tarrant Cty. v. Ashmore,* 635 S.W.2d 417, 424 (Tex. 1982); *but see Johnson v. State,* 366 S.W.3d 11, 21 (Mo. 2012) (holding that an open meetings act does not apply to a nonpartisan reapportionment commission where such commission is comprised solely of judges and the law specifically excluded from coverage judicial entities when operating in an administrative capacity).

On January 26, 2021, the Board adopted a "Public Meeting and Notice Requirement Policy."[15] Although this policy is not available in the Record, the version referenced by the Board in its Opposition appears to still be available online,[16] and appears consistent with a version of the Policy previously viewed by undersigned counsel. This Public Meeting and Notice Requirement Policy contains three sections: a background section, staff recommendation section, and the Board's adopted policy, which is set forth at the bottom of the document in italics. The adopted policy reads as follows:

> It is the policy of the Alaska Redistricting Board that ***the board comply with the Alaska Open Meetings act and seek to provide 72 hours of public notice*** prior to board meetings with 24 hours notice being allowable. Notices shall be posted to the State of Alaska Public Notice System.[17]

The use of the word "and" in between the two clauses "it is the policy of the Alaska Redistricting Board that the board comply with the Alaska Open Meetings Act" and "seek to provide 72 hours of public notice prior to board meetings…" demonstrates that these two clauses are conjunctive, not disjunctive—in other words, the Board intended to be both bound by the Open Meetings Act, and to seek to provide 72 hours of public notice prior to Board meetings. These two obligations are not mutually exclusive: had the Board wished to adopt the Open Meetings Act only as to its notice requirements, it could have done so explicitly. But the Board did not: instead, the Board adopted a policy demonstrating clear, unequivocal intent to be bound by the Open Meetings Act, as well as to comply with a policy of providing 24-72 hours' public notice prior to its public meetings. In reliance on this policy, the record demonstrates that numerous members of

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15 Opposition at 17.

16 https://www.akredistrict.org/files/5016/1281/5700/Public-Meeting-Policy.pdf.

17 *Id.,* emphasis added.

the public, recognizing this policy, sought to communicate with the Board regarding its compliance with the Open Meetings Act.[18] At no point did the Board issue a statement to disillusion the public of its collective impression that the Open Meetings Act applied to the Board—and, as described above, there would have been no colorable legal basis for the Board to do so. In short, the Open Meetings Act indisputably applies to the meetings of the Alaska Redistricting Board.

III. BOARD'S PROCESS DEFENSES AND ALLEGATIONS ARE PROPERLY CONSIDERED SEPARATELY FROM THE MOTION FOR RULE OF LAW AND SHOULD BE ADDRESSED AT OR NEAR THE CLOSE OF TRIAL

As previously stated, process is a fundamental component of the Alaska redistricting process, with the Board's process and procedures impacting not only the Open Meetings Act and the Public Records Act, but also the due process clause of the Alaska Constitution, equal protection clause of the Alaska Constitution, and Art. VI, Section 6 of the Alaska Constitution. In *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987), the Alaska Supreme Court emphasized this importance of process and its consideration when conducting an equal protection analysis:

> We are of the view that a neutral factors test, similar to that proposed by Justice Powell in *Davis v. Bandemer*, 478 U.S. 109, 173 (1986), should be employed to assess the legitimacy of the Board's purpose in designing Senate District E. Under such a test we look both to the *process* followed by the Board in formulating its decision and to the *substance* of the Board's decision in order to ascertain whether the Board intentionally discriminated against a particular geographic area. Wholesale exclusion of any

[18] *See, i.e.*, Exhibits H and I attached hereto; true and correct copies of a letter from the Native American Rights Fund to the Alaska Redistricting Board dated September 7, 2021 (alerting it to its ongoing violations of the Open Meetings Act, including unlawful executive sessions and overly broad application of attorney-client privilege that the Board was employing); and an October 26, 2021 letter to the Board from the Alaska Democratic Party alerting the Board that its public meetings procedures may not comply with the Open Meetings Act.

> geographic area from the reapportionment process and the use of any secretive procedures suggest an illegitimate purpose…

Similarly, considerations of due process involve the rational or irrational nature of the Board's conduct. The process necessarily informs these actions. In past redistricting cases, Open Meetings Act violations have involved challenges over emails or even improperly-noticed meetings. In this case, East Anchorage Plaintiffs intend to assert, as demonstrated in their Application, that the Board intentionally diluted the vote and voice of East Anchorage voters, and intentionally and unlawfully hid behind process in order to do so. These issues may involve process but they are substantive in nature and exceed the limited scope of the Open Meetings Act. East Anchorage Plaintiffs propose that consideration of these issues collectively but at the close, rather than the eve, of trial will best serve the interests of the plaintiffs, the Court, the Board, and the public.

IV. CONCLUSION

The Board's failure to present expert witness testimony in this trial, its failure to present any affidavit testimony by Board member Bahnke and Board member Borromeo in its direct witness affidavits, its aggressive attempts to protect the Board's discussions and its members' reliance on legal counsel during the senate pairings meetings, and now its sudden and notably aggressive attempt to evade longstanding procedural requirements has East Anchorage Plaintiffs once again silenced.

For the reasons set forth above and articulated in the initial Motion for Rule of Law, the East Anchorage Plaintiffs respectfully reiterate their request for a ruling of law recognizing that the attorney-client privilege applies narrowly to proceedings by a government entity such as the Board and that, under this narrowly tailored privilege:

1. General principles of law applying to the redistricting process are not privileged; and

2. Discussions or legal advice received by the Board regarding potential senate pairings before these pairings have been presented to the public are not privileged.

As the Board's Opposition demonstrates, any other interpretation of the attorney-client privilege as it applies to a government entity enables and facilitates governmental bodies to hide controversial deliberations from the public eye under the guise of privilege.

Additionally, while East Anchorage Plaintiffs reiterate that the scope of the attorney-client privilege is *not* reliant upon the use of the privilege in executive session or the Board's novel Open Meetings Act defenses, the Board's interpretation of the scope of the Open Meetings Act and its application to the Board is wholly misplaced and ignores well-established law and the plain meaning of the Open Meetings Act itself. Further, the Board's violations of the Open Meetings Act are blatant and evident from only a cursory review of the records in this case.

Finally, East Anchorage Plaintiffs' reiterate their request for separation by the Court of the process and procedure defenses raised by the Board for briefing and consideration at closing argument.

DATED this 14th day of January, 2022.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Plaintiffs

By: /s/ Holly C. Wells
Holly C. Wells, ABA #0511113
Mara E. Michaletz, ABA #0803007
William D. Falsey, ABA #0511099

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of January, 2022, a true and correct copy of the foregoing document was served electronically on the following:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the	)	
2021 Redistricting Plan.	)	
	)	Case No. 3AN-21-08869CI

AFFIDAVIT OF BUDD SIMPSON
(Direct Testimony)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I, Budd Simpson, being first duly sworn, depose and state as follows:

1. My name is Budd Simpson. I am of the age of majority and have personal knowledge as to the testimony I present herein. I offer this testimony as one of five members of the 2021 Alaska Redistricting Board.

2. I have been a resident of Juneau and Douglas, Alaska, and have practiced law in Alaska since 1977.

3. My law practice has afforded me the opportunity to represent many clients in Alaska, and in particular, Southeast Alaska. Since 1977, I have travelled to virtually every community of any size in the Panhandle from Yakutat to Ketchikan for legal work, including the small island communities that dot Southeast's landscape. The only community of significant population in Southeast to which I have not been is Metlakatla. I have been to Skagway on many occasions, and have represented clients

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34. During public session on November 8, 2021, the Board considered the possible senate pairings for the sixteen (16) house districts within the Municipality of Anchorage. Because each senate district is comprised of two contiguous house districts, there would be eight (8) senate districts contained in the Municipality of Anchorage. The Board considered numerous ways to pair the Anchorage house districts. Member Marcum explained her reasons for suggesting a pairing of Eagle River and JBER in light of the strong military connections between the two, and also proposed pairing South Muldoon with Eagle River and explained her reasons for that district as well. I found Ms. Marcum's explanation reasonable.

35. After the public discussion on November 8, the Board entered executive session to obtain legal advice about the potential pairings that had been discussed. There were significant legal issues to discuss regarding the proposed senate pairings and the executive session lasted until the end of the day. The Board adjourned for the evening, and advised the public that executive session would continue the next morning (November 9) until 10:30 am. Based on legal advice we received during executive session, I was not willing to support some of the senate pairings that were proposed during public session.

36. After the litigation discussion was complete, the Board exited executive session on the morning of November 9. Member Marcum made some modifications to her proposed pairings, and moved the Board to adopt Anchorage senate pairings that

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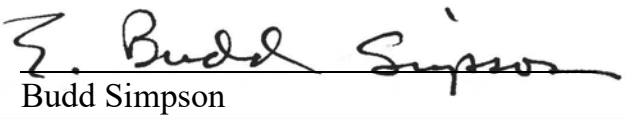
did not pose the legal problems that were discussed in executive session. I voted to adopt member Marcum's proposed senate pairings, including Senate District K.

FURTHER AFFIANT SAYETH NAUGHT.



Budd Simpson

SUBSCRIBED AND SWORN to before me this _____ day of January, 2022, at _____, California.

_____
Notary Public in and for the State of California
My Commission expires:_____

EXHIBIT D
Page 3 of 3

SCHWABE, WILLIAMSON & WYATT, P.C.
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the

2021 Redistricting Plan.
Case No. 3AN-21-08869CI
_____/

VIDEOTAPED DEPOSITION OF:

BUDD SIMPSON

TAKEN: SATURDAY, JANUARY 8TH, 2022

AT 9:00 AM AKST

BEFORE: CASSANDRA E. ELLIS, RPR CRR CSR

to inform your vote on the senate pairings?

A. Yes.

Q. And can you describe your reliance, you know, the information that you learned from the VRA consultant on the senate hearings, your reliance on that?

MR. SINGER: I'm going to instruct you Mr. Adelson's (phonetic) advice is covered by the attorney-client privilege, so I'm going to instruct you not to disclose his specific legal advice to you.

BY MS. MICHALETZ:

Q. Mr. Simpson --

A. So with that --

Q. Yeah.

A. With that admonition, a -- a question about either Voting Rights Act or constitutionality came up, and we asked -- somebody asked for an executive session to discuss, you know, litigation exposures with counsel and with the voting rights expert.

And that occurred, and then, you know, subsequent to receiving that advice, you know, we continued with the development of the -- of the district pairings.

Q. All right. Well, how did you apply a VRA analysis to your consideration of the senate pairings?

A. How did I apply it?

Q. Mm-hmm.

A. I don't -- I don't understand that question. I mean, we made pairings, and I was confident that the pairings that I ultimately supported were consistent with law and constitutional requirements.

Q. Well, so the board, as you said, has these constitutional occupations that necessarily drives its decision. And so I'm trying to figure out the extent to which you personally took the VRA obligations into consideration when you voted to pair Eagle River with those Eagle River house descriptions with Anchorage?

A. I believe that's what I just said.

Q. Okay. You know, in our review of the -- of the VRA information, and the -- and what the consultants produced we really couldn't figure out whether or not they included the Eagle River house districts in their analysis, do you happen to know?

A. Yes, I happen to know.
Q. What's the answer?
THE WITNESS: Can I answer that?
MR. SINGER: Well, what I -- I guess what I caution, Mr. Simpson, is the -- the formal VRA analysis included a report, and we made that public and did a public presentation about it, and that analysis, I think, is fair game for questions. And then there was also a specific litigation-focused discussion in executive session, which is subject to attorney-client privilege.
THE WITNESS: And we're talking about that specific executive session.
MR. SINGER: Well, I don't know, the question -- the question is a little confusing so --
MS. MICHALETZ: I can certainly ask it again. I mean, we reviewed the materials from the VRA consultants, and I'm just trying to understand more, right? Because it's hard for me to understand the extent to which those Eagle River house districts were analyzed and played into their -- into their --
MR. SINGER: The public -- I mean,

I don't want to get into answering questions, and I don't want to interfere, but just so we're clear that the VRA conclusion -- VRA analysis, the conclusion was that the -- there are not house districts in Anchorage that are likely subject to the Voting Rights Act or that was not aided to support the single factors were met in Anchorage. So that was the VRA analysis.

There were also -- there was also an executive session on November 8th that involved a discussion about a potential litigation. And then we engaged with Mr. Adelson, an attorney, and myself, in a discussion, and I think he's a voting rights expert, but that was a -- it was really a discussion about providing legal advice to the board. It's just different than a VRA analysis.

So when we use VRA analysis at the board we were talking about applying the jingles factors. So again, I don't want to get into testifying or interrupt, but I think there's a little confusion so I'm trying to provide a little clarity.

THE WITNESS: And additional clarity is that I think we, as a board, were

using VRA as shorthand for that and any other constitutional issues regarding voting rights, whether it's, like, literally Voting Rights Act. So the reference to VRA there may be confusing, itself.

MS. MICHALETZ: Got it. I mean, I appreciate that. I mean, I'm a lawyer, I appreciate semantics. I would imagine you appreciate that, too.

So I just have a couple of more questions about discovery, because, you know, we're getting this information from the board, we're processing it very quickly, and there are just some documents that I have a few more questions about, that pertain to e-mails that were sent to or from you.

Randy, can you bring up publish -- oh, let me go back.

Counsel, do you have any objection to the admission of the document labeled 11340 as an exhibit?

MR. SINGER: I'm sorry, which -- which one is that?

MS. MICHALETZ: The one that we were just discussing.

MR. SINGER: That e-mail?
MS. MICHALETZ: Yeah.
THE WITNESS: That's not with the -- the number.
MR. SINGER: If you can back up real quick, just so we're clear what you have.
MS. MICHALETZ: Yeah, so the actual Bates stamp is ARB153757.
THE WITNESS: That's this.
MR. SINGER: We're not -- we're not making admission -- you know, you get to mark whatever you want to mark as a deposition exhibit.
MS. MICHALETZ: Sounds good. All right.
MR. SINGER: I don't know for trial, but one thing I did want to say for -- you and for other counsel, I haven't actually seen how the PII is redacted in these documents until when I did my review, it was highlighting, not black.
So if anybody -- if there's a document that anybody's received with a PII redaction, it interferes with your understanding of the document, just call us and we'll get you

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

IN THE MATTER OF THE

2021 REDISTRICTING PLAN.
_____/
Case No. 3AN-21-08869 CI
(Consolidated)

CERTIFIED TRANSCRIPT

VIDEOTAPE DEPOSITION OF MELANIE BAHNKE

Pages 1 - 231
Thursday, January 6, 2022
9:00 A.M.

Taken by Counsel for Plaintiff
via
Zoom Internet
Anchorage, Alaska

Q All right. How about this. We'll try to go for it. I'll see -- and assuming that I -- you know, if it becomes longer than four questions, we can --

A Okay.

Q All right. Great.

So I am Holly Wells. I represent the East Anchorage plaintiffs, which are Felisa Wilson, George Martinez, and Yarrow Silvers.

The first question: Board Member Bahnke, you made some very clear and pointed comments throughout the November 8th and 9th Senate pairing meetings. And I would only ask whether or not those comments were accurate reflections of how you felt about the Senate pairing process and the observations you made during that process?

A They were, and they still are.

Q My other questions pertain predominantly to executive sessions. Were general principles of law discussed during an executive session at all during the redistricting process?

A I can't discuss --

MR. SINGER: Holly -- I'm going to instruct you not to -- not to answer what was -- the sole purpose of our executive sessions was to discuss specific legal strategy with regard to likely and

anticipated litigation. We are well aware of the Cool Homes standard, and asking the witness what was discussed in executive session seeks to invade attorney-client privilege. I'm instructing Ms. Bahnke not to answer.

MS. WELLS: And for the record, I will just state and make clear that the only question I asked was regarding general principles of law, which I -- you know, and will just state that for the record.

Matt, I'll also just note that we did, in our update to the Court, recognize that we are --

MR. SINGER: Counsel, just ask -- ask the next question to the witness. If we need to meet and confer, we can.

MS. WELLS: Matt, we are in an incredibly expedited application process. I am going to state to you that we are going to file a motion that addresses this issue, because it's in our best interests to let you know that as soon as possible. Thank you.

BY MS. WELLS:

Q All right. So we're going to move on to the next question. My next --

A I will say one thing. Our attorney is very, very good at telling us when we can't talk about

something in executive session. So I appreciated his sound, legal advice.

Q Thank you.

A Because I am not an expert on what can and can't be talked about in executive session, and so I appreciated having somebody to help us.

Q My next question is likely going to elicit an objection from counsel, as well, but I'm going to ask it for the record.

Did you, in executive session, discuss pairings that had not yet been adopted or proposed to the public?

MR. SINGER: And I'm going to instruct the witness not to answer an attorney-client communication that took place in executive session.

MS. WELLS: Understood.

BY MS. WELLS:

Q So that is all of my questions except for a very general one, which is: Is there anything that, except for -- and I think you had some comments regarding executive session that you wanted to express. But is there anything that you would like to say about the process, specifically the Senate pairings process, since that's the scope of my representation?

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the

2021 Redistricting Plan. Case No. 3AN-21-08869CI

_____/

VIDEOTAPED DEPOSITION OF:

JOHN BINKLEY

TAKEN: TUESDAY, JANUARY 11TH, 2022

AT 9:09 AM AKST

CERTIFIED TRANSCRIPT

BEFORE: CASSANDRA E. ELLIS, RPR CRR CSR

A. I don't think so. I mean, you know, I looked at that totality, as I recall.
Q. So in order to have dilution or consider dilution did you need to have, in your opinion, a Voting Rights Act violation?
A. I -- I don't know the answer to that.
Q. Okay.
A. I'm not sure that was well formed in my mind.
Q. So when the board took on the senate pairings, in Anchorage, were there considerations regarding the voter representation in the East Anchorage districts?
A. As -- as I recall, we did -- we did discuss that.
Q. And did you discuss the impacts that pairing those with Eagle River might have on those -- on those East Anchorage voters?
A. I need to be careful, maybe in terms of what we discussed in executive session sometimes blurs a little bit, making certain that I don't go outside of the privilege. So I can maybe ask counsel to stop me if I'm headed in the wrong direction.

I do recall discussing the pairing of the senate districts. And I can't remember the specifics, but I think there was advice given to us by our expert, our consultant on senate pairings.

Q. Do you remember the general principles of law you were keeping in your mind when you decided, for example, house districts, what you were looking at, the criteria?

A. Yeah, that was voting rights, making sure that --

MR. SINGER: She's asking you about house districts.

MS. WELLS: Yes.

BY MS. WELLS:

Q. Yes. So with the house districts, when you were trying to decide where to draw the lines, you considered -- I hear you talk often about the parameters and criteria you considered?

A. Yeah.

Q. In 3, right?

A. I think my recollection is we drew the 40 districts, got our districts, and then had those analyzed by the consultant to make

sure they complied with the Voting Rights Act.

Q. And outside the Voting Rights Act, just from the constitution, itself, when you were thinking about how these districts complied or did not comply with the constitution, do you remember the general principles of law that you applied?

A. Well, I think when we looked really, first, to the big three, as we all referred to them, and then making as close as practicable to the ideal district size, and we came up with our 40 district plan and then had that looked at in terms of the other areas that are required.

Q. And when you did that, when you -- I mean, I know you likely had some general knowledge coming into this, but were you provided some training and guidance on exactly what the criteria were under the constitution and how to weigh it and how it had been weighed in the past?

A. I think general guidance is a good description. And I by no means was an expert on this, so I had very little knowledge coming into it.

Q. But you sort of -- so the board sort of -- it had some general knowledge in its criteria, and then once it formulated a plan then it would -- it would check that, check the legality of that plan with legal counsel; does that sound right?

A. That sounds fair, yeah.

Q. So when you were looking at these issues of dilution and racial polarization in East Anchorage did you have a similar set of criteria that you were applying?

A. I mean, would you suggest -- are you talking about the senate districts, now?

Q. Yes, let's start there, with the senate pairings, in particular. Was there criteria that your legal counsel and your analysts had provided you to give you some guidance on how to really, you know, the criteria that you were applying to get to where you were and to your decision?

MR. SINGER: And I'm going to counsel, so there's -- you got to draw a line in your mind, here. We provided you advice about the general legal principles, we did that in public session with regard to the requirements

for senate pairings, and you're free to answer about that.

We also gave you specific litigation-related advice in an executive session, and that's confidential. So that's the --

A. Okay. That's what we talk about, the pairings, and I guess that would have been an executive session when advice was given on specific pairings for senate districts.

Q. Okay. I think -- I feel like I will try to ask it one more time.

A. Okay.

Q. And it's -- so when you're looking at these senate pairings in a specific area, and really I'm asking specifically about Anchorage because that is an area where additional analysis was requested, you know, did you -- in your mind were you thinking, okay, I have to avoid dilution of a -- a minority voter or a person who's in the minority political affiliation or a minority language or national origin, were you -- did you have sort of a concept of I need to pay attention to how our pairings may or may not dilute the voice of the

individuals in this district?

A. Yeah, I believe we did. I think we -- you know, that was something that all of us were conscious of.

Q. Okay. And so do you remember what that was, what you sort of looked at as you weighed the potential pairings?

A. Not specifically.

MS. WELLS: Okay. Well, it has been a long day, and I think the few other -- lucky for you, I have two pages of questions that have already been completely addressed, so you -- 5:19 is not so bad. So I want to thank you, really, for everything that you guys did. I know that even the staff, this was truly a herculean effort, so on behalf of the East Anchorage plaintiffs, who do very much approve of the house district map.

THE WITNESS: Well, thank you, Ms. Wells. And I should just say, as for the plaintiffs from East Anchorage, the ones that are a party to this litigation, they were really a great people. I appreciated their participation. They were articulate, passionate about what they felt, and to have members of the

public come out and engage I -- I was impressed with that and appreciated them doing that, and so you've got great clients that you're representing.

MS. WELLS: I do. I do, but I will tell them that. They will be -- they will really appreciate that. So enjoy your evening and hopefully you can go do something fun. I have no further questions.

THE WITNESS: Thank you.

THE VIDEOGRAPHER: Anything further, anybody?

MR. SINGER: Oh, Tanner, do you have any questions?

MR. AMDUR-CLARK: I do not. Thank you again, and thank you for all your work on this process.

THE WITNESS: You bet, Tanner.

THE VIDEOGRAPHER: Let me close it out. This concludes the deposition of John Binkley. The time is 5:12.

(Signature having not been waived, the deposition of John Binkley was concluded at 5:20 p.m.)

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September 7, 2021

Submitted via Email

Alaska Redistricting Board
P.O. Box 240147
Anchorage, AK 99524
testimony@akredistrict.org

Dear Alaska Redistricting Board:

The Native American Rights Fund ("NARF") is a non-profit 501(c)(3) organization that focuses on applying existing laws and treaties to guarantee that national and state governments live up to their legal obligations to tribes. After watching the Redistricting Board's ("Board") meetings on August 23 and 24, we wanted to raise multiple concerns with the Board's process.

I. Failure to consider the Voting Rights Act prior to public comment

The Board appears to have decided that it will not consider the requirements of the Voting Rights Act ("VRA") until the final weeks of the redistricting process. This decision is not required under Alaska's Constitution or the Alaska Supreme Court's prior decisions, and it will significantly harm the ability of the public to participate fully and fairly in redistricting.

Alaska law does not require the Board to ignore the VRA before conducting public hearings, and doing so is illogical. *In re 2011 Redistricting Cases*, 274 P.3d 466, 467-68 (Alaska 2012), does not compel a contrary approach. In that case, the Alaska Supreme Court outlined the proper procedure for drawing maps:

> The Board must first design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socioeconomic integration; it may consider local government boundaries and should use drainage and other geographic features in describing boundaries wherever possible. Once such a plan is drawn, the Board must determine whether it complies with the Voting Rights Act and, to the extent it is noncompliant, make revisions that deviate from the Alaska Constitution when deviation is "the only means available to satisfy Voting Rights Act requirements."

Id. (quoting *Hickel v. Se. Conf.*, 846 P.2d 38, 52 n.22 (Alaska 1992)).

EXHIBIT H
Page 1 of 5

This process does *not* require that the Board conduct public hearings without first considering the VRA. Instead, this process merely requires that the Board create its initial draft map by first looking to the State's constitutional requirements, and then making VRA-required adjustments as necessary. In both *In re 2011 Redistricting Cases* and *Hickel v. Southeast Conference*, the court specifically referenced Article VI, Section 6 of the Alaska Constitution:[1] the section that provides the criteria for map drawing. *Hickel* 846 P.2d 38 at 44; *In re 2011 Redistricting Cases*, 274 P.3d at 467. The court does not refer more broadly to the public comment process required under the Alaska Constitution. And neither the court nor the Constitution require that consideration of the VRA wait until after the Board's public hearings are largely complete. Indeed, "[o]nce such a plan is drawn, the Board must determine whether it complies with the Voting Rights Act," not after the public-comment process. *In re 2011 Redistricting Cases*, 274 P.3d at 467.

The 2011 Board overtly prioritized the VRA from the very beginning of its map drawing, and it was this approach that the court took issue with. As the court noted, "[i]t is undisputed that the Board began redistricting in March and April of 2011 by focusing on complying with the Voting Rights Act, thereby ignoring the process we mandated in *Hickel*." *Id*. In 2011, the Board received Census data in mid-March. By early April, after traveling the state for preliminary public hearings and before beginning to draw an initial draft map, the Board was already discussing the requirements of the VRA and how it might avoid retrogression. It chose to prioritize those requirements when beginning to create districts. *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1034 (Alaska 2012). The error there was not that the Board considered the VRA before issuing its proposed map; it was that the Board began drawing its initial draft map with the VRA—and not the State's constitutional requirements—at the forefront.

Now, in 2021, by failing to consider the VRA prior to issuing a proposed map and holding hearings to receive public comments, the Board is limiting the impact Alaskans can have on the redistricting process. The Board will tour the state with a map that may not satisfy the requirements of federal law. When the Board must later make decisions about how to adjust that map in order to comply with federal law, it will do so without the benefit of significant public comment on those adjustments. Alaska's Constitution mandates public hearings for a reason. The Redistricting Board must ensure that those hearings are as effective as possible by adopting a proposed map that complies with all governing law, including the VRA.

[1] "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." ALASKA CONST. article VI, sec. 6.

II. Failure to consider race as part of socioeconomic integration

The Board and staff appear to believe that no consideration of race is allowed when drawing districts that achieve relative socioeconomic integration. However, the fact that areas are predominantly Alaska Native has been cited by the Alaska Supreme Court as support for socioeconomic integration. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987); *Hickel*, 846 P.2d at 46. In these cases, race is one factor in a list of several that can support the conclusion that two areas are sufficiently integrated. For example, in *Kenai Peninsula Borough*, the court held that a Southeast district that included Metlakatla and Hoonah was socioeconomically integrated in part because "many of the communities [it included] are predominantly Native." 743 P.2d at 1361. To be sure, the mere fact that a district includes largely Alaska Native communities is not enough to show socioeconomic integration, particularly when the Alaska Native peoples in that district include multiple, culturally distinct groups. *See Hickel*, 846 P.2d at 53–54. But there is no bar on the Board considering race as one possible indicator of socioeconomic integration.

Though the Board is not required to consider race as a factor in the analysis, it is one of several factors the Board *may* consider. The Board should allow individuals and organizations to testify about racial characteristics, as part of the socioeconomic integration analysis, as that is one factor the Board should consider.

III. Refusal to consider data about third-party maps

In the Board's August 30 email to subscribers, it instructed those who plan to submit maps for the Board's consideration to "not include labels that are related to politics, elections, or demographic information such as . . . statistics on voting age population, race, ethnicity, or gender." From this email, it appears that the Board will refuse to consider whether third-party maps satisfy the requirements of the VRA before releasing them for public comment. As discussed above, this decision is not required by state law. Furthermore, it abdicates the Board's responsibility to propose maps that satisfy all of the legal requirements governing redistricting. Again, by declining to consider VRA compliance until after the public hearing process, the Board is not allowing the public to fully participate in the redistricting process.

IV. Reliance on past districts

During the Board's August 23 and 24 meetings, Executive Director Peter Torkelson stated that it was good practice to adhere to prior districts, because they had already been approved by the Alaska Supreme Court. This approach is incorrect. Unlike some other states, Alaska has no criteria that legislative districts should respect existing districts, or even consider them at all. As far as we are aware, the Board has not passed its own guidance that would adopt this as a criterion for line-drawing. Furthermore, the populations distributed across our state have changed and shifted over the course of the past decade. Configurations that were allowed ten years ago might not be justifiable today—new, more compact, and more integrated districts may be possible. The Board cannot simply assume that the current districts are constitutional as applied to the new 2020 data.

V. Availability of race data in the public software

During the August 23 and 24 meetings, Board member Melanie Bahnke asked staff why there was no race data included in the public software offered through Districtr. Executive Director Torkelson said he would need to speak with Districtr to determine whether this data could be added.

Districtr has racial breakdowns available, by total population and by voting-age population, for nearly every state. This information is provided on their mapping software and was previously available for Alaska. NARF contacted Districtr inquiring why this information had been removed for Alaska, and the organization quickly offered to re-add the race data to their own website, although not to the program nested on the Board's website.

It is NARF's understanding that Board staff told Districtr that the Board is barred from considering race data in the initial map-drawing process and recently asked Districtr to remove the race data for Alaska. The Board should work with Districtr to reintegrate this demographic information into the mapping program. It is crucial that Alaskans have this information so they can ensure that their proposed maps comply with the requirements of the VRA. Additionally, Alaskans may want to consider racial information in their determinations about socioeconomic integration, and will need access to the data in order to effectively do so.

VI. Use of executive sessions

The Board is subject to the Open Meetings Act, which it adopted explicitly in January 2021. Under this law, "actions of [the Board should] be taken openly and [its] deliberations [should] be conducted openly." Alaska Stat. § 44.62.312(a)(2). All of the Board's meeting should be open, except where executive sessions are allowed.

At this point, the Board has received nearly all legal briefing in executive session. The current practice excludes the public from important discussions and fails to educate the public about the requirements to which maps must conform.

The Open Meetings Act contains four explicit exceptions, specifying the subjects that may be discussed in executive session: (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). *Id.* § 44.62.310(c). None of these exceptions applies to discussions of the relevant law governing redistricting.

Executive session is not broadly appropriate under attorney-client privilege. Though attorney-client privilege may sometimes require executive session, this is limited to situations where "the revelation of the communication will injure the public interest." *Cool Homes, Inc. v. Fairbanks North Star*

Borough, 860 P.2d 1248, 1262 (Alaska 1993). This includes avoiding legal liability, litigation strategies, proposed settlements, or conference regarding an appeal. *Id.* (collecting cases). That exception is not appropriate for a "mere request for general legal advice or opinion by a public body in its capacity as a public agency." *Id.* at 1261–62. Indeed, even if the Board were currently involved in litigation, that might not be enough. *Id.* at 1262.

It appears that the information the Board is currently receiving in executive session includes general legal advice regarding its actions as a public entity. Sharing that information with the public would not harm the public interest; indeed, it "might be informative and desirable." *Id.* Therefore, the Board should reconsider its liberal use of executive sessions. General legal advice should be provided in view of the public.

Thank you for the opportunity to participate in the redistricting process. We recognize that this is a difficult task and we appreciate the time and effort that you have dedicated to it.

Sincerely,

Megan Condon
Staff Attorney
Native American Rights Fund
MCondon@narf.org
(907) 276-0680

EXHIBIT H
Page 5 of 5

October 26, 2021

John Binkley, Chair
Alaska Redistricting Board
PO Box 240147
Anchorage, AK 99524

Dear Mr. Binkley,

As you are aware, the Alaska Constitution requires that the Alaska Redistricting Board ("the Board") conduct public hearings regarding proposed redistricting plans. On September 20, 2021, the Board adopted six proposed redistricting plans to form the basis of this year's meetings. Since that date, the Board has been traveling the State on a public meeting tour to obtain input from Alaskans before adoption of the final plan by November 10, 2021.

The Alaska Democratic Party has been watching this process closely: As an entity dedicated to equality and civil rights for all Alaskans, we have a substantial vested interest in ensuring that the plan that is ultimately adopted is constitutional, fair, and ensures that the diverse voices of our state and local communities are well-represented in the democratic process through our elected officials. In this spirit, we write to underscore and resolve two ongoing and serious concerns that have emerged throughout the redistricting process: the inability of the public to meaningfully attend and participate at the Board's meetings, and the importance of making the Board's final plan available promptly and in an actionable format.

In the words of Board Member Nicole Borromeo, the Board's public meetings are an opportunity "to hear from Alaskans from every region of the state… as [the Board] present[s] [the draft maps] in public meetings in communities across the state."[1] This is consistent with the Board's obligations under the Alaska Open Meetings Act, Alaska Statute 44.62.310-312, to ensure that **all** of its meetings are open to the public. As articulated within the Act, the function of governmental bodies, such as the Board, is to

[1] *See* "Board Approves Proposed Plans," September 20, 2021, https://www.akredistrict.org/news/board-approves-proposed-redistricting-plans/ (accessed October 21, 2021).

"aid in the conduct of the people's business."[2] Thus, the people have a right to be fully informed in the actions the government takes so that they are empowered to "control… the instruments they have created."[3]

However, it appears that access to the Board's meetings is not being granted to all members of the public who would like to attend. While the Board may be making efforts to travel throughout the state to hear from community members in person regarding the proposed plans, the Board's decision to disallow telephonic or videoconference participation at community meetings poses substantial legal problems. Not only does this practice prevent participation by members of rural communities who are logistically unable to travel to meeting locations, but it also excludes from meetings those who do not wish to risk infection from the ongoing global COVID-19 pandemic.

Permitting submission of written comments and holding occasional "call-in only" meetings are not acceptable substitutes for real time remote participation in the Board's community-based meetings. At these community meetings, members of the public benefit not only from the opportunity to speak directly to the Board, but also from experiencing the larger dialogue from community members and the conversation between Board members responsive to this community input. Because these same dynamics are not present with regard to written comments or the remote "call-in only" hearings, the public is being denied the protections of the Open Meetings Act and the benefits of participating in the deliberative process underlying the work of the Board.

Both the plain language of Alaska statute and precedent from the Alaska Supreme Court empower the Board to permit remote access to meetings. AS 44.62.310(a) specifically states that "attendance and participation at meetings by members of the public… may be by teleconferencing." The use of teleconferencing in this context facilitates not only individuals' safety, but also "the convenience of the parties, the public, and the governmental units conducting the meetings."[4] Notably—and with specific regard to the dangers posed by the Board's practice in the context of a pandemic—in *State v. Arctic Village Counsel*,[5] the Alaska Supreme Court just last month observed that "travel and remaining indoors for extended periods of time with other people during the COVID-19 pandemic poses personal health risks,"[6] and approved a modification to Alaska's voting procedures which enabled voters to exercise their political rights despite ongoing public health concerns.[7] Under this guidance, we are hopeful that the Board will reconsider the manner in which it hosts its community

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[2] AS 44.62.312(a).
[3] *Id.*
[4] AS 44.62.312(a)(6).
[5] *State v. Arctic Vill. Council,* No. S-17902, 2021 WL 4234997, at *8 (Alaska Sept. 17, 2021).
[6] *Id., quoting United States v. Greenlight Organic, Inc.,* 503 F. Supp. 3d 1269, 1273 (Ct. Int'l Trade 2021).
[7] *Id.*

meetings so that all who desire to do so are able to make their voices heard while staying safe.

Consistent with our desire to ensure that meetings are conducted fairly and safely, we also wish to ensure that the public is able to easily access the Board's final plan in a technologically actionable and accessible format. Previously, the Board has initially disseminated plans only in .pdf format. Because this format could not be manipulated, zoomed in, or otherwise analyzed, it was impossible to easily determine whether the plan complied with constitutional mandates or raised any other concerns. In anticipation of the Board's release of the final adopted plan, we request that it will be made available for immediate viewing and download in all of the following formats: .pdf, .shp, and .kmz/.kml or public Google Map, along with the intended senate pairings, in order to allow the public and interested parties to properly analyze and assess the demographic and statistical metadata and information attendant to the plan's districts.

Thank you very much for your prompt and careful attention to these straightforward requests, both of which are made to ensure the Board complies with its statutory and constitutional duties. Please do not hesitate to contact me with any questions or concerns, as the Alaska Democratic Party expects the Board will prioritize its compliance with its legal obligations as described herein.

Sincerely,

Casey Steinau

Casey Steinau
Chair

Lindsay Kavanaugh

Lindsay Kavanaugh
Executive Director