

1 IN THE SUPREME COURT OF THE STATE OF ALASKA

2 )  
3 In the Matter of the )  
4 2021 Redistricting Plan. )

5 )  
6 ) Supreme Court No. S-\_\_\_\_\_  
Trial Court Case No. 3AN-21-08869CI

7 **ALASKA REDISTRICTING BOARD’S**  
8 **EMERGENCY PETITION FOR REVIEW**

9 **I. INTRODUCTION**

10 The Redistricting trial is set to begin on Friday, January 21, and today the  
11 superior court issued an order that constitutes an unprecedented departure from settled  
12 law as to a public entity’s right to confidential advice of counsel. This case involves  
13 five challenges to the independent Alaska Redistricting Board’s (“Board”) 2021  
14 Redistricting Plan which reapportions the Alaska Legislature based on the 2020 U.S.  
15 Census. The Board seeks immediate appellate review of the superior court’s order that  
16 requires the Board to turn over communications between it and its constitutionally  
17 mandated legal counsel for *in camera* review because plaintiffs have alleged the Board  
18 violated the Open Meetings Act. The superior court’s order is based on a misreading  
19 and breathtaking expansion of this Court’s 1993 decision in *Cool Homes, Inc. v.*  
20 *Fairbanks North Star Borough.*<sup>1</sup> Neither *Cool Homes* nor the Open Meetings Act  
21 permits the superior court to review attorney-client communications, and neither  
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<sup>1</sup> *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993).

1 supports the notion that the Open Meetings Act limits the contents of attorney-client  
2 communications in written communications exchanged outside of public meetings.

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4 The superior court below read *Cool Homes* to mean:

- 5 1. A government body’s confidential attorney-client  
6 communications sent and received outside of any meeting are  
7 not privileged if the communication involves a discussion of  
8 a general principle of law.<sup>2</sup>
- 9 2. A government body’s discussion of general principles of  
10 redistricting law with its legal counsel during executive  
11 session, even in the context of discussion about specific  
12 litigation concerns, constitutes a violation of the Open  
13 Meetings Act.<sup>3</sup>
- 14 3. If a government body violates the Open Meetings Act in this  
15 way, its attorney-client communications, including emails  
16 exchanged before any meeting, are rendered non-privileged.<sup>4</sup>

17 *Cool Homes* says nothing of the sort. Moreover, the remedy for an Open Meetings Act  
18 violation is never waiver of the attorney-client privilege, but instead is the remedy set  
19 forth in AS 44.62.310(f). The statute allows an action taken by the body to be voided,  
20 if the public-interest factors counsel in favor of that sole remedy in the statute.<sup>5</sup> There  
21 is no legal basis for the superior court’s order below, and the Board seeks immediate  
22 review to protect its right to confidential legal advice from its counsel.

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24 <sup>2</sup> See Order Re Motion for Rule of Law – Attorney Client Privilege, at 14 (Jan.  
18, 2022), attached as **Exhibit A**.

25 <sup>3</sup> **Exhibit A** at 14.

26 <sup>4</sup> **Exhibit A** at 14.

<sup>5</sup> AS 44.62.310(f).

1           The Board seeks immediate review to protect its right to confidential attorney-  
2 client communications. Article VI, § 9 of the Alaska Constitution specifies that the  
3 Board shall have independent legal counsel. Under AS 15.10.220, the Board’s counsel  
4 is responsible for defending the Board’s proclamation plan. The superior court’s order  
5 is not only a radical departure from this Court’s precedents recognizing the sanctity of  
6 the secrecy of attorney-client communications, but threatens the Board’s ability, as an  
7 institution going forward, to obtain candid legal advice to complete its “Herculean” task  
8 of redistricting.<sup>6</sup> The next legal counsel to the Board will choose his or her words very  
9 carefully when communicating to the Board, knowing that a politically motivated  
10 plaintiff need only *accuse*—without evidentiary support—the Board of misusing  
11 executive session to have the finder of fact read through the Board’s confidential written  
12 attorney-client communications. The Board will be chilled in seeking confidential  
13 advice, knowing that the fact finder in inevitable litigation may read that advice.  
14 Because the superior court’s order below injures the public interest in having the Board  
15 complete its difficult task with the benefit of unvarnished, candid legal advice from its  
16 constitutionally mandated legal counsel and threatens the Board’s work going forward  
17 as an institution, the Board respectfully requests this Court grant the petition for review  
18 and reverse the superior court’s order.  
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25 <sup>6</sup> *Egan v. Hammond*, 502 P.2d 856, 865 (Alaska 1972); *see also Groh v. Egan*,  
26 526 P.2d 863, 875 (Alaska 1974); *Kenai Peninsula Borough v. State*, 743 P.2d 1352,  
1359 (Alaska 1987); *Hickel v. Southeast Conference*, 846 P.2d 38, 50 (Alaska 1992);  
*In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).

1 Immediate review is warranted because of the immediate and impending damage  
2 the court’s order poses. The damage to the Board and public wrought by the court’s  
3 order will occur as soon as the Board is forced to turn over attorney-client privileged  
4 communications to the finder of fact. It cannot be undone by a later ruling by this Court.  
5 The superior court cannot forget the contents of the Board’s confidential attorney-client  
6 communications even if a month or two from now this Court corrects its erroneous  
7 application of law. The damage will be irreparable.  
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10 **II. BACKGROUND**

11 On November 10, 2021, the Board issued its Final Plan that reapportioned the  
12 Alaska Legislature based on the 2020 U.S. Census results.<sup>7</sup> Under Article VI, Section  
13 11, anyone who sought to challenge the Final Plan had until December 10, 2021, to file  
14 their challenge.<sup>8</sup> Because redistricting challenges are as sure to occur as death and  
15 taxes, on November 19, 2021, nine days after the Board issued its Final Plan, the  
16 presiding judges of all of Alaska’s judicial districts issued an administrative order  
17 regarding judicial assignment of challenges.<sup>9</sup> Ultimately, five plaintiff groups  
18 challenged the Final Plan by the 30-day deadline on December 10, 2021.  
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22 <sup>7</sup> See Alaska Redistricting Board’s Proclamation of Redistricting (Nov. 10, 2021),  
attached as **Exhibit B**.

23 <sup>8</sup> Alaska Const. art. VI, § 11 (“Application to compel correction of any error in  
24 redistricting must be filed within thirty days following the adoption of the final  
25 redistricting plan and proclamation by the board.”).

26 <sup>9</sup> See Presiding Judges’ Statewide Administrative Order Regarding Redistricting  
Challenges (Nov. 19, 2021) (available at: [https://courts.alaska.gov/jord/docs/2021/  
statewide-redistricting-challenges.pdf](https://courts.alaska.gov/jord/docs/2021/statewide-redistricting-challenges.pdf)).

1 On December 21, 2021, the presiding judge of the Third Judicial District issued  
2 a Second Pretrial Order that included the following:

3 Any assertion of the attorney-client privilege in response to an initial  
4 discovery obligation or a discovery request must be accompanied by a  
5 privilege log that that [sic] specifies the documents being withheld. The  
6 log must refer to documents by an identifier and Bates stamp pages. The  
7 party asserting the privilege must assume that the Court will be asked to  
8 review the assertion and prepare copies of the material subject to the  
9 assertion for a rapid *in camera* filing.<sup>10</sup>

10 On December 22, 2021, the case was assigned to Anchorage Superior Court Judge  
11 Thomas Matthews, who issued a Third Pretrial Order.<sup>11</sup> The Third Pretrial Order  
12 required the Board to, among other things, produce *all* correspondence to or from the  
13 Board members and staff regardless of date (from the Board's appointment in 2020 to  
14 issuance of its Final Plan in November 2021) or subject matter (from redistricting  
15 discussions to lunch orders). Specifically, the Court ordered:

16 The Board shall prepare in electronic form for supplementation to the  
17 parties all correspondence to or from the board members or staff,  
18 excluding only correspondence that is claimed to be protected by attorney  
19 client privilege.<sup>12</sup>

20 The Board undertook the massive effort to comply with these unheard-of pretrial  
21 obligations and produced over 100,000 pages of email communications by December  
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25 <sup>10</sup> See Second Pretrial Order (Dec. 21, 2021), attached as **Exhibit C**.

26 <sup>11</sup> See Third Pretrial Order (Dec. 22, 2021), attached as **Exhibit D**.

<sup>12</sup> **Exhibit D** at 3 (¶ 9).

1 31, 2021.<sup>13</sup> The superior court then issued a Fourth Pretrial Order, with the following  
2 requirement:

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4 The Board shall prepare in electronic form for supplementation by  
5 December 31, 2021 to the parties all correspondence to or from the  
6 board members or staff, excluding only correspondence that is  
7 claimed to be protected by attorney client privilege. For such  
8 privilege communications, the Board shall prepare and serve a  
9 summary of the communications, identifying in at least general terms  
10 the number of documents or communications withheld and the date  
11 range. While the Court has not ordered a document by document  
12 privilege log at this time, the Board must prepare a separate file of  
13 such documents to aid in the resolution of any privilege assertion and  
14 for *in camera* filing.<sup>14</sup>

15 On January 7, 2021, the Board produced a privilege log of the withheld  
16 communications. The same day, one plaintiff group—the East Anchorage Plaintiffs—  
17 filed a Motion for Rule of Law seeking a ruling (but not a document production) on the  
18 scope of attorney-client privilege enjoyed by the Board.<sup>15</sup> Attached to the motion were  
19 transcripts from the Board’s meetings on November 5, 8, and 9, 2021, prior to its  
20 adoption of the Final Plan.<sup>16</sup>

21 From these transcripts, the East Anchorage Plaintiffs speculated that the Board  
22 had improperly used executive session to: (1) discuss with its legal counsel general  
23 principles of law regarding redistricting, and (2) vet with its legal counsel new senate

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23 <sup>13</sup> **Exhibit A** at n.66.

24 <sup>14</sup> See Fourth Pretrial Order at 5 (Jan. 4, 2021), attached as **Exhibit E**.

25 <sup>15</sup> See East Anchorage Plaintiffs’ Motion for Rule of Law Regarding Scope of  
26 Attorney-Client Privileged Communications with Government Entities (Jan. 7, 2022),  
attached as **Exhibit F**.

<sup>16</sup> See Exhibits A-C attached to **Exhibit F**.

1 pairings before the public heard about the pairings.<sup>17</sup> The East Anchorage Plaintiffs  
2 attached no evidence that confirmed these accusations—it was just their hunch.

3  
4 A couple days later, another plaintiff group—the Matanuska-Susitna Borough  
5 Plaintiffs—filed a request to join the East Anchorage Plaintiffs’ Motion.<sup>18</sup> The  
6 Matanuska-Susitna Borough Plaintiffs attached to their joinder request the privilege log  
7 that the Board had produced to comply with the superior court’s pretrial orders that  
8 required the Board to produce—without any discovery request from plaintiffs—all of  
9 the Board’s communications. The privilege log was a list of over 2,425 emails. The  
10 Matanuska-Susitna Borough demanded the superior court order the Board produce for  
11 *in camera* review 1,800 of the 2,425 emails.<sup>19</sup> The next day, the Valdez and Skagway  
12 Plaintiffs joined the request.<sup>20</sup> The next day after that the Calista Plaintiffs also filed a  
13 joinder request.<sup>21</sup>

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16 Two days later on January 12, 2022, the superior court issued an order directing  
17 the Board to respond to these motions by January 13, 2022.<sup>22</sup> But before the Board  
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19 <sup>17</sup> **Exhibit F** at 2.

20 <sup>18</sup> *See* Mat-Su Borough Plaintiffs’ Joinder in Motion for Rule of Law Regarding  
21 Scope of Attorney-Client Privilege (Jan. 10, 2022), attached as **Exhibit G**.

22 <sup>19</sup> *See* Exhibit A to **Exhibit G** (on thumb drive, sort by color; yellow is demanded  
23 production).

24 <sup>20</sup> *See* Valdez-Skagway Plaintiffs’ Joinder in Motion for Rule of Law Regarding  
25 Scope of Attorney-Client Privilege (Jan. 11, 2022), attached as **Exhibit H**.

26 <sup>21</sup> *See* Calista Plaintiffs’ Joinder in Motion for Rule of Law Regarding Scope of  
Attorney-Client Privilege (Jan. 12, 2022), attached as **Exhibit I**.

<sup>22</sup> Order for ARB Response to Motions for Rule of Law re Scope of Attorney-  
Client Privilege (Jan. 12, 2022), attached as **Exhibit J**.

1 could file its response to the motions on January 13, the Court issued another order for  
2 the Board to produce the emails *before* the court ruled on the motions.<sup>23</sup>

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4 Also on January 13, the Board filed its response to the motions.<sup>24</sup> The Board  
5 pointed out in its opposition that Plaintiffs had made several errors of law and fact in  
6 their motions. Shortly after filing its response, the Board also moved the superior court  
7 to reconsider its demand that the Board produce the emails *before* the superior court  
8 determined that *in camera* review was appropriate, or, alternatively, asking for a short  
9 stay so the Board could seek emergency relief from this Court.<sup>25</sup> The superior court  
10 granted reconsideration and directed the Board to prepare for an *in camera* review.<sup>26</sup>  
11 The Valdez and Skagway Plaintiffs,<sup>27</sup> the Mat-Su Plaintiffs,<sup>28</sup> and the East Anchorage  
12 Plaintiffs<sup>29</sup> filed replies in support of the original motion.  
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17 <sup>23</sup> Order for Production of Privileged Documents for *In Camera* Review and  
18 Plaintiff Reply Briefs (Jan. 13, 2022), attached as **Exhibit K**.

19 <sup>24</sup> See Alaska Redistricting Board’s Opposition to East Anchorage Plaintiffs’  
20 Motion for Rule of Law (Jan. 13, 2022), attached as **Exhibit L**.

21 <sup>25</sup> See Alaska Redistricting Board’s Motion for Reconsideration or Alternatively,  
22 Motion to Stay Order (Jan. 13, 2022), attached as **Exhibit M**.

23 <sup>26</sup> See Order Granting Reconsideration (Jan. 14, 2022), attached as **Exhibit N**.

24 <sup>27</sup> See Valdez-Skagway Plaintiffs’ Reply to Alaska Redistricting Board’s  
25 Opposition to Rule of Law Motion (Jan. 14, 2022), attached as **Exhibit O**.

26 <sup>28</sup> See Mat-Su Borough Plaintiffs’ Response to Alaska Redistricting Board’s  
Opposition to East Anchorage Plaintiffs’ Motion for Rule of Law (Jan. 14, 2022),  
attached as **Exhibit P**.

<sup>29</sup> See 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 (Jan. 14, 2022), attaches as **Exhibit Q**.

1 On Sunday, January 16, the superior court held oral argument on the motion for  
2 rule of law. Before the hearing, the Board supplemented its summary of privileged  
3 communications and produced additional ones that it had reviewed and concluded were  
4 not privileged.<sup>30</sup> After the hearing, the Valdez and Skagway Plaintiffs filed with the  
5 Court a Supplemental Authority,<sup>31</sup> and the Board submitted its public meeting policy.<sup>32</sup>

7 On January 18, the superior court issued the Order that the Board seeks relief  
8 from in this petition for review.

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10 **III. DISCUSSION**

11 The Board seeks immediate relief from this Court to shield its confidential  
12 attorney-client communications from the eyes of the finder of fact below. The superior  
13 court's order requires the Board to produce confidential communications between  
14 counsel and the Board. That relief is an astounding departure from black-letter law that  
15 has shielded attorney-client communications for centuries. Plaintiffs' and the Board's  
16 arguments are included in their respective filings below, attached hereto. The Board  
17 does not repeat them here but highlights the points.  
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23 <sup>30</sup> Alaska Redistricting Board's Notice of Service of New Summary of Privileged  
24 Communications (Jan. 16, 2022), attached as **Exhibit R**. The spreadsheet marked as  
25 Exhibit A to the Notice of Service is on the thumb drive filed herewith).

26 <sup>31</sup> See Valdez-Skagway Plaintiffs' Supplemental Authority letter to Judge  
Matthews and Clerk of the Trial Courts (Jan. 16, 2022), attached as **Exhibit S**.

<sup>32</sup> See ARB's Notice of Filing Policy Requested During Oral Argument (Jan. 16,  
2022), attached as **Exhibit T**.

1           *First*, the superior court misstates the law of attorney-client privilege. Pursuant  
2 to Alaska Evidence Rule 503, any confidential communication between a client and a  
3 lawyer, made to facilitate professional legal services, is privileged. In *Griswold v. City*  
4 *of Homer*, this Court expressly held that public entities are entitled to the privilege.<sup>33</sup>  
5  
6 The Open Meetings Act does not amend, alter or apply in any way to the privilege that  
7 applies to written communications by counsel to client done outside of public meetings.  
8  
9 Nor does the statutory remedy in AS 44.62.310(f) say anything about waiver or  
10 disclosure of attorney-client communications.

11           *Second*, it is in the public interest for the Board to have confidential legal  
12 discussions with its counsel. As this Court has noted in affirming the government’s  
13 right to confidential legal advice, the “common law has long recognized the privileged  
14 nature of attorney-client communications and attorney work-product. . . .”<sup>34</sup> and that “it  
15 is clearly in the public interest for a governmental agency to be able to receive  
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20 <sup>33</sup> *Griswold v. Homer City Council*, 428 P.3d 180, 187 (Alaska 2018).

21 <sup>34</sup> *See id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“The  
22 attorney-client privilege is the oldest of the privileges for confidential communications  
23 known to the common law.” (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton  
24 rev. ed. 1961))); *Hickman v. Taylor*, 329 U.S. 495 (1947) (recognizing the work-  
25 product privilege for litigation); *Langdon v. Champion*, 752 P.2d 999, 1004 (Alaska  
26 1988) (explaining that “[t]he ‘work product doctrine,’ first recognized [in *Hickman*], is  
part of Alaska’s Civil Rule 26(b)(3).” (footnote omitted)); *United Servs. Auto. Ass’n v.*  
*Werley*, 526 P.2d 28, 31–33 (Alaska 1974) (applying common law attorney-client  
privilege); *Killington, Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368, 1376-80 (Vt. 1990)  
(applying the common law work-product privilege to the Vermont Access to Public  
Records Act, Vt. Stat. Ann. tit. 1, § 317(b)(4) (1989)).

1 confidential advice from its attorneys.”<sup>35</sup> That is certainly true of the Board, which is  
2 comprised of five different Alaskans every ten years to engage in the Herculean effort  
3 of legislative reapportionment in Alaska.  
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5 *Third*, the superior court appears to be ordering production of privileged  
6 documents for *in camera* review based on a statute that does not apply to the  
7 independent Alaska Redistricting Board and based on a remedy not available under  
8 Alaska’s Open Meetings Act, even if it did apply to the Board. Specifically, Plaintiffs  
9 cite to this Court’s decision in *Cool Homes, Inc. v. Fairbanks North Star Borough*,<sup>36</sup> in  
10 which this Court noted that Alaska’s Open Meetings Act required additional  
11 transparency from governmental bodies *during public meetings*. But, this Court has  
12 never determined that the Act applies to the Board, which was created in 1998 by a  
13 constitutional amendment that made it independent of all three branches of government,  
14 subject to the provisions of Article VI of the Alaska Constitution. The Court has since  
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18 <sup>35</sup> *Griswold*, 428 P.3d at 187-88 (citing *Gwich’in Steering Comm. v. Office of the*  
19 *Governor*, 10 P.3d 572, 578 (Alaska 2000) (recognizing that certain disclosures “would  
20 deter the open exchange of opinions and recommendations” and that certain privileges  
21 are necessary “to protect the executive’s decisionmaking process, its consultative  
22 functions, and the quality of its decisions”); *City of Kenai v. Kenai Peninsula*  
23 *Newspapers, Inc.*, 642 P.2d 1316, 1323 (Alaska 1982) (recognizing “the interest of the  
24 public in having the business of government carried on efficiently and without undue  
25 interference” (quoting *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413, 421 (Or. 1961)  
(en banc))); *City of Orlando v. Desjardins*, 493 So.2d 1027, 1029 (Fla. 1986) (noting  
26 “the imbalanced posture and the disadvantaged status of public entities” without the  
benefit of attorney-client privilege); *Killington*, 572 A.2d at 1379 (stating that not  
recognizing work-product privilege “would produce an anomalous and unfair result”).).

<sup>36</sup> *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1259-62  
(Alaska 1993).

1 then *assumed* it applied because it did not have to reach that issue because no relief was  
2 warranted based on a violation of the Act,<sup>37</sup> but it has never decided that issue. The  
3 Board is not subject to the Act because it is independent of the Legislature. Otherwise,  
4 the Legislature could pass laws that added requirements beyond Article VI that, for  
5 example, required the Board to shield incumbents or draw election districts based on  
6 the results of prior elections.<sup>38</sup>

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8 *Fourth*, even if the Act did apply to the Board, its statutory provisions say  
9 nothing about waiver of attorney client privilege. The Act specifies the remedy  
10 available for a violation of its provisions:  
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12 Action taken contrary to this section is voidable. . . . If the court finds that  
13 an action is void, the governmental body may discuss and act on the  
14 matter at another meeting held in compliance with this section. A court  
15 may hold that an action taken at a meeting held in violation of this section  
16 is void only if the court finds that, considering all of the circumstances,  
17 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.<sup>39</sup>

18 Nowhere does the Act specify that an alleged improper use of executive session should  
19 result in disclosure of what was communicated during that executive session, let alone  
20 that the Act should apply to limit the content of attorney-client communications made  
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23 <sup>37</sup> *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (*assuming* that  
the Open Meetings Act applied to the Board and refusing to void the redistricting plan).

24 <sup>38</sup> *See generally Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987)  
25 (holding that the legislature was not subject to the Open Meetings Act under the  
26 separation of powers doctrine). As an independent state entity, the Alaska Redistricting  
Board is beholden to Article VI, but is not subject to rulemaking by the legislature.

<sup>39</sup> Alaska Stat. 44.62.310(f).

1 before or after a public meeting. Neither the Plaintiffs nor the superior court identified  
2 a case from anywhere in America interpreting a state’s open meeting act to require  
3 disclosure of confidential attorney-client communications. Importantly, the Alaska  
4 Supreme Court refused to invalidate actions of the Governor’s Reapportionment Board  
5 back in the 1990s when the Board was part of the executive branch and subject to the  
6 Open Meetings Act because it reasonably concluded that voiding the action of the  
7 Board based on a meetings violation would be a disproportionate remedy.<sup>40</sup> None of  
8 the cases cited by Plaintiffs support their unheard-of conflating of open meetings law  
9 with waiver of attorney-client privilege.<sup>41</sup>  
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15 <sup>40</sup> *Hickel v. Southeast Conference*, 846 P.2d 38, 57 (Alaska 1992); *see also In re*  
16 *2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (assuming that the Open  
17 Meetings Act applied to the Board and refusing to void the redistricting plan).

18 <sup>41</sup> None of the following cases direct the government to disclose what occurred in  
19 an executive session because that executive session was improperly held: *Smith County*  
20 *Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984); *Minneapolis Star*  
21 *& Tribune Co. v. Housing and Redevelopment Authority*, 246 N.W.2d 448 (Minn.  
22 1976); *Oklahoma Associations of Municipal Attorneys v. Oklahoma*, 577 P.2d 1310  
23 (Ok. 1978); *City of San Antonio v. Aguilar*, 670 S.W.2d 681 (Tex. App. 1984); *Hui*  
24 *Malama Aina O Ko’olau v. Pacarro*, 666 P.2d 177 (Haw. App. 1983); *Channel 10,*  
25 *Incorporated v. Independent School District No. 709*, 215 N.W.2d 814 (Minn. 1974).

26 The only case cited by Plaintiffs that orders production of information from an improper executive session is *Detroit News, Inc. v. Independent Redistricting Commission*, 2021 WL 6058031, \*14 (Mich. Dec. 20, 2021). But, as explained above, that case was about Michigan’s new constitutional amendment that abrogated any right to attorney-client privilege and the remedy in that case was based on the Michigan Constitution, not an open meetings act statute: “To remedy these violations of the Constitution, we order production of the recording of the October 27 meeting and seven memoranda noted above.”) (emphasis added). Alaska’s Open Meetings Act provides no such remedy.

1           *Fifth*, the superior court’s automatic *in-camera* review provision is a departure  
2 from this Court’s precedent. As the U.S. Supreme Court has cautioned, “[t]here is no  
3 reason to permit opponents of the privilege to engage in groundless fishing expeditions,  
4 with the district courts as their unwitting (and perhaps unwilling) agents.”<sup>42</sup> Before a  
5 court will engage in an *in camera* review “‘the judge should require a showing of a  
6 factual basis adequate to support a good faith belief by a reasonable person,’ *Caldwell*  
7 *v. District Court*, 644 P.2d 26, 33 (Colo. 1982), that *in camera* review of the materials  
8 may reveal evidence to establish the claim that the [privilege] exception applies.”<sup>43</sup> The  
9 Alaska Supreme Court has heightened this requirement by adding a relevance  
10 requirement to the sought-after but withheld documents: “On appeal, Christensen cites  
11 no authority to justify requiring the court to conduct an *in camera* review of discovery  
12 documents withheld by a party on grounds of privilege, even when, as here, the  
13 assertion of privilege is facially valid, no specific basis for challenging the privilege is  
14 established, and no specific need for disclosure is shown.”<sup>44</sup>  
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19           Plaintiffs have not met this standard. Instead they seek to enlist the superior  
20 court on a fishing expedition through the Board’s correspondence with its attorney and  
21 correspondence in which its attorney’s advice was passed on by a member or staff to  
22 another within the Board. The order requires the Board to produce all emails pertaining  
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24 <sup>42</sup> *United States v. Zolin*, 491 U.S. 554, 571 (1989).

25 <sup>43</sup> *Id.* at 572.

26 <sup>44</sup> *Christensen v. NCH Corp.*, 956 P.2d 468, 474 (Alaska 1998) (emphasis added);  
*Central Const. Co. v. Home Indemnity Co.*, 794 P.2d 595, 598-99 (Alaska 1990).

1 to the Board’s redistricting work during the time period it adopted its Final Plan:  
2 November 1-10, 2022, regardless of whether the email was sent during a meeting of the  
3 Board at all. The superior court also indicates the Board is not entitled to attorney-  
4 client privilege about general legal principles, even though such communications  
5 plainly fall within the definition of privilege under Evidence Rule 503.  
6

7 *Finally*, the stakes of the court’s ruling on *in camera* review are heightened  
8 because this is a redistricting case. In redistricting cases, the court serves as the trier of  
9 fact.<sup>45</sup> Future counsel and future Boards will be forever chilled from exchanging  
10 candid, unvarnished legal advice if the precedent has been set that the finder of fact in  
11 the all-but-assured litigation that follows the redistricting process will have access to  
12 attorney-client communications if any challenger simply disputes the privileged nature  
13 of the communication or speculates that an Open Meetings Act violation may have  
14 occurred.  
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17 **IV. CONCLUSION**

18 For the foregoing reasons, the Board respectfully requests this Court grant its  
19 petition for review and reverse the superior court’s order that the Board produce its  
20 attorney-client communications to the finder of fact below for *in camera* review.  
21 Absent immediate intervention by this Court, the public will be injured by the superior  
22 court’s ruling because it will chill all future Board-attorney communications. Article  
23 VI, Section 9 requires the Board to obtain independent counsel for a reason:  
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<sup>45</sup> See Alaska R. Civ. P. 90.8(f).

1 redistricting Alaska is a complicated task that requires advice about how best to comply  
2 with the Alaska constitution. The superior court's order invades the attorney-client  
3 privilege based on a misreading of *Cool Homes* and an incorrect application of the Open  
4 Meetings Act to written communications not done during a public meeting.  
5

6 Trial is set to commence January 21, 2022. The Board respectfully requests that  
7 the Court grant immediate review, and either issue a decision based on review of the  
8 briefing and order below (all attached hereto), or that it direct immediate responses by  
9 opposing parties so that a decision can be made by January 19 or 20. If such prompt  
10 review is impossible, then the Court should direct a short stay of the superior court trial  
11 until this fundamental issue of law can be addressed by this Court.  
12

13 DATED at Anchorage, Alaska, this 18th day of January, 2022.  
14

15 SCHWABE, WILLIAMSON & WYATT, P.C.  
16 Attorneys for Alaska Redistricting Board

17 By:   
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Matthew Singer, ABA No. 9911072

Email: [msinger@schwabe.com](mailto:msinger@schwabe.com)

19 Lee C. Baxter, ABA No. 1510085

Email: [lbaxter@schwabe.com](mailto:lbaxter@schwabe.com)

20 Kayla J. F. Tanner, ABA No. 2010092

Email: [ktanner@schwabe.com](mailto:ktanner@schwabe.com)  
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