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IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the)
2021 Redistricting Plan.)
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Supreme Court No. S-18303

STATE’S RESPONSE TO EMERGENCY PETITION FOR REVIEW

Yesterday, the Redistricting Board filed an Emergency Petition for Review of the superior court’s order concerning the scope of the attorney-client privilege. The State asks this Court to deny that petition for review and reserve ruling on the potentially significant adverse consequences of the superior court’s legal analysis until after the superior court litigation plays out. This important issue need not and should not be decided until it can be thoroughly briefed and carefully considered by this Court.

The State is named as a defendant in two of the five consolidated redistricting cases. While it has not actively participated in those cases because it takes no position on the merits of those cases or the general discovery issues, the State has nevertheless actively monitored the cases. The State received both the superior court’s order and the Board’s Emergency Petition for Review yesterday, followed by this Court’s order this morning requesting responses by 3:00 p.m.

Appellate Rules 402 and 403 set forth this Court’s standards to take the highly unusual step of reviewing a mid-stream, non-final trial court order. Petitions for review should be granted only “when the sound policy behind the rule requiring appeals . . . to be taken only from final judgments or decisions is outweighed” by one of four

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considerations.¹ Despite the requirements of Rule 403(b) to include a discussion of those extraordinary circumstances justifying such review, the standards set forth in Appellate Rule 402 (b)(1)-(4) are not even mentioned in the Board's Petition. The Board seems to argue only that this Court should act promptly to prevent the superior court judge from performing an *in camera* review of the materials over which the Board has asserted the attorney-client privilege. The State does not agree that *in camera* review for privilege would cause harm to the Board or the public sufficient to warrant a rushed ruling on a wide-ranging, extremely important legal issue, in one day, without the benefit of careful briefing.

That said, the State agrees with the Board that the superior court appears to have made a legal error that this Court might need to correct on appeal. The superior court may have misconstrued this Court's ruling in *Cool Homes, Inc. v. Fairbanks North Star Borough*, with potentially significant consequences far beyond this case. *Cool Homes* addressed the propriety of an executive session under the Open Meetings Act (OMA), rather than the applicability of the attorney-client privilege in other contexts. Yet the superior court's reasoning could curtail the ability of *all* entities subject to the OMA to receive the kind of candid advice from counsel that the attorney-client privilege is

¹ Appellate Rule 402(b).

meant to protect.² Because State executive agencies are generally subject to the OMA, such a ruling—if affirmed by this Court—would have wide-ranging effects on executive branch agencies, many other boards and commissions, and all of the advice the Department of Law provides to its clients across State government. The Open Meetings Act is important, but so is the ability of government clients to receive careful and candid legal advice. The superior court’s weighing of those competing interests appears to sacrifice one to the other.

Ruling on the serious issue before the trial that begins in two days would be unnecessary and unwise. The superior court might, upon completing its *in camera* review, determine that the Board has correctly asserted attorney-client privilege after all. And even if the superior court makes a legal error, there is no reason this Court could not correct that error in the ordinary course after final judgment, with the benefit of full briefing and additional time.

The State is aware of the extraordinary time constraints on this litigation and has no interest in delaying resolution of the 2021 Redistricting Plan, so it also requests that any additional consideration of the attorney-client issue be conducted in a way that will

² See Order Re Motion for Rule of Law – Attorney Client Privilege, 14 (Jan. 18, 2022) (relying on *Cool Homes, Inc. v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993) to conclude “discussions of general principles of law applying to the redistricting process are not privileged”).

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not delay trial or the superior court's decision. Given the importance of the issue, however, if Court is inclined to grant the petition and issue a ruling that would have precedential value and implicate executive agencies, the State respectfully requests at least three business days to file a substantive response to the superior court's order.

DATED January 19, 2022.

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In the Matter of the 2021
Redistricting Plan.

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Supreme Court No.: **S-18303**

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

CERTIFICATE OF SERVICE

I hereby certify, that on this date, true and correct copies of the **State's Response to Emergency Petition for Review**, and this **Certificate of Service** were served via electronic mail on the following:

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