

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' PROPOSED FINDINGS OF FACT**

**I. RELEVANT BACKGROUND**

1. The Alaska Redistricting Board ("Board") members were appointed in late July, 2020.<sup>1</sup>

2. Republican Governor Michael Dunleavy appointed Budd Simpson ("Simpson") and Bethany Marcum ("Marcum"), both registered Republicans, on July 29, 2020.<sup>2</sup>

3. Marcum is a resident of Anchorage and Simpson is a resident of Juneau.<sup>3</sup>

4. Former Senate President Cathy Giesel appointed John Binkley ("Binkley") on July 29, 2020.<sup>4</sup>

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<sup>1</sup> Board 2021 Process Report, p. 1, ARB000005.

<sup>2</sup> Board 2021 Process Report, p. 1, ARB000005; Deposition of Budd Simpson ("Simpson Depo.") at 209:5-16; Deposition of Bethany Marcum ("Marcum Depo.") at 179:9-15.

<sup>3</sup> Board 2021 Process Report, p. 1, ARB000005.

<sup>4</sup> Board 2021 Process Report, p. 1, ARB000005.

5. Binkley is a registered Republican and has held office as a Republican in the past.<sup>5</sup>

6. The Democratic Speaker of the House of Representatives, Bryce Edgmon, appointed Nicole Borromeo (“Borromeo”) on July 30, 2020.<sup>6</sup>

7. Borromeo is a resident of Anchorage.<sup>7</sup>

8. Former Alaska Supreme Court Chief Justice Joel Bolger appointed Melanie Bahnke (“Bahnke”) on August 7, 2020.<sup>8</sup>

9. In December, 2020, the Board retained Peter Torkelson (“Torkelson”) to serve as the Board’s Executive Director and TJ Presley (“Presley”) to serve as its Deputy Executive Director.<sup>9</sup>

10. The State of Alaska Department of Labor agreed to provide “technical expertise” of the State Demographer, Eric Sandberg (“Sandberg”), who had assisted the Board in 2011 through 2013.<sup>10</sup>

11. On January 21, 2021, Torkelson sent an email to Binkley and Presley noting that through the archive review, they found the 2010 full formal request for proposal to retain Dr. Lisa Hanley. Torkelson noted that “much like the legal counsel choice, it strikes me that personality and difficult-to-quantify measures of experience or approach would

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<sup>5</sup> Board 2021 Process Report, p. 1, ARB000005; Deposition of John Binkley (“Binkley Depo.”) at 24:18-25:2.

<sup>6</sup> Board 2021 Process Report, p. 1, ARB000005.

<sup>7</sup> Board 2021 Process Report, p. 1, ARB000005.

<sup>8</sup> Board 2021 Process Report, p. 1, ARB000005.

<sup>9</sup> Board 2021 Process Report, p. 1, ARB000005.

<sup>10</sup> Board 2021 Process Report, p. 1, ARB000005.

bear most heavily on the Board's selection of an expert in the VRA arena. Because of these non-tangible factors, and[sic] RFI might make the most sense."<sup>11</sup>

12. In the January 21, 2021 email correspondence from Torkelson to Binkley and Presley, Torkelson recommended the use of a Request for Information instead of a Request for Proposals in part because "if a computer generated 1 million plans, 95% of them would be more 'balanced' using whatever hot button point the plaintiff was trying to make: partisan divide, racial divide, etc."<sup>12</sup>

13. In the January 21, 2021 email from Torkelson to Binkley and Presley, Torkelson advocated for a "VRA+ Ensemble expert." According to Torkelson, "this person would not only run the traditional VRA analysis, but could also develop and run an ensemble analysis of the Board's plan. This is a natural fit because the VRA person must have racial and partisan voting data to build their VRA analysis in the first place. The consultant would then be able to defend against an ensemble challenge during the litigation phase. In this way the consultant will have seen all the forbidden fruit data so that we aren't blindsided in a court room, and be prepared to defend out[sic] plan against a hostile ensemble style attack."<sup>13</sup>

14. On March 12, 2021, the Board retained Matt Singer and Lee Baxter of the Schwabe Williamson & Wyatt to "advise and represent the Board in legal matters."<sup>14</sup>

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<sup>11</sup> January 21, 2021 email correspondence from Torkelson to Binkley and Presley, ARB00111034; Ex. 6011, p. 1.

<sup>12</sup> January 21, 2021 email correspondence from Torkelson to Binkley and Presley, ARB00111035; Ex. 6011, p. 2.

<sup>13</sup> January 21, 2021 email correspondence from Torkelson to Binkley and Presley, ARB00111035; Ex. 6011, p. 2.

<sup>14</sup> Board 2021 Process Report, p. 2, ARB000006.

15. On March 2, 2021, Torkelson sent an email to Legislative Affairs Agency attorney Emily Nauman (“Nauman”) asking her if the Board’s interviewing of law firms privately rather than in public was appropriate. In response, Nauman asked Torkelson if the Board “decide it was covered by the general open meetings act (AS 44.62.310). Torkelson replied “Yes. We adopted the standard SOA open meetings law that applies to all boards and commissions.”<sup>15</sup> The Board did not alter its process regarding request for proposals for legal services despite its adoption of the Open Meetings Act.

16. On April 19, 2021, the Board issued a Request for Information for a Voting Rights Act (“VRA”) Consultant and on June 21, 2021 the Board executed a contract with Bruce Adelson and Dr. Jonathan Katz of Federal Compliance Consulting, LLC.<sup>16</sup>

## **II. THE WORK OF THE BOARD**

17. On August 12, 2021, the U.S. Census Bureau released the results of the 2020 US Census regarding Alaska’s population. The release of the U.S. Census Bureau’s results obligated the Board to adopt a proposed plan(s) within 30 days of the August 12, 2021 release date.<sup>17</sup>

18. On September 9, 2021, the Board adopted “Board Composite v.1” and “Board Composite v.2” proposed redistricting plans, neither of which contained proposed senate pairings.<sup>18</sup>

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<sup>15</sup> March 2, 2021 email correspondence between Torkelson and Neuman, ARB00130626, Ex. 6010.

<sup>16</sup> Board 2021 Process Report, p. 2, ARB000006.

<sup>17</sup> Board 2021 Proclamation of Redistricting, p. 1, ARB000002.

<sup>18</sup> ARB10708-ARB10765 (Board Composite v.1); ARB 10766-ARB10821 (Board Composite v.2).

19. September 11, 2021, marked the end of the 30-day period within which the Board was required to adopt its proposed plans. The Board did not meet on September 10 or September 11. Thus, the only two plans developed and adopted with the 30-day period were Versions 1 and 2 (V.1 and V.2). Neither V.1 nor V.2 included proposed senate pairings. The Board did not meet again until September 17

20. On September 17, 2021, The Board met for a total of six hours and 12 minutes to review the draft maps.<sup>19</sup> After hearing two hours of public testimony, the Board moved to replace V.1 and V.2 with Version 3 (V.3) and Version 4 (V.4).<sup>20</sup> Prior to this time, V.3 and V.4 had never been made available for public review or comment, and both maps differed substantially from the maps previously drawn by the Board.<sup>21</sup> The Board then received presentations from five third-party groups that each offered a proposed redistricting plan, and the Board took public testimony related to those plans.<sup>22</sup> Again, none of the Board's proposed plans included senate pairings, and members of the public were not able to testify about senate pairings.

21. On September 20, 2021, the Board met for a total of six hours and six minutes. This was the last meeting before the Board commenced the "road show" phase of its process. The Board adopted V.3 and V.4 after the 30-day period within which the Board was constitutionally required to adopt one or more proposed plans. The Board also

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<sup>19</sup> ARB000166 - ARB000174.

<sup>20</sup> Board 2021 Process Report, p. 3 (Nov. 20, 2021), ARB000007.

<sup>21</sup> See ARB000618-000855 (Board Packet for Sept. 17-19, 2021 Board meetings, which did not contain any mention of revisions to V.1 or V.2 or proposed revisions to Board drawn maps); ARB000856-000943 (Board Packet for Sept. 20, 2021 omitting any proposed revisions to Board drawn maps or revised Board drawn maps).

<sup>22</sup> ARB000170-000173.

adopted four of the five third-party plans. Those plans were from a coalition of Doyon, Tanana Chiefs Conference, Fairbanks Native Association, Sealaska, and Ahtna (the “Doyon Coalition”); Alaskans for Fair Redistricting (“AFFR”); Alaska for Fair and Equitable Redistricting (“AFFER”) and the Alaska Senate Minority Caucus (“Senate Minority”). The Board adopted and then rescinded the plan proposed by the Alaska Democratic Party, making it the only proffered third-party plan the Board did not adopt. It was at this meeting that the Board contends it adopted proposed senate pairings through the AFFER proposed plan; however, this was never announced to the public; members of the public were not permitted to testify about senate pairings; and the AFFER proposed plan does not resemble any proposal discussed by the Board during its senate pairing proceedings on November 8-10, 2021.

22. The Board also adopted four third-party redistricting plans, on September 20, 2021, which did include senate pairings. However, none of the senate pairings proposed in the third-party plans paired a house district containing North or South Muldoon, Government Hill or portions of Downtown Anchorage with Eagle River.<sup>23</sup>

23. In its announcement regarding the adopted plans, the Board referenced only the map components of each plan — the announcement included a quotation from Member Nicole Borromeo, which stated “[w]e look forward to hearing feedback from Alaskans on our new draft maps, as well as the four adopted third-party maps, as we present them in public meetings in communities across the state.”<sup>24</sup> The announcement

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<sup>23</sup> Third Party Proposed Plans, ARB001388-ARB001424.

<sup>24</sup> See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

was devoid of any mention of senate pairings, televising to the public that no proposed senate pairings had been adopted.

24. On that same day, the Board unanimously approved the purchase of items in the managed services proposal and permitted each Board member to work directly with JC Kestel, Procurement Officer of Legislative Affairs Agency, to obtain cell phone service.<sup>25</sup>

25. During depositions, Board members confirmed they were offered a lap top computer, cellular telephone, and dedicated Board email account.<sup>26</sup> Several Board members also confirmed the use of their personal cell phones for Board work and that they produced text messages and emails from their personal accounts relevant to the Board's work.<sup>27</sup>

26. After the road show was concluded, the Board reconvened in Anchorage to finalize its house district map. On November 2, 2021, the Board met for a total of six hours and 55 minutes.<sup>28</sup> Of that total time, the Board spent two hours and 23 minutes in executive session.<sup>29</sup> In addition, the Board spent two hours and 48 minutes in a mapping work session.<sup>30</sup>

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<sup>25</sup> September 10, 2021 Board Meeting Minutes; ARB000119 – ARB000120.

<sup>26</sup> Deposition of Nicole Borrromeo ("Borrromeo Depo.") at 160:12-25; Deposition of Melanie Bahnke ("Bahnke Depo.") at 152:14-23, 153:18.

<sup>27</sup> Borrromeo Depo. at 160:12-25; Bahnke Depo. at 152:18-155:9, Marcum Depo. at 104:25-105:11.

<sup>28</sup> ARB000193; ARB000199.

<sup>29</sup> ARB000196.

<sup>30</sup> ARB000199.

27. On November 3, 2021, the Board met for a total of seven hours, most of which took the form of a mapping work session.<sup>31</sup>

28. On November 4, 2021, the Board met for a total of seven hours, most of which took the form of a mapping work session.<sup>32</sup>

29. On November 5, 2021, the Board met for a total of 10 hours and nine minutes.<sup>33</sup> During that time, the Board met in executive session twice. The first executive session lasted one hour and 35 minutes.<sup>34</sup> This was followed by a mapping work session that lasted one hour and 46 minutes.<sup>35</sup> Following public testimony, the second executive session lasted 55 minutes.<sup>36</sup> The Board thus met in executive session for a total of two and one-half hours. The Board adopted V.4, as well as a redistricting map labeled “Board Consensus v.7” that was labeled the “Final Map” as the “final redistricting map with the allowance that staff may make minor changes to facilitate metes and bounds, and will return a report with recommended changes to the board for review prior to final proclamation adoption.”<sup>37</sup>

30. On November 8, 2021, having finalized its house district map, the Board reconvened to begin its work regarding senate districts. That day, the Board met for a total of nine hours and 25 minutes, during which time it took two hours of public testimony

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<sup>31</sup> ARB000200.

<sup>32</sup> ARB000200.

<sup>33</sup> ARB00201; ARB000209.

<sup>34</sup> ARB000202.

<sup>35</sup> ARB000202.

<sup>36</sup> ARB000208.

<sup>37</sup> ARB000208.



regarding senate pairings. This was the only public testimony that was ever taken regarding senate pairings. After taking this testimony, the Board entered executive session “for legal and other purposes related to receiving legal counsel for the Board.”<sup>38</sup> The Board remained in executive session for one hour, and then took a lunch break. After lunch, the Board entered a senate pairings work session at 1:21 p.m., which lasted until 5:00 p.m.<sup>39</sup>

31. In review of a video recording of the work session, Marcum and Simpson can be seen and heard consulting and discussing an unredacted chart received from Randy Ruedrich (“Ruedrich”) providing incumbent information for house districts statewide.<sup>40</sup>

32. After the work session, Marcum moved for the Board to enter executive session “for legal advice with regard to the proposed Senate pairings” — though no senate pairings had been proposed at that time. That executive session lasted until the Board recessed at 6:25 p.m.<sup>41</sup>

33. On November 9, 2021, the Board reconvened at 9:00 a.m. in executive session. The Board exited executive session at 10:30 a.m.<sup>42</sup> Marcum moved to accept the following Senate pairings for Anchorage: Districts 9 and 10, Districts 11 and 12,

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<sup>38</sup> ARB000208.

<sup>39</sup> ARB000208.

<sup>40</sup> Marcum Depo. at 206:21-218:25 (identifying Ex. 6005 as a chart received from Randy Ruedrich containing incumbent information and stating that she pulled up on her computer “the version that [she] had, which was the unredacted version” to show Simpson); video recording of November 8, 2021 Board Meeting at 2:52:00-2:55:30.

<sup>41</sup> ARB000208.

<sup>42</sup> ARB000215.

Districts 13 and 14, Districts 15 and 16, Districts 19 and 20, Districts 17 and 23, Districts 18 and 24, and Districts 21 and 22.<sup>43</sup> Simpson seconded the motion. Bahnke opposed the motion and requested a roll call vote. The motion passed 3-to-2, with Binkley, Marcum, and Simpson in favor, and Bahnke and Borromeo against.<sup>44</sup>

34. Borromeo moved to reconsider the vote, with Bahnke seconding the motion. Borromeo expressed strong opposition against pairing East Anchorage district with the Eagle River districts, noting that “it opens the Board up to an unfortunate and very easily winnable argument [of] partisan gerrymandering.”<sup>45</sup> Borromeo noted that Marcum stated the previous day that this pairing “gives Eagle River the opportunity to ... have more representation, so they’re certainly not going to be disenfranchised by the process,”<sup>46</sup> and stated that the pairing “defies logic” and is contrary to “the sound, sound legal advice [the Board] got from counsel in executive session.”<sup>47</sup>

35. However, before Borromeo had finished speaking, Binkley and Marcum called the question — a violation of Robert’s Rules of Order, by which the members of the Board had previously agreed to abide.<sup>48</sup> The motion to reconsider the vote on adoption of the Anchorage senate pairings failed, with only Bahnke and Borromeo in favor of reconsideration.<sup>49</sup>

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<sup>43</sup> ARB000215.

<sup>44</sup> ARB000215.

<sup>45</sup> ARB007040.

<sup>46</sup> ARB007041.

<sup>47</sup> ARB007041.

<sup>48</sup> ARB007043; Binkley Depo. at 198:25-199:9.

<sup>49</sup> ARB000215.

36. After a lunch break, the Board then met to consider the senate truncation cutoff. Borrromeo moved that any legislator with a percentage of voter change 16.3 percent and below is not up for truncation; the motion passed unanimously.<sup>50</sup>

37. Then, the Board pivoted to consider whether it should set the terms of the senate election cycles. Bahnke suggested that, to avoid the appearance of partisanship or knowledge as to which seats would be truncated, the Board should flip a coin to make the decision. In contrast, Binkley suggested that there should be some rationale for the decision, and proposed alternating between the 2024 and 2022 cycles beginning with Senate District T. Simpson and Marcum supported Binkley's proposal, with Marcum specifically noting that the Board had not been presented with any incumbent information.<sup>51</sup> A vote was held, and Binkley's method passed. Borrromeo then moved to determine the sequencing for truncations beginning with Senate District A going in the 2024 cycle, but the majority board members voted against this motion.<sup>52</sup> Marcum then moved to alternate by numerical order with District A going in the 2022 cycle, and the motion passed. It appears that the majority board members had a preference for this configuration, despite their purported neutrality and ignorance of incumbents.<sup>53</sup> After this decision, the Board entered a recess at 4:30 p.m. The Board did not take any public testimony on November 9, 2021.

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<sup>50</sup> ARB000217.

<sup>51</sup> ARB000217.

<sup>52</sup> ARB000217.

<sup>53</sup> ARB000217.

38. On November 10, 2021, the Board adopted a Final Proclamation of Redistricting, including senate pairings. This is the Board's Final Plan.<sup>54</sup>

39. Borromeo and Bahnke initially refused to sign the Proclamation as a direct result of the arbitrary East Anchorage/Eagle River pairings and the dilution that these pairings may cause, specifically, in House District 21-South Muldoon.<sup>55</sup> Ultimately, they signed the Proclamation, noting their dissent.<sup>56</sup> Both Members' closing statements are contained in the Board's minutes in their entirety at ARB000219-ARB000221.

### **III. INTENTIONAL VIOLATION OF BOARD-ACCEPTED PARLIAMENTARY RULES OF ORDER**

40. During his deposition, Binkley stated that, although the Board did not officially adopt any formal conduct, ethics, or decorum rules, all members agreed early on in the procedure that they would comply with Robert's Rules of Order during their public meetings.<sup>57</sup>

41. Yet, at the November 9, 2021 Board meeting, the Board violated Robert's Rules, through its Chair, when Binkley shut down debate regarding senate pairings without a 2/3 vote as required by Article VII, section 44 of Robert's Rules.<sup>58</sup>

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<sup>54</sup> Board 2021 Proclamation of Redistricting, ARB000002-000115.

<sup>55</sup> November 10, 2021 Board Meeting Minutes, ARB000219.

<sup>56</sup> Board 2021 Proclamation of Redistricting, ARB000003.

<sup>57</sup> Binkley Depo. at 198:25-199:9.

<sup>58</sup> November 9, 2021 Board Meeting Tr., p. 11, ARB007043; Article VII, section 44 of Robert's Rules of Order.

42. Although Bahnke and Borromeo vehemently objected to the majority members' attempt to call the question while debate was ongoing, the other Board members steadfastly refused to continue debate.<sup>59</sup>

43. Bahnke remarked in her closing comments on November 10, 2021 that "the Board took action to end discussion and debate [November 9, 2021], which I think procedurally and technically, was contrary to Robert's Rules of Order." While Bahnke recognized she was not an expert on Robert's Rules, she did not "think that [the Robert's Rules violation] was unintentional, because as a former legislator, [Binkley was] very well versed in Robert's Rules of Order."<sup>60</sup>

#### **IV. OPEN MEETINGS ACT**

44. The Board's use of executive sessions violated the Open Meetings Act and led to violations of the due process clause of the Alaska Constitution.

45. September 7, 2021, the Board entered executive session at 11:18 a.m. with a motion to enter executive session for the purposes of receiving legal advice under AS 44.62.310(c)(4) for matters involving consideration of government records that are not subject to public disclosure. The executive session lasted approximately one hour and 48 minutes.<sup>61</sup>

46. November 2, 2021, the Board entered executive session at 10:48 a.m. with a motion to enter executive session under AS 44.62.310(c)(3) and AS 44.62.310(c)(4) respectively involving matters which by law, municipal charter or ordinance are required

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<sup>59</sup> November 9, 2021 Board Meeting Tr., p. 11, ARB007043 - ARB007044.

<sup>60</sup> November 10, 2021 Board Meeting Tr., p.21, lines 6-25, ARB007192.

<sup>61</sup> September 7, 2021 Minutes at ARB000160 - ARB000161.

to be confidential and matters involving consideration of government records that by law are not subject to public disclosure. The executive session lasted approximately two hours and 23 minutes.<sup>62</sup>

47. November 5, 2021, the Board entered executive session at 9:05 a.m. with a motion to enter executive session for the purpose of receiving legal advice under AS 44.62.310(c)(3) and AS 44.62.310(c)(4) respectively involving matters which by law, municipal charter, or ordinance are required to be confidential and matters involving consideration of government records that by law are not subject to public disclosure. The executive session lasted approximately one hour and 35 minutes.<sup>63</sup>

48. November 5, 2021, the Board entered executive session at 4:05 p.m. with a motion to enter executive session for the purpose of receiving legal advice under AS 44.62.310(c)(3) and AS 44.62.310(c)(4) respectively involving matters which by law, municipal charter, or ordinance are required to be confidential and matters involving consideration of government records that by law are not subject to public disclosure. The executive session lasted approximately 55 minutes.<sup>64</sup>

49. November 8, 2021, the Board entered executive session at 11:00 a.m., with a motion enter executive session for legal and other purposes related to receiving legal counsel for the board. The executive session lasted approximately one hour.<sup>65</sup>

50. November 8, 2021, the Board entered executive session at 5:01 p.m. with a motion for the Board to enter executive session for legal advice with regard to the

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<sup>62</sup> November 2, 2021 Minutes at ARB000196.

<sup>63</sup> November 5, 2021 Minutes at ARB000201 - ARB000202.

<sup>64</sup> November 5, 2021 Minutes at ARB000208.

<sup>65</sup> November 8, 2021 Minutes at ARB000213.

proposed senate pairings. The executive session lasted approximately one hour and 24 minutes.<sup>66</sup>

51. November 9, 2021 meeting began with an extended executive session from the day before, resulting in an “overnight executive session” which is not permitted under the OMA.<sup>67</sup> The executive session that morning lasted approximately one hour and 30 minutes.<sup>68</sup>

## **V. ARTICLE VI, SECTION 10 OF THE ALASKA CONSTITUTION**

52. Art. VI § 10 of the Alaska Constitution provides that the “[B]oard shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the [B]oard.”

53. While the Board plan complied with this provision with regard to the house districts, no proposed plan including the East Anchorage/Eagle River Pairings was properly and timely presented to the public before its adoption, which resulted in a violation of this constitutional provision.

54. Instead, the Board exited executive session on November 9, 2021 and, without discussion adopted new pairings proposed by Marcum that changed every one of the pairings in Marcum’s previous proposal but three. In other words, five of the eight Anchorage pairings were changed without public input, notice or discussion.<sup>69</sup>

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<sup>66</sup> November 8, 2021 Minutes at ARB000214 - ARB000215.

<sup>67</sup> See Dunsmore Aff., ¶ 20; November 8, 2021 Tr. pp. 217 – 218 at ARB006713 - ARB006714; November 9, 2022 Tr. p. 2 at ARB007034.

<sup>68</sup> November 9, 2021 Minutes at ARB000215.

<sup>69</sup> November 9, 2021 Tr., pp. 2-4, at ARB007034 – ARB007036.

55. The failure to comply with this constitutional mandate precluded the public from effectively and meaningfully informing or challenging the Board’s proposed pairings before they were adopted and the Board from curing the violations of procedural and process requirements that occurred during the meetings and work sessions held by the Board on senate pairings.

56. Because no plan adopted or considered by the Board during its public hearing process paired Eagle River with either North or South Muldoon, the Board violated the procedural requirements of Art. VI, § 10 of the Alaska Constitution.

57. The Board failed to hold public hearings on the proposed senate pairings.<sup>70</sup>

58. When the Board adopted six proposed redistricting plans on September 20, 2021, the Board issued an announcement presenting the plans it adopted to the general public.<sup>71</sup>

59. The announcement included a statement by Borromeo that “[w]e look forward to hearing feedback from Alaskans on our new draft maps, as well as the four adopted third-party draft maps, as we present them in public meetings in communities across the state.”<sup>72</sup>

60. The announcement was devoid of any mention of proposed senate pairings, emphasizing instead that the Board was only adopting proposed maps for house districts.

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<sup>70</sup> See *generally* September 9, 2021, at ARB009985 - ARB009988; ARB010013 and September 20, 2021 Board Meeting Tr. at ARB010143 - ARB010411 (Board does not present any senate pairings).

<sup>71</sup> See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

<sup>72</sup> See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).



Consistent with this focus on house district maps, the announcement stated that ‘detailed maps will be posted on the Alaska Redistricting Board’s website at <https://www.akredistrict.org/map-gallery> when they are available.’ (emphasis added).<sup>73</sup>

61. The Senate Minority Caucus Map Comments noted that “[t]he Board’s maps did not offer Senate Districts while preparing our map, nor can Senate Districts be assumed by reviewing the sequential numbers on the Board maps as some are not contiguous. This has impaired our Caucus’ ability to comment on those maps in regard to Senate Districts.”<sup>74</sup>

62. Steve Colligan responded to an email from Board Staff member Juli Lucky that “Senate Pairing are part of the future process after drawing District boundaries, except for the 2 Fairbanks districts which were determined in court during the last redistricting process.” He replied that “AFFER may have some inferred pairings in our plan submittal but through public testimony there may be better solutions.”<sup>75</sup>

63. On September 17, 2021, Lea Filippi, an Anchorage resident, encouraged the Board to disclose its senate pairings.<sup>76</sup>

64. On September 18, 2021, Katherine Tompkins, another Anchorage resident, submitted testimony urging the Board to propose senate pairings, stating “[t] he most important point I want to make is I believe the Senate districts need to be proposed and

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<sup>73</sup> See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

<sup>74</sup> Senate Minority Caucus Map Comments, ARB003695.

<sup>75</sup> Email correspondence between Steve Colligan and Board Staff Member Juli Lucky, ARB00059806 - ARB00059809; Ex. 6012.

<sup>76</sup> Filippi Written Testimony, September 17, 2021, ARB0002357.

included for public comment. Without noting Senate districts for public comment, it prevents individuals from commenting on one half of the Legislature.”<sup>77</sup>

65. As Plaintiff Yarrow Silvers (“Silvers”) remarked in her October 4, 2021 online public testimony, the Board did not publish any proposed senate pairings together with the proposed house district maps or provide the public with any meaningful opportunity to provide input as to senate pairings.<sup>78</sup>

66. Silvers wrote “I have concerns that the board maps do not show senate pairings and I would like to request that the board allow public testimony on these pairings before adopting a map.”<sup>79</sup>

67. In response to a question posed by a member of the public regarding the inclusion of senate pairings in the preliminary plans, Matt Singer responded that the constitution “indicates that the final plan shall include the senate districts” and therefore, “the board has some discretion or does not have clear guidance from the constitution” on whether to include the senate districts in the preliminary plans. Additionally, Singer noted that “Certainly you’re going to hear from the public, and that – and that public input may be helpful to the board as it thinks about Senate pairings.” Eric Sandberg recalled that in the last cycle, senate pairings were not made in the draft plans, but were made in the final plan. Binkley noted that it would be instructive to review the third-party plans that will be presented on September 17, 2021.”<sup>80</sup>

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<sup>77</sup> Tompkins Written Testimony, September 18, 2021, ARB003172.

<sup>78</sup> Silvers Written Testimony, October 4, 2021, ARB003890.

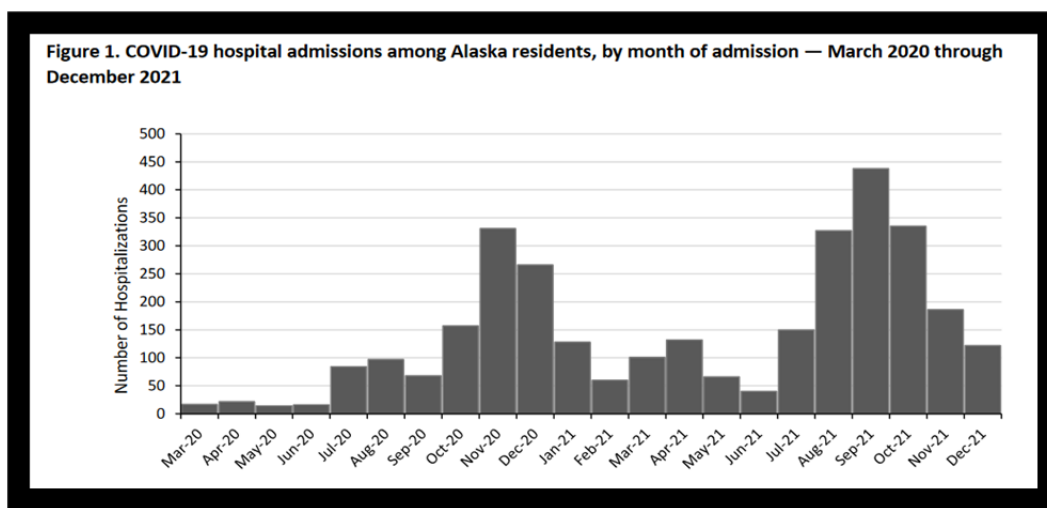
<sup>79</sup> Silvers Written Testimony, October 4, 2021, ARB003890.

<sup>80</sup> September 7-9, 2021 Board Meeting Tr., ARB009985 – ARB009988.

68. The Board argues that the Board proposed senate pairings on November 8, 2021 during the Board's meeting but the Board, as an entity, never adopted preliminary senate pairings for consideration nor were such pairings presented for public hearing.<sup>81</sup>

## VI. INSUFFICIENT PUBLIC HEARINGS UNDER ALASKA CONSTITUTIONAL PROVISIONS

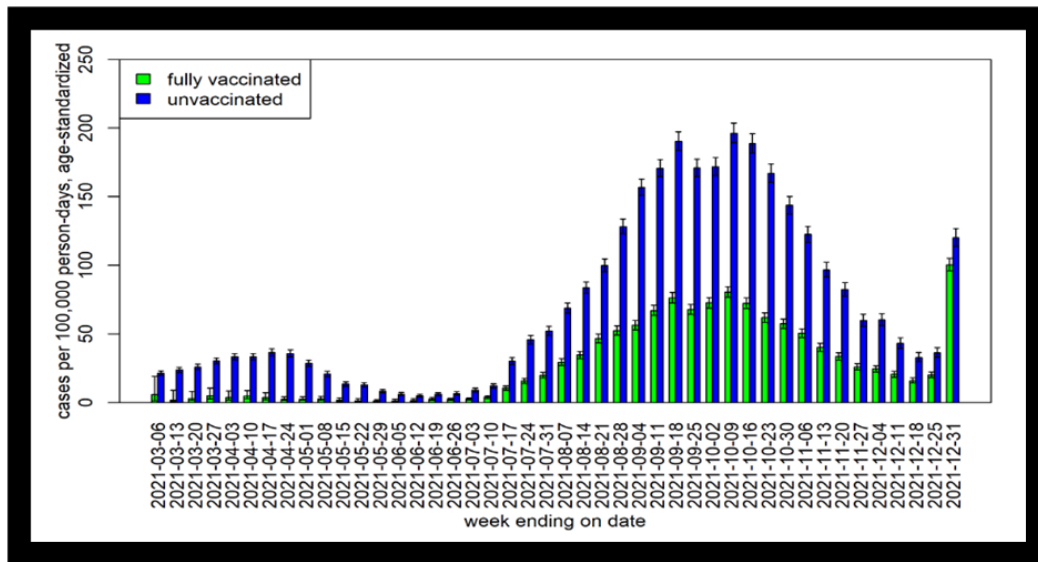
69. The state of Alaska was experiencing all-time highs for both infection rates and hospitalizations related to COVID-19 pandemic during the redistricting process.<sup>82</sup>



Alaska Division of Public Health Covid-19 Update, December 2021, p. 1, Figure 1.

<sup>81</sup> November 8, 2021 Board Meeting Tr., ARB006496 – ARB006748.

<sup>82</sup> Alaska Division of Public Health Covid-19 Update, December 2021, Available at: [https://dhss.alaska.gov/dph/Epi/id/siteassets/pages/HumanCoV/COVID\\_monthly\\_update.pdf](https://dhss.alaska.gov/dph/Epi/id/siteassets/pages/HumanCoV/COVID_monthly_update.pdf)



Alaska Division of Public Health Covid-19 Update, December 2021, p. 8, Figure 3.

70. Both state and local government entities across the state of Alaska adopted laws and policies permitting or requiring virtual hearings and meetings.<sup>83</sup>

71. The Alaska Division of Elections was ordered by the Alaska Supreme Court to waive witness signature requirements on election ballots because requiring voters to secure such signatures may unnecessarily expose them to increased COVID-19 exposure or require them to violate local laws to secure a witness signature during community lockdowns.<sup>84</sup>

72. On October 1, 2021, the Native American Rights Fund sent a letter to the Board encouraging it to hold hearings accessible to the public.<sup>85</sup>

<sup>83</sup> State of Alaska Health Advisory No. 1, issued 2/14/2021; <https://covid19.alaska.gov/wp-content/uploads/2021/02/02.14.21-Health-Advisory-1-Recommendations.pdf>; Fairbanks North Star Borough Assembly Adopted Memorandum Approved May 6, 2021 with an Effective Date of November 10, 2021.

<sup>84</sup> See *State v. Arctic Village*, 495 P.3d 313 (2021).

<sup>85</sup> ARB002363 - ARB002366.

73. On October 26, 2021, the Alaska Democratic Party sent a letter to the Board encouraging it to hold virtual hearings accessible to the public.<sup>86</sup>

74. Despite the pandemic, the Board continued to conduct in-person meetings throughout the State with intermittent teleconferences to take statewide public comments.<sup>87</sup>

75. On September 7, 8, and 9, 2021, the Board met in a “webcast and teleconferenced series of meetings” in Anchorage, which allowed the public to watch and to call in to testify.<sup>88</sup>

76. On October 1 and 15, 2021, the Board presented one hour “Meet the Maps” statewide zoom webinars during which Board staff walked through the proposed plans and “demonstrated interactive map tools, hi-res PDF download options and public comment submission pages.”<sup>89</sup>

77. Unlike the public virtual meetings held by other State of Alaska entities, the Board purchased and used an “Owl Video System.” This system reportedly picked up the audio of the speaker and then focused the main camera on the speaker. The system then displayed essentially a spliced reel of videos of other areas of the meeting room with the conversations in each of those locations interspersed with the main audio.<sup>90</sup>

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<sup>86</sup> ARB001798 - ARB001800.

<sup>87</sup> Board 2021 Process Report, ARB000008 - ARB000009.

<sup>88</sup> Board 2021 Process Report, ARB000007.

<sup>89</sup> Board 2021 Process Report, ARB000008 - ARB000009.

<sup>90</sup> Board 2021 Process Report, ARB000010; see *also* Torkelson Aff., ¶¶ 47-49; Marcum Depo. at 220:11-221:22 (comments by Board attorney Matthew Singer conceding the Owl video recording produced a “confusing image.”).

78. The Owl System resulted in virtual hearings with substantial portions of the video inaudible and the images on the video obscured by the constant movement of the cameras and the lack of focus on Board members.<sup>91</sup>

79. At least one Board member recognized during their deposition testimony that they could not hear or clearly identify what they were seeing when observing the official hearing videos included in the record.<sup>92</sup> Additionally, a member of the public who attended the meetings – Randy Ruedrich – was unable to hear anything said on the video record when it was later played to him.<sup>93</sup>

80. On March 2, 2021, Torkelson confirmed to Legislative Affairs Agency attorney Nauman that “We adopted the standard SOA open meetings law that applies to all boards and commissions.”<sup>94</sup> This position was confirmed during her deposition by Marcum, who testified the Board was “always” under the Open Meeting Act.<sup>95</sup>

81. Borromeo noted in September 2021 that “there have been allowances and disallowances on the time given for public testimony and the amount of time given to public members has not consistently been adhered to.”<sup>96</sup>

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<sup>91</sup> See App. A, Affidavit of Jeanette Starr, dated January 10, 2022, filed with the Court on January 12, 2022 as Exhibit A to East Anchorage Plaintiffs’ Response to Board’s Objections to Pre-Filed Direct Testimony (noting that despite her best efforts, Ms. Starr, owner of Pacific Rim Reporting, was unable to transcribe portions of the ARB meeting work session which was played at the deposition of Bethany Marcum).

<sup>92</sup> Marcum Depo., p. 213: p. 217:10-14.

<sup>93</sup> Ruedrich Depo. at p. 40:18-41:9.

<sup>94</sup> March 2, 2021 email correspondence between Torkelson and Neuman, ARB00130626, Ex. 6010.

<sup>95</sup> Marcum Depo., p. 213:20-214:10.

<sup>96</sup> September 7-9, 2021 Board Meeting Minutes, ARB000163.

82. Borromeo noted in September 2021 that “unilateral decisions have been made on allowing work sessions individually and with other board members.”<sup>97</sup>

83. Borromeo noted in September 2021 that “map drawing should be the board’s responsibility; staff should not be doing this as the lines in the map must be defended by the board.”<sup>98</sup>

84. Borromeo noted in September 2021 that “there have been comments disparaging the joint work sessions as being tedious. The benefit of joint work sessions is for each board member to give input on where the lines should be drawn as every board member has different expertise and connections to various areas of the state.”<sup>99</sup>

85. Borromeo noted in September 2021 that “some board members are not included and are not getting the benefit of the board’s counsel.” Borromeo proposed that “[i]f a meeting is held where staff and Mr. Singer are present, the full board should be given notice even if it is solely an administrative meeting.”<sup>100</sup>

86. In September 2021, Borromeo requested “more consistent actions from the board” and Binkley agreed that it is the board’s responsibility to draw the map lines.<sup>101</sup>

87. In early September 2021, Bahnke requested that “any [Board] deliberations must be on the record and that no side conversations between board members should

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<sup>97</sup> September 7-9, 2021 Board Meeting Minutes, ARB000163.

<sup>98</sup> September 7-9, 2021 Board Meeting Minutes, ARB000163.

<sup>99</sup> September 7-9, 2021 Board Meeting Minutes, ARB000163.

<sup>100</sup> September 7-9, 2021 Board Meeting Minutes, ARB000163.

<sup>101</sup> September 7-9, 2021 Board Meeting Minutes, ARB000163.

take place that consist of map drawing and could impact the outcome of the overall map.”<sup>102</sup>

## **VII. PUBLIC TESTIMONY**

88. Applicant and Joint Base Elmendorf-Richardson (JBER) resident Major (ret.) Felicia Wilson first testified before the Board regarding the JBER community, stating that JBER is not monolithic and that JBER residents tend to do community service around the gates they live near. Major Wilson encouraged the board to reapportion JBER around the gates by which they are located.<sup>103</sup>

89. As early as September 7-9, 2021, Anchorage resident, Yarrow Silvers, voiced concerns about a version of a map presented by the board where part of East Anchorage was pushed into Eagle River while another part of East Anchorage was pushed into South Anchorage. East Anchorage includes some of the lowest income neighborhoods in Anchorage whereas South Anchorage has some of the highest, showing clear socio-economic factors which should preclude East Anchorage from being pushed into South Anchorage and Eagle River. Silvers reiterated her request to consider East Anchorage as a defined socio-economic part of Anchorage to give fair representation.<sup>104</sup>

90. On September 17, 2021, Anchorage resident, Lynette Pham, noted that East Anchorage and Eagle River are two distinct communities and grouping these two communities together takes away from the voices of the two communities.<sup>105</sup>

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<sup>102</sup> September 7-9, 2021 Board Meeting Minutes, ARB000163.

<sup>103</sup> August 24, 2021 Board Meeting Minutes, ARB000154.

<sup>104</sup> September 7-9, 2021 Board Meeting Minutes, ARB000168.

<sup>105</sup> September 17, 2021 Board Meeting Minutes, ARB000168.



91. On November 2-4, 2021, the Board “observed that Anchorage has neighborhoods that are increasingly diverse with non-white voters.” The minutes summarized the Board’s observations regarding this diversity, recognizing the “emerging trend” of increased diversity in Anchorage. According to the minutes, “[t]he distribution of population in Anchorage was reviewed. For example, in House District 19, 33.4% of voters identify as White, 9% identify as two or more races, 14.2% identify as Asian, 12.5% identify as Hispanic, 12.4% identify as Alaska Native or Indian, 9% identify as Black or African American, and 9% identify as Hawaiian or Pacific Islander, .4 or .5% identify as some other race. Therefore, there is a very diverse population of voters in this community and in several other neighborhoods particularly in Northeast Anchorage. Observing this, a Voting Rights Act analysis was done to determine if the ‘Gingles factors’ are met, which means that the minority coalition has a 50 percent or greater voting age population, is politically cohesive, and practices racial block voting. In conclusion, there was no statistical evidence to support that there is political cohesion among the diverse neighborhoods in Anchorage or that there is racial block voting.”<sup>106</sup>

92. On November 5, 2021, Silvers, a Scenic Foothills Community Council member and representative, read a resolution that was passed by the Scenic Foothills Community Council: “Now therefore it be resolved that the Scenic Foothills Community Council recommends that the redistricting board bring the new state redistricting plan into closer alignment with local neighborhood boundaries, including East Anchorage, and not split off part of the socioeconomically distinct East Anchorage neighborhoods, including the Scenic Foothills Community Council neighborhood, Eagle River, or a South

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<sup>106</sup> November 2-4, 2021 Board Meeting Minutes, ARB000197.

Anchorage district which are socioeconomically distinct from East Anchorage especially done in the current proposed Board Map v.3 around the Muldoon curve.” This resolution passed on November 4, 2021, with 18 votes in favor and 0 opposed. It was reported that although it was too late to make changes to the recently passed resolution the night before, the Council was shown the newly revised working maps and many Council members spoke strongly in favor of Board Map v.4 Best.<sup>107</sup>

93. Silvers spoke in favor of Board Map v.4 Best, on the bases that it was more compact, respects socioeconomic boundaries, has acceptable deviations, considers public testimony, unlikely to violate the VRA, and preserves the voices of racially diverse communities in East Anchorage. Silvers expressed concerns about Board Map v.1 being analyzed for VRA violations in the last mapping work session but was still “on the table” this morning with changes being made to the map. Although the map was adjusted during the current date’s mapping work session, she stated that much of Anchorage was “still chopped up”, districts have been created that “look like snakes”, and natural socioeconomic boundaries are not respected. In particular, she observed that District 20 remains strangely divided with part of the district in a South Anchorage district, and characterized that option as “disingenuous” which “raises many questions.”<sup>108</sup>

94. Major Wilson expressed concern about last minute changes being made to the maps about one hour prior to public testimony taking place and expressed that the integrity of Joint Base Elmendorf-Richardson (JBER) and the minority districts around

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<sup>107</sup> November 5, 2021 Board Meeting Minutes, ARB000202.

<sup>108</sup> November 5, 2021 Board Meeting Minutes, ARB000202.

Muldoon, Northeast Anchorage, and Mountain View were best represented in Board Map v.4 Best.<sup>109</sup>

95. Alaskans for Fair Redistricting (AFFR) representative, Joelle Hall, spoke in favor of Board Map v.4. Additionally, Hall suggested that a record be made on what did and did not work well in this process so that participants of the next redistricting cycle can benefit from the experiences of those who worked in this redistricting cycle.<sup>110</sup>

96. Northeast Community Council member and representative, Donna Mears, read the following statement: “Although my understanding is that community council boundaries are not necessarily a consideration for district boundaries, we believe they should be. Particularly in the case of Northeast Community Council where multiple map versions have and continue to split the north and eastern portions of our community, and Bartlett High School into an Eagle River district. My experience as a Northeast Community Council board member over the last couple years is that state and local representatives are very small portions of our council district rarely, if ever, show up. This is important. In Anchorage, the most consistent and accessible opportunity for constituents to interact with the representatives is at community council meetings; this is the place where our work is done both for representatives and the community. From our perspective, in Northeast Anchorage, community boundaries are more important than a slightly larger population deviation as it provides better access to our representatives. Again, Bartlett should be in a district with families it serves and Northeast Anchorage

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<sup>109</sup> November 5, 2021 Board Meeting Minutes, ARB000202.

<sup>110</sup> November 5, 2021 Board Meeting Minutes, ARB000202.

residents should be paired with their neighbors.” Mears stated that the Northeast Community Council met on October 21, 2021, and that while they did not have a statement on the most current maps, from Mears’ personal perspective, Board Map v.4 Best reflected the Northeast Community Council’s.<sup>111</sup>

97. Anchorage Community Land Trust Executive Director, Kirk Rose, stated he participates in many activities in Mountain View and Fairview and spoke in favor of these communities remaining whole and cohesive. He observed “[T]here have been issues of representation impacting these communities for many years. For many years, both districts have only been represented by one Assembly member while other districts have been represented by two. Any maps that divide these communities is problematic for representation for these low-income and diverse communities.”<sup>112</sup>

98. The Board received consistent input as to the senate pairings. On November 8, 2021, Anchorage resident Alex Baker spoke in favor of combining Districts 20 and 21 together because all of Downtown Anchorage should remain in one senate district. Baker opined that Fairview is geographically blended with Downtown Anchorage and is where many of his community members recreate, walk, drive, and frequent businesses. Baker requested that the Board combine Districts 20 and 21 together as a senate pairing.<sup>113</sup>

99. On November 8, 2021, Silvers spoke against pairing East Anchorage with Eagle River or South Anchorage, and in favor of pairing Districts 18 and 23 together. She

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<sup>111</sup> November 5, 2021 Board Meeting Minutes, ARB000203.

<sup>112</sup> November 5, 2021 Board Meeting Minutes, ARB000207.

<sup>113</sup> November 8, 2021 Board Meeting Minutes, ARB000211.

commented that if this pairing is not practical, “Districts 17 and 18 would be an alternative pairing. Eagle River and the suburb towns north of Eagle River should be paired together as they are socioeconomically integrated and should remain together for better representation. South Anchorage is a poor pairing for District 18 as it is separated by miles and results in poor representation.”<sup>114</sup>

100. Eagle River resident Roger Branson spoke in favor of pairing Districts 22 and 24 together as Chugiak/Eagle River has long identified as its own socioeconomic area.<sup>115</sup>

101. Mears stated that the Northeast Community Council area is represented in the map by four House districts. According to Board minutes, Mears spoke in favor of pairing Districts 18 and 23.<sup>116</sup>

102. Anchorage resident Jeremy Houston spoke in favor of pairing Districts 21 and 20 in the Downtown Area. He observed that “since he has moved to the area, it has become apparent that the two areas are socioeconomically integrated. He does most of his shopping, working, and recreating in the downtown area. Additionally, many JBER military members use the downtown area to recreate as well.”<sup>117</sup>

103. All together there were 196 testimonial statements related to the senate pairings. Of those, 108 were in opposition to an Eagle River/East Anchorage pairing; only six were in support of the pairing.<sup>118</sup>

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<sup>114</sup> November 8, 2021 Board Meeting Minutes, ARB000211.

<sup>115</sup> November 8, 2021 Board Meeting Minutes, ARB000211.

<sup>116</sup> November 8, 2021 Board Meeting Minutes, ARB000212.

<sup>117</sup> November 8, 2021 Board Meeting Minutes, ARB000211.

<sup>118</sup> See *generally* App. B.

## **VIII. SENATE PAIRING CONSIDERATIONS, JUSTIFICATIONS, AND ABSENCE THEREOF**

104. According to the depositions of the Board, when developing the senate pairings, the Board members generally identified the primary requirement for senate districts that they share a border.<sup>119</sup> According to Marcum, while the senate pairings did not have to reflect socioeconomic integration,<sup>120</sup> the Board nonetheless “considered socioeconomic considerations” when pairing senate districts but deferred questions about further pairing considerations to legal counsel.<sup>121</sup>

105. Binkley further confirmed during his deposition that the Board considered “a lot of different considerations” during the senate pairings deliberations, including “different information, different combinations, different proposals,” and that the primary consideration was contiguity, but thereafter considered what was “reasonable.”<sup>122</sup> Binkley testified that the most of the work regarding dilution considerations was left to “counsel and staff.”<sup>123</sup> Binkley confirmed that the Board discussed the pairing of the senate districts and that there was advice given by the experts regarding the senate pairings.<sup>124</sup>

106. Despite clear constitutional mandates to do so, Binkley testified that he had never heard of the term “as near as practically contiguous” in the context of the contiguity requirement.<sup>125</sup> Binkley confirmed that the Board was conscious of the necessity of

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<sup>119</sup> Marcum Depo., pp. 171:17-22, 156:3-8; Borromeo Depo., pp. 43:2-9, 185:6-22.

<sup>120</sup> Marcum Depo. at 155:5-9.

<sup>121</sup> Marcum Depo., pp. 155:12-156:2.

<sup>122</sup> Binkley Depo. at 267:21-268:14.

<sup>123</sup> Binkley Depo., p. 269:1-7.

<sup>124</sup> Binkley Depo. pp. 280:11-281:5.

<sup>125</sup> Binkley Depo., p 268:15-25.

considering how the Board's pairings may dilute the voice of the voters in the Anchorage senate districts in its decision, but denied that he could recall what factors the Board considered.<sup>126</sup> However, other Board members clearly understood the concept. At trial, Board Chair Binkley testified that districts which encompass uninhabited areas are not contiguous: "And so I could not ever describe 33 as compact. It's barely contiguous. And by barely I mean the part that connects the northern part of that to the southern part basically has almost no people in it, so it's just – it's basically a fiction, in my mind."<sup>127</sup>

107. Simpson confirmed at his deposition that the Board requested an executive session to discuss the "litigation exposures" relating to the senate pairings discussion in order to discuss with the Board's "voting rights expert," and that subsequent to receiving that advice, the Board continued with the development of senate pairings and that he ultimately understood that the pairings he supported would be consistent with the law and constitutional requirements.<sup>128</sup> Simpson also confirmed the fact that the Board used the term "VRA" as shorthand for not only the Voting Rights Act, but any constitutional issues relating to voting rights.<sup>129</sup>

108. After adoption of both house and senate districts, Borrromeo stated the following during the November 10, 2021 Board meeting: "I want to begin by reminding Alaskans here today and listening across the state what the goal of redistricting is as defined by the framers of our constitution and instructed by the Court in Hickel. The goal

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<sup>126</sup> Binkley Depo., pp. 284:14-285:8.

<sup>127</sup> February 3, 2022 Trial Tr. at 1850-1851.

<sup>128</sup> Simpson Depo., p. 226:3-10

<sup>129</sup> Simpson Depo., pp. 229:24-230:5.

of all apportionment plans is simple: a true, just, and fair representation. Regretfully, the Board lost sight of this goal yesterday and in the process, we have failed Alaskans and we abused the public's trust and state government.”<sup>130</sup>

109. Borromeo observed on November 10, 2021 that “Member Marcum failed to offer a compelling reason not to pair the two Eagle River districts or the two Muldoon districts, besides for her subjective belief that the board failed to consider pairing JBER and Eagle River into a single House seat. We did, we considered it, and we firmly rejected it on two grounds: compactness and public testimony. Moreover, there was limited – almost no debate or justification really – for drawing these Senate districts this way on the record, and I apologize to Alaskans for that.”<sup>131</sup>

110. Borromeo stated during the November 10, 2021 Board meeting “that the now paired South Muldoon and Eagle River, through Senate Seat K, do not have a single road connected meaning the residents in District 21 have to drive almost four miles down Muldoon Road through District 20 before even reaching the Glenn highway and then having to drive another twelve miles north before they can exit into Eagle River.”<sup>132</sup>

111. Borromeo also acknowledge the differences between the residential South Muldoon neighborhood and comments by Borromeo suggesting it was relied upon by Eagle River residents for its commercial offerings, stating in part: “This part of Muldoon (the southern part) is not a bustling hot bedded economic enterprise. It’s almost entirely

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<sup>130</sup> November 10, 2021 Board Meeting Minutes, ARB000219; November 10 Board Meeting Tr., p. 16, lines 19-25; p. 17, lines 1-25, ARB 007187 - ARB007188.

<sup>131</sup> November 5, 2021 Board Meeting Minutes, ARB000219; November 10 Board Meeting Tr. p. 16, lines 19-25; p. 17, lines 1-25, ARB 007187-ARB007188.

<sup>132</sup> ARB007189-007190, November 10, 2021 Board Meeting Tr.



residential and for us to pull the wool over the state's eyes and believe that this part of Muldoon is traveling this far to shop, play, and recreate is absurd.”<sup>133</sup>

112. These sentiments were confirmed again at the depositions of Bahnke and Borromeo. Borromeo testified at her deposition that she did not believe the Anchorage senate pairings were fair or that they had been sufficiently discussed on record.<sup>134</sup> She stated her description of the pairings as “nonsensical” was based on the fact there were better options that would have paired the Eagle River house districts together.<sup>135</sup> Additionally, she considered the fact that Eagle River has been historically trying to exit the Municipality of Anchorage, along with the community sentiment that accompanied that movement.<sup>136</sup> Bahnke further testified at her deposition that she found evidence of “naked partisan gerrymandering” based on Marcum’s comments, based on the fact that she stated that Marcum’s proposed Senate pairing plan gave “more representation” to the Eagle River constituency.<sup>137</sup>

113. Borromeo testified that she did not believe the Board considered the best option – pairing the Eagle River house districts together – because Marcum did not present it as an option.<sup>138</sup> Further, the two Board members who wanted to discuss the

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<sup>133</sup> *Id.*

<sup>134</sup> Borromeo Depo., pp. 20:23-21:6.

<sup>135</sup> Borromeo Depo., p. 21:17-21.

<sup>136</sup> Borromeo Depo., p. 28:5-23.

<sup>137</sup> Bahnke Depo., pp. 17:6-18:11.

<sup>138</sup> Borromeo Depo., pp. 31:14-32:14.

non-Marcum options were precluded from doing so by Binkley, who did not allow for such discussion, or even any on Marcum's proposals.<sup>139</sup>

114. During the November 8 meeting, Simpson responded to criticism from Bahnke and Borromeo against Marcum's pairings by defending Marcum's pairings and stating "Bethany has articulated a number of reasonable, logical connections in support of the pairings she's suggesting. Certainly they're not the only ones, and they are things about which reasonable people could differ . . . in the end we have to pick one or two or whatever and – make a decision. But I don't think it's right to say that there's no reasonable basis for those. There's reasons, and she's articulated them."<sup>140</sup> Simpson confirmed his opinion of what is "reasonable" being defined at least in part as having a reason at his deposition.<sup>141</sup>

115. Binkley expressly stated to Borromeo, in response to the Eagle River/East Anchorage pairings that, according to Borromeo, she "had already 'won too much' and now it was time that I step aside and I allow others to get some wins. This isn't about me as an individual, this is about fair maps for our state. I didn't win anything; Alaska lost. I presented and I defended fair maps that stand on their own merit because I put in the time and energy, and I can defend my maps and will defend my maps in the next round of litigation. I thank Member Bahnke for standing alongside and accepting natural pairings of these districts. And second, even if it's true – whatever that means – that I had already

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<sup>139</sup> Borromeo Depo., pp. 32:15-21, 37:17-38:2.

<sup>140</sup> November 10 Board Meeting Tr. p. 201:4-18; ARB006697.

<sup>141</sup> Simpson Depo., pp. 239:8-240:14.

won too much, it's hardly a reason for rejecting the natural pairings of Eagle River as a Senate district and North and South Muldoon themselves as a Senate district.<sup>142</sup>

116. Borromeo further testified during her deposition that when she was told by Binkley that she had already “won too much” during the redistricting process, he appeared to signal that he and Borromeo had come to an impasse on the subject.<sup>143</sup>

117. Bahnke stated the following on November 10, 2021, after the adoption of the house districts and the controversial adoption of the Anchorage senate pairings:

As I reflect on the process – it's been 15 months of us putting our heads together. In terms of the process, I think what we saw throughout the process, for example, I started mentioning the way that the board took action to end discussion and debate yesterday which I think, procedurally and technically, was contrary to Robert's Rules of Order and I'm not expert on Robert's Rules of Order, but I don't think that was unintentional because as a former legislator, you're very well versed in Robert's Rules of Order. I'm not going to challenge that. It is symbolic of the greater issue that is our end outcome. Our outcome has resulted in the silencing or muzzling or muffling – whatever term you want to use – a particular segment of Alaskan voters. Again, throughout the process there was even at one point where the legitimacy of my authority to speak on behalf of Alaska Natives in my own district was at play and I've attempted to walk through this process in a manner that maintains decorum in order to get us moving along. I thought the ends would justify the means, so I put up with a lot in terms of where I felt I was being silenced. The process played out on a micro level of the silencing of a particular segment of our population. I was discouraged yesterday, but I'm actually encouraged today. Had we adopted Senate pairings that were just, that would have been a great victory for the state, but I think the greater victory that I see playing out here is that it is shining the light of the need for Alaskans to expect and deserve better from, not only our elected officials, but also our appointed officials. Alaskans are now witnessing, on a micro level, what is happening at a statewide level. We deserve better as Alaskans whether we're Republicans, Democrats, Independents, Undeclared, rural Alaskans, urban Alaskans, brown, black, yellow, white – at the end of the day we're all Alaskans and I'm not going to end on a discouraged note. If anything, this has bolstered, not just me – because this is happening to me on a micro level, - but I think that it is going

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<sup>142</sup> November 10, 2021 Board Meeting Minutes, ARB000220; November 10 Board Meeting Tr. p. 16, lines 19-25; p. 17, lines 1-25, ARB 007187 - ARB007188.

<sup>143</sup> Borromeo Depo. at 45:21-48:18.

to shed a bigger light and motivate people on a statewide level to expect fairness and uphold the tenants of our democracy.<sup>144</sup>

118. Substantial testimony was submitted before the Board demonstrating the continued and persistent movement in Eagle River to detach from the Municipality of Anchorage.<sup>145</sup>

119. On January 11, 2022, Municipality of Anchorage Assembly members Jamie Allard and Crystal Kennedy, both representatives of the Eagle River/Chugiak Assembly District 2, introduced Ordinance 2022-18. If adopted, this ordinance would have placed an advisory ballot before Birchwood, Chugiak, Eagle River, Eklutna, and Peters Creek area voters “an advisory ballot proposition on whether the area should research and study the potential to detach from the municipality of Anchorage and establish a separate local government unit.”<sup>146</sup>

120. Despite testifying in favor of the Eagle River/East Anchorage pairings, Assembly member Allard’s memorandum accompanying Anchorage Ordinance 2022-18 requested support for that ordinance, which if adopted would take the first step for exploring voter support detachment and the fiscal implications of such detachment.<sup>147</sup>

121. Anchorage Ordinance 2022-18 acknowledged that Eagle River groups since the 1970s have been promoting the detachment of Eagle River from the Municipality of Anchorage.<sup>148</sup>

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<sup>144</sup> November 8-10, 2021 Board Meetings Minutes, ARB000220 – ARB000221; November 10, 2021 Board Meeting Tr. pp.21-23.

<sup>145</sup> See, e.g., ARB00051102, ARB00058323, ARB00063567-00063568.

<sup>146</sup> Municipality of Anchorage Ordinance 2022-18, Ex. 6019, p. 6-10.

<sup>147</sup> Assembly Memorandum Regarding AO Ordinance 2022-18, Ex. 6019, p. 9.

<sup>148</sup> Municipality of Anchorage Ordinance 2022-18, Ex. 6019, p. 6-10.

122. On August 27, 1974, voters in the Birchwood, Chugiak, Eagle River, Eklutna, and Peters Creek area voted to detach from what was, at the time, the Greater Anchorage Borough. The Alaska legislature approved the detachment and the Eagle River-Chugiak Borough was formed until the Alaska Supreme Court overturned the legislative approval, finding that the detachment constituted unlawful special legislation.<sup>149</sup>

123. In the 2021 Proclamation, the Board disclosed that “it was further advised that while diverse minority populations exceeded 50% in some Anchorage districts, there was no available evidence to suggest that these minorities were voting as a bloc, or being opposed by a bloc of white voters” and concluded that “[w]ithout these legal preconditions being met, counsel advised the Board to avoid subordinating traditional redistricting criteria to racial considerations.”<sup>150</sup>

## **IX. PARTISAN GERRYMANDERING**

124. Marcum testified that the Board members “would not have access to political data, that we would not have it on our computers, that we would not access it.”<sup>151</sup> On November 7, 2021 at 6:47pm, the night before the scheduled Board meeting regarding senate pairings, Ruedrich emailed the Board at its designated email address as well as Marcum and Simpson separately, incumbent information for each of the house districts.<sup>152</sup>

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<sup>149</sup> Municipality of Anchorage Ordinance 2022-18, Ex. 6019, p. 8; *Abrams v. State*, 534 P.2d 91 (Alaska 1975).

<sup>150</sup> Board 2021 Proclamation, pp. 5-6, ARB000009-ARB000010.

<sup>151</sup> Marcum Depo., p. 198, lines 1-21.

<sup>152</sup> Ruedrich Depo., p. 14:19-15:10; November 7, 2021 email correspondence from Ruedrich to Board, Ex. 6005.

125. At the November 8, 2021 Board meeting, Board Staff member Juli Lucky informed the Board and Ruedrich that the incumbent information had been redacted from the email correspondence before its presentation to the Board and public.

126. Neither Marcum nor Simpson acknowledged their personal receipt of the email correspondence from Ruedrich. When asked about her receipt of the email, Marcum responded that she did not recall receiving the document on the night it was purportedly emailed but that it could have been provided to Board members in a compilation or at a later date.<sup>153</sup>

127. Marcum testified that while she had access to incumbent information provided to the Board by Ruedrich, she “didn’t bother looking at the incumbent information,” and explained that such information was “irrelevant to the process that we were tasked with, and it just muddled the waters...”<sup>154</sup>

128. When the unredacted incumbent information document was presented to Marcum in her deposition, she claimed she did not know what the information on the document proposed and that she could “honestly say this is the first time that I have looked at any of the names that are on [the] document.”<sup>155</sup>

129. Despite Marcum’s representations to the contrary, the November 8, 2021 hearing depicts Marcum and Simpson having a conversation during the work session expressly referencing the unredacted version of the incumbent information provided by Ruedrich. While Marcum could not hear her comments or those of Simpson when

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<sup>153</sup> Marcum Depo., Ex. 11; Marcum Depo., p. 202, lines 7-25.

<sup>154</sup> Marcum Depo., Ex. 11; Marcum Depo., p. 200, lines 11-14.

<sup>155</sup> Marcum Depo., p. 206, lines 21-25; p. 207-211.

watching the November 8, 2021 hearing, she conceded when watching that video that she had a conversation with Simpson during which the incumbent information was referenced, and in deposition did not deny the two used the word “incumbent” during their discussion.<sup>156</sup>

130. Marcum admitted that she went to her computer to pull up the unredacted version of the incumbent information but when asked why she pulled up that version when Simpson was holding the unredacted version, as opposed to just looking over Simpson’s shoulder at that redacted version, Marcum responded, in part that she looked at it electronically because that is “her preferred way of reading.”<sup>157</sup> In depositions, Marcum further confirmed she reviewed the unredacted materials sent by Ruedrich containing the incumbent information on November 8, 2021, during her conversation with Simpson during the senate pairing deliberations.<sup>158</sup>

131. Marcum stated during the November 8, 2021 meeting that “Eagle River has its own two separate House districts. This actually gives Eagle River the opportunity to have more representation, so they’re certainly not going to be disenfranchised by this process.” Bahnke expressed incredulity at this statement, asking “[s]o you’re saying that by splitting Eagle River, they would have more representation?” Marcum was evasive in her answer, causing Bahnke to clarify “we’re talking about Senate seats here.”<sup>159</sup>

132. Across all four versions of Anchorage senate pairings that Marcum proposed, Eagle River and East Anchorage were paired each time. She noted at the

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<sup>156</sup> Marcum Depo., p. 215:6-217:5; 217:15-25; p. 218:1-3, 10-22.

<sup>157</sup> Marcum Depo., p. 217, lines 1-5.

<sup>158</sup> Marcum Depo. at 215:6-217:5.

<sup>159</sup> November 8, 2021 Board Meeting Tr., ARB006672 – 006673.

November 8, 2021 Board Meeting: “And I will say that I started with one premise that I think is one of the most important premises that we have ignored throughout this process. . . . And that is the very natural both physical, as well as socioeconomic connection between JBER and Eagle River. . . . So that is the one thing that’s common in all four of these maps.”<sup>160</sup>

133. On November 8, 2021, Marcum repeatedly referred to the testimony supporting the pairing of Eagle River with Muldoon.

134. However, the support for these pairings specifically referenced by Marcum included a letter from Dan Saddler she read into the record and partial statements by East Anchorage Plaintiff Major (ret.) Felisa Wilson.

135. In supporting her decision to pair Eagle River with East Anchorage districts, Marcum relied on a letter from Dan Saddler.

136. Dan Saddler is a former Republican representative for the Eagle River/Chugiak district.

137. Despite Marcum’s reliance on her testimony, Felisa Wilson testified against pairing Eagle River with East Anchorage districts.

138. Aside from Saddler’s testimony, only five other members of the public testified in favor of any version of Marcum’s pairings.<sup>161</sup>

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<sup>160</sup> November 8, 2021 Board Meeting Tr., p. 174, ARB006670.

<sup>161</sup> See generally App. B, Senate Pairings Testimony Compilation, p. 102 at ARB002589; p. 108 at ARB003249; p. 120 at ARB002415; p. 121 at ARB002430 and November 5, 2021 Board Meeting Minutes at ARB000206.



139. Jamie Allard, a Republican Municipality of Anchorage Assembly Member was among the six who testified in support of pairing Eagle River and East Anchorage.<sup>162</sup> Allard filed a Letter of Intent with the Alaska Public Offices Commission indicating her intent to run for the State House district on December 2, 2021.

140. Marcum stated during her deposition that she “would not deny using the word incumbents as part of discussing the fact that we are not wanting to see the incumbents,” though she could not understand her own conversation as depicted on the public hearing recording.<sup>163</sup>

141. Despite admitting to viewing the unredacted version of incumbent information on November 8th, Marcum testified on November 9 that “I’d just state for the record, we have not been provided with any incumbent information. And in addition, we don’t know who’s been truncated, so I mean, I think that the proposal that you put forward is logical because we—we know that this information has not been presented to us.”<sup>164</sup>

142. The Municipality of Anchorage Assembly submitted written testimony to the Board on November 4, 2021, urging the Board “to reject any proposals that could be perceived as placing partisan objectives ahead of Constitutional guidelines for districts, are particularly concerned about the Marcum proposal to create an East Anchorage/Eagle River district.”<sup>165</sup>

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<sup>162</sup> November 5, 2021 Board Meeting Minutes at ARB000206.

<sup>163</sup> Marcum Depo., p. 218, lines 10-16.

<sup>164</sup> November 9, 2021 Board Meeting Tr., p. 33, lines 19-25; Marcum Depo., p. 225; Marcum Depo., p. 225:11-23.

<sup>165</sup> November 4, 2021 letter from Anchorage Assembly Leadership, Ex. 6002.

143. The Assembly warned “[g]errymanders produce legal uncertainty, confusion among voters, and undermine faith in our democracy. The Northeast Community Council has urged that East Anchorage neighborhoods not be gerrymandered in Eagle River districts, and we ask that you honor the request of local voters and their community council.”<sup>166</sup>

144. The Northeast Community Council adopted Resolution 2021-5, which urged the Board to “protect our neighborhoods and maintain our neighborhood ties by including the entire NECC boundaries within one senate district.”<sup>167</sup>

145. Borromeo noted Marcum’s express comments observing that “splitting Eagle River into two Senate seats would extend the electoral influence of the community resulting in ‘more representation’,” arguing on November 10, 2021 that “far from being compelling rationale, [Marcum’s] observation exposes the board to claims of racial and partisan gerrymandering in North and South Muldoon which contains some of the highest minority voting age population concentrations in Anchorage, and one of the most diverse neighborhoods in our country. The publicly stated goal of expanding Eagle River’s influence into the legislature is not only an example of partisan gerrymandering, it is a direct path for future litigants to take us on in suing us.”<sup>168</sup>

## **X. ART. VI, SECTION 6: CONTIGUITY**

146. Eagle River and Anchorage are in separate watershed districts.<sup>169</sup>

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<sup>166</sup> November 4, 2021 letter from Anchorage Assembly Leadership, Ex. 6002.

<sup>167</sup> Closing Brief, App. B “East Anchorage Senate Testimony Compilation”, p. 32; Resolution 2021-5, ARB 003202-ARB003203.

<sup>168</sup> November 5, 2021 Board Meeting Minutes, ARB000220; November 10 Board Meeting Tr., p. 19, lines 18-25; p. 20, lines 1-8, ARB 007190-ARB007191.

<sup>169</sup> Municipality of Anchorage Watershed District Map, Ex. 6015.

147. The state of Alaska acknowledged the separation between East Anchorage and Eagle River communities of interest in Health Mandate 12, which took effect on March 28, 2020 and remained enforceable until remanded by Governor Dunleavy. Health Mandate 12 “limited travel between communities to critical infrastructure or critical personal needs.”<sup>170</sup>

148. In the COVID-19 Health Mandate FAQs defining “community” for purposes of Health Mandate 12, the State reminded the public that “Common sense applies-normal usage of location names and understanding of geographic separation applies when asking community boundaries. For instance, Eagle River, Palmer, Wasilla, and Anchorage are all separate communities.”<sup>171</sup>

#### **XI. ARTICLE VI, SECTION 10**

149. The Board did not hold public hearings on its Proposed Plan v.1 or Proposed Plan v.2, which were the only plans adopted by the Board during the 30-day window provided by the Alaska Constitution.

150. Proposed Plan v.3 and Proposed Plan v.4, which were adopted by the Board on September 20, 2021, were not adopted within the 30-day window.

151. Likewise, the third-party plans adopted by the Board — proposed by AFFER, AFFR, the Doyon Coalition, and the Senate Minority Coalition — were not adopted within the 30-day window.

152. Proposed Plan v.3 and Proposed Plan v.4 did not include senate pairings.

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<sup>170</sup> See *generally* State of Alaska Health Mandate 12 Frequently Asked Questions, Ex. 6014.

<sup>171</sup> State of Alaska Health Mandate 12 FAQ “How is ‘community’ defined?”, Ex. 6014, p. 7.

153. The third-party proposed plans did include senate pairings; however, none of these pairings combined East Anchorage house districts with Eagle River house districts to form senate districts. The senate pairings suggested by AFFER did not propose a senate pairing which combined South Muldoon with East Anchorage—rather, the AFFER suggested senate pairings appeared to largely preserve the East Anchorage Community of Interest.

154. The Board’s public announcement regarding its adopted plans did not include any mention of senate pairings.<sup>172</sup> Likewise, senate pairings were not published to communities across the state during the Board’s road show.

155. The public was never given an indication of which, if any, senate district plan or plans had been adopted by the Board.

156. The public repeatedly expressed its confusion regarding this absence of a proposed senate district plan — members of the public wrote to and orally requested the Board to disclose its senate pairing proposals to the public.<sup>173</sup>

157. No hearing was ever held on any senate pairing plan adopted by the Board.

158. The Board allowed the public only two hours to testify regarding senate pairings. This testimony took place on a single day — November 8, 2021.<sup>174</sup> As of that

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<sup>172</sup> See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

<sup>173</sup> See ARB003541, ARB003542, ARB003554, ARB003973, ARB008190, ARB008207, ARB008224, ARB002357, ARB003172, ARB003231, ARB002367, ARB002369, ARB003592, ARB007764 (public testimony submitted to the Board, all requesting disclosure of Board’s proposed senate pairings to the public).

<sup>174</sup> ARB006691, November 8, 2021 Board Meeting Tr.

date, the Board had not announced its intent to pair Anchorage house districts with Eagle River house districts.

159. David Dunsmore details flaws in this approach to public testimony in his affidavit as follows: “In contrast to the house portion of the redistricting process, there was very limited opportunity for public input on senate pairings, truncation, or term assignments. The Board never adopted senate pairings for any of the Board options made available for public testimony on the road show, and the public testimony taken at the beginning of the November 8 meeting was the only testimony taken after the adoption of the house map. There was no public testimony taken on the specific proposed senate pairings before they were adopted, truncation, term assignment, or the final redistricting proclamation ... Throughout the redistricting process, the Board had a policy of taking public testimony at the beginning and end of every meeting day. During the November 8 meeting, I asked Deputy Director T.J. Presley to confirm that the Board would be continuing this practice but he referred me to the Board. I did not have an opportunity to ask the Board, through its chair or otherwise, before the pairings were adopted.”<sup>175</sup>

160. In her affidavit testimony, Major Wilson states that she testified to the Board regarding senate pairings and her belief that Eagle River house districts should be paired together into a single senate district.<sup>176</sup> However, member Marcum took her comments out of context and “misconstrued the words of [Wilson’s] testimony to misrepresent it as in favor of pairing Eagle River house districts with JBER or Northeast Anchorage

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<sup>175</sup> Dunsmore Aff. at ¶¶ 24-25.

<sup>176</sup> Wilson Aff. at ¶ 19.

districts.”<sup>177</sup> Wilson testified that “[t]here was no opportunity for the public to rectify this misrepresentation of [her] testimony, nor to give further comment on the senate pairings as selected by the Board.”<sup>178</sup>

161. Silvers testified in her affidavit that “[t]he Board did not provide the public with any proposed senate pairings for its consideration before the November 8, 2021 meeting, and only permitted public testimony before revealing the Board’s pairing proposals, unlike the house map process which allowed testimony before the adoption of the final house map.”<sup>179</sup>

162. The Board did not cross-examine Wilson or Silvers as to this testimony.

## **XII. EQUAL PROTECTION**

163. The Board proclaimed early on in its process that it would not be considering political information in its decision-making.<sup>180</sup> The Board made this statement repeatedly, and publicly.<sup>181</sup>

164. At depositions, Marcum and Simpson both admitted to receiving a spreadsheet from Randy Ruedrich, former chair of the Alaska Republican Party, which

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at ¶ 21.

<sup>179</sup> Silvers Aff. at ¶ 36.

<sup>180</sup> Binkley Depo. at pp. 185-188 (explaining that Board decided it would not be considering political information early on in its process and desired “to follow the constitution and do it, to the greatest extent that we could, apolitically”).

<sup>181</sup> *Id.* at 185; see also Simpson Depo. at pp. 210-211 (Q: “... I’ve read e-mails from the staff to the public saying we invite your testimony but please don’t include political information. Is that consistent with what you understand the board to have solicited and invited from the public?” A: “It is, yes, we were all, at least as far as I was aware, doing our best to maintain a nonpartisan approach. We all understood the constitutional requirements and that’s what we were trying to do”).

provided incumbent information for the Board's final house districts, suggested senate pairings, and a column indicating whether an incumbent could be reelected from the new districts selected by the Board.<sup>182</sup>

165. Marcum's deposition testimony demonstrates that she and Simpson viewed this information during the senate pairings work session in which Marcum apparently developed her proposals pairing Eagle River house districts with those in East Anchorage.<sup>183</sup>

166. This fact was never revealed to the public: indeed, later in the Board's process, when discussing the senate term truncation cutoff, Marcum took it upon herself to "just state for the record [the Board has] not been provided with any incumbent information."<sup>184</sup>

167. The Board's actions result in a reduction of proportionality of representation to East Anchorage voters from partisan, community of interest, and racial perspectives. As East Anchorage Plaintiffs' expert witness Dr. Chase Hensel testified in his affidavit, in East Anchorage — particularly in House District 20 (N. Muldoon) and 21 (S. Muldoon), "multiple minorities live together in an urban setting with the employment and living conditions that accompany poverty and low educational attainment."<sup>185</sup>

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<sup>182</sup> Marcum Depo. at pp. 197-201, 206-229 (testifying that she received and viewed incumbent information despite stating on the record that the Board had "not been provided with any incumbent information"); Simpson Depo. at pp. 218-223, 233-239 (denying reviewing incumbent information despite Marcum deposition testimony that she showed Simpson the unredacted document); see *also* Ex. 6005 (email from Randy Ruedrich to Simpson providing incumbent information).

<sup>183</sup> *Id.*

<sup>184</sup> Marcum Depo. at p. 225.

<sup>185</sup> *Id.* at ¶ 61.

168. In contrast, Eagle River resident Sean Murphy testified that “Eagle River commerce continues to grow and thrive, even during the pandemic” and “Eagle River residents are generally more affluent and educated per capita than East Anchorage and ... Eagle River residents have the same or very similar religious beliefs”<sup>186</sup> compared to the diverse origins and beliefs of East Anchorage residents.

169. On October 4, 2021, NAACP Anchorage president Kevin McGee (“McGee”) wrote to the Board, encouraging the Board to “protect[] every Alaskan’s vote, with low population deviation, compactness, socioeconomic integration, and contiguity.”<sup>187</sup> McGee drew the Board’s attention to the import of “protect[ing] minority voters’ franchise in Southcentral Alaska,” as “attempts at partisan gerrymandering would come at the expense of meeting Constitutional obligations.”<sup>188</sup> By way of example, McGee noted that “attempts to ... add Eagle River population to an East Anchorage House seat, or to pair a Government Hill House seat with an Eagle River House seat, are clearly motivated by partisanship but disenfranchise minority voters who make up a large percentage of Government Hill, JBER, and East Anchorage voters.”<sup>189</sup>

170. On November 8, 2021, McGee again submitted written testimony to the Board, writing that Eagle River house districts should not be paired with those in East Anchorage.<sup>190</sup> In this written testimony, McGee provided two alternate pairing proposals

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<sup>186</sup> Murphy Aff. at ¶¶ 5-16 (explaining differences between Eagle River and Anchorage communities of interest).

<sup>187</sup> October 4, 2021 McGee Written Testimony, ARB00056511-00056512.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> November 8, 2021 McGee Written Testimony, ARB ARB00050920-ARB00050921.



for the East Anchorage community of interest, both of which would have maintained the integrity of existing communities and complied with constitutional mandates while maximizing the minority populations within senate districts:

One Senate pairing configuration is visually obvious: Take the four House seats in East Anchorage (HDs 17, 18, 19, 23), and pair them into two Senate seats. Pair Downtown (HD 20) with Government Hill/JBER (HD 21), which is logical since it unites Downtown into a Senate seat, and protects minority voters' voice.

Though less visually obvious, another pairing configuration also can ensure minorities' vote, and voice in the electoral process is protected. Pair HD 21/HD 19, HD 16/HD 17, and HD 23/HD 18. This configuration protects minority voters' voice at the Senate level, and logically links adjacent neighborhoods with JBER. Effectively, it ensures our most diverse neighborhoods have a real voice in three Senate districts.<sup>191</sup>

171. In his affidavit in this case, McGee provides additional testimony about his background, the work and history of the NAACP, and his observations regarding the redistricting process. McGee testifies that the senate pairings adopted by the Board “established a clear disadvantage to the Northeast Anchorage community of color by the senate pairings of the Muldoon community with that of Eagle River.”<sup>192</sup>

172. The affidavit testimony of Silvers, and Wilson provides additional evidence of the unique community character of the East Anchorage community of interest as distinct from Eagle River.

173. Bahnke testified at deposition that the Board was not aware of the racial composition of specific communities while mapping, as it was the Board’s understanding that “[w]e weren’t supposed to factor in race.”<sup>193</sup> However, the Board had the ability to

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<sup>191</sup> *Id.*

<sup>192</sup> McGee Aff. at ¶ 23.

<sup>193</sup> Bahnke Depo. at pp. 77-78.

access racial data through its AutoBound Edge software throughout its mapping process.<sup>194</sup>

174. As the Board's executive director Peter Torkelson testified in his January 27, 2022 supplemental affidavit, the Board's AutoBound Edge software's "default matrix" undercounted minority voters by excluding those who self-identified as "white with Hispanic heritage" from its calculation of the minority composition of a particular area.<sup>195</sup> Although some limited information about minority populations in Anchorage was released to the public,<sup>196</sup> demonstrating that the Board did, in fact, receive and consider race information during its redistricting process, the vast majority of the Board's deliberations regarding senate pairings were shielded from the public through executive sessions.<sup>197</sup>

175. When the Board's "default matrix," Exhibit 6004, is compared with the more inclusive calculation provided in Exhibit 1007, it becomes apparent that Anchorage house districts were depicted as approximately two percent less diverse than they actually are.<sup>198</sup> As Erin Barker testified in her affidavit, using the data from the Board's default matrix suggests that when Districts 20 and 21 — North and South Muldoon — are combined into one senate district, the district would only have 49.31 percent minority

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<sup>194</sup> January 27, 2022 Torkelson Aff. at ¶ 5.

<sup>195</sup> *Id.*

<sup>196</sup> See ARB000113, Supplemental Alaska Racially Polarized Voting Analysis for 2021 Redistricting (stating that an analysis of voting patterns on minority individuals in the Anchorage area is "not possible" because there are "no precincts that are anywhere close to homogeneous").

<sup>197</sup> ARB00163257-ARB00163264 (correspondence among Board staff and Board's experts regarding a VRA compliance report "which includes a detailed discussion of Anchorage and its increasing minority VAP" for discussion in executive session).

<sup>198</sup> Barker Aff. at ¶¶ 11-28.

voting age population.<sup>199</sup> Using the more inclusive senate data unavailable through the Board’s default matrix, it becomes apparent that the combined district would, in fact, have a minority voting age population of 51.12 percent, rendering it a minority-majority district.<sup>200</sup> In contrast, when these diverse house districts are paired with Eagle River districts, their minority population plummets.<sup>201</sup>

176. The Board received 196 pieces of written testimony relating to senate pairings — of which 32 specifically objected to Marcum’s proposed pairings, while only six supported such pairings. This testimony provided myriad examples of the separate and distinct nature of the East Anchorage and Eagle River communities of interest.<sup>202</sup>

177. The record does not reflect that the Board perceived its East Anchorage senate pairings as appropriate and lawful. Bahnke and Borromeo were outspoken in their impression that not only were the East Anchorage/Eagle River pairings inequitable, non-contiguous, and discriminatory against the East Anchorage community of interest, but they were also chosen “against the sound, sound advice ... from counsel in Executive Session”<sup>203</sup>

178. Even Board Chairman Binkley never stated that he believed the Board’s final senate pairings were the best option — he simply stated, at the November 8, 2021 meeting, that “[t]here’s good justification from all different ways ... all of these [senate

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<sup>199</sup> *Id.* at ¶ 30.

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., January 27, 2021 Torkelson Aff. at Table 2, depicting minority voting age population of Alaska house districts with both inclusive and default formulae.

<sup>202</sup> See *generally* App. B: November 7-10 Senate Pairing Testimony.

<sup>203</sup> ARB007041, November 9, 2021 Board Meeting Tr.

pairing plans] are very justifiable, in my opinion. It's a question of what you think is the most reasonable..."<sup>204</sup>

179. Only Marcum and Simpson — both of whom had access to incumbent information, which was concealed from the public — were openly in support of the Board's adopted senate pairings.

180. Dr. Hensel testified that "the pairing of PD 21 and PD 22 and the pairing of PD 23 and 24 will substantially dilute the voting power of voters in PD 21(South Muldoon) and significantly dilute the voting power of voters in PD 23 (Gov't Hill/JBER/Northeast Anchorage)."<sup>205</sup> This is because the Muldoon districts are "swing districts" whereas "PD 22... has a solidly Republican voting pattern."<sup>206</sup> The "united Republican voice," when paired with East Anchorage districts, "would dominate and dilute the more economically, ethnically, educationally, and politically diverse PD 21 and eclipse the urban concerns that derive from its own sense of place."<sup>207</sup>

181. Dr. Hensel also testified that "the largely White district PD 22 (Eagle River Valley) will dilute the political voice of PD 21's Minority voters. This is because the distinctions rich vs. poor, exurban vs. urban, and high vs. low educational attainment, in the respective districts, map with White vs. Minority. These categorical differences underlie different political choices."<sup>208</sup> In short, "the promulgated senate pairing of PD 21 and PD 22 groups together House districts that are not similar enough to be deemed a

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<sup>204</sup> ARB006691, November 8, 2021 Board Meeting Tr.

<sup>205</sup> Hensel Aff. at ¶55.

<sup>206</sup> *Id.* at ¶¶ 69-72

<sup>207</sup> *Id.* at ¶¶ 73-76.

<sup>208</sup> *Id.* at ¶ 76.

single community of interest. PD 22 and PD 24 (Eagle River Valley and Eagle River/Chugiak) also constitute a single community of interest.”<sup>209</sup>

182. In light of this totality of circumstances, the burden of proof shifts to the Alaska Redistricting Board to justify its decision as having been taken to ensure proportionate representation.<sup>210</sup> The Board has taken no steps to supplement or clarify its record to provide additional evidence in support of the East Anchorage/Eagle River pairings.

DATED this 9th day of February, 2022.

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<sup>209</sup> *Id.* at ¶ 73.

<sup>210</sup> *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987).

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of February, 2022, a true and correct copy of the foregoing document was served electronically on the following:

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