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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

EAST ANCHORAGE PLAINTIFFS'

CONCLUSIONS OF LAW

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1. A bench trial in the above-captioned matter was held between January 21, 2022 and February 6, 2022. While this was a consolidated case, the case in chief in *Felisa Wilson v. Alaska Redistricting Board*, Case No. 3AN-21-08869CI, was held primarily on January 21, 2022. In accordance with the Superior Court's order, this closing brief includes the final arguments of the East Anchorage Plaintiffs as well as their proposed findings of fact and conclusions of law. Additionally, in an effort to assist the Court in navigating the administrative record, Appendices A-C include compilations of documents admitted into the record and direct affidavit testimony.

I. THE CIVIL RULE 90.8 ADMINISTRATIVE RECORD

2. This trial is unique in several respects that impact the presentation of evidence and matters of law. Generally, the appeal of the decision of an administrative body is limited to review of that body's record. Here, as recognized in Alaska Civil Rule 90.8(a), the Superior Court has discretion to supplement the agency record with witness testimony, deposition testimony or other documents. Specifically, Rule 90.8 states:

> The record in the superior court proceeding consists of the record from the Redistricting Board (original papers and exhibits filed before the board and the electronic record or transcript, if any, of the board's proceedings), as supplemented by such additional evidence as the court, in its discretion, may permit. *If the court permits the record to be supplemented by the testimony of one or more witnesses, such testimony may be presented by deposition without regard to the limitations contained in Civil Rule 32(a)(3)(B).* A paginated copy of the record from the Redistricting Board shall be filed in the supreme court at the same time it is filed in the superior court. (Emphasis added.)

This is only the second redistricting cycle applying Civil Rule 90.8 from the start to finish of redistricting litigation.[1] The hybrid nature of the proceedings has resulted in disputes amongst the parties regarding the scope of the Board's record, the nature of the trial, and the rights and obligations of the parties during the proceedings.

3. For context, in 2011, the redistricting board initially submitted a record consisting of 23 volumes and 13,474 pages.[2] The record was later supplemented by an additional volume consisting of 1,318 pages.[3] The record was supplemented by the testimony of ten witnesses at trial and by way of designated deposition testimony.[4] In addition to the record submitted by the Board, the parties agreed upon 69 joint exhibits, which were all admitted.[5] The parties sought and were granted admission of an additional 12 exhibits.[6]

4. By comparison, in 2021 the Board submitted several tranches of the record over the course of this litigation, totaling 11,662 pages. More than 200 pages of those files were corrupted or contained no data and have never been provided to the parties in

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1 The Alaska Supreme Court adopted Civil Rule 90.8 on November 15, 2021, after litigation of the 2001 Redistricting Plan had commenced. Judge Rindner truncated the proceedings accordingly, but the Rule did not govern discovery. The Court noted in that case that "[t]he parties began extensive discovery and multi-track depositions were taken of the approximately 160 witnesses initially identified" before Rule 90.8 was adopted. *In re 2001 Redistricting Cases*, 2003 WL 34119573, February 2, 2002.

2 Memorandum Decision and Order Re: 2011 Proclamation Plan, Alaska Superior Court, Case No. 4FA-11-02209CI, February 3, 2012 Slip Op. at 47.

3 *Id.*

4 *Id.* at 47, 51.

5 *Id.* at 51.

6 *Id.*

usable form.[7] Emails were "broken" from their attachments, making it impossible for a reader to identify what documents were attached, if any, to Board correspondence.[8] The documents were provided electronically and the files were only named with Bates numbers, making the record difficult to navigate.[9]

5. The low quality of the record is indicative of the Board's broader approach to this litigation. Motion practice and extensive argument was devoted to the Board's objections to parties' exhibits, most of which in the case of East Anchorage Plaintiffs, were publicly available self-authenticating documents from government sources that should have been subject to strict judicial notice.[10] Ultimately, the Board has behaved as though this litigation were a criminal proceeding in which the defendant is not obligated to produce evidence or put on its own case. The Board's strategy and behavior are the antithesis of an administrative proceeding in which a government entity's decision-making

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[7] *See* East Anchorage Plaintiffs' Third Notice Regarding Status of Discovery and Anticipated Procedural Requests, January 6, 2021, pp. 2-3 (observing that approximately 7,400 pages of discovery were received on December 31, 2021, many of which were documents already included in the administrative record. "These records were not identified, and forced Plaintiffs' counsel and staff to sort through thousands of redundant, duplicitous documents. Additionally, emails and attachments to emails were separated from each other, which prohibits Plaintiffs from understanding and evaluating what materials the Board received, transmitted, and considered, and using this information to depose Board members or otherwise prosecute their cases. Lastly, these batches of production included dozens of "0kb" or "empty" files, suggesting that materials may have been withheld without an assertion of privilege").

[8] *Id.* at 3, noting that "[t]he Board's intentional conduct in producing material to Plaintiffs in an unusable format, without any chronological or logical order, and detaching attachments from emails, has substantially prejudiced Plaintiffs and would be clear grounds for sanctions and the ordered reproduction of discovery in any other suit."

[9] *See generally id.* at 2-5.

[10] *See generally* East Anchorage Plaintiffs' Ex. 6000-6044.

is challenged, particularly where, as here, the Board's decision is so fundamental to the representative democracy rights of East Anchorage Plaintiffs.

II. STANDARD OF REVIEW

6. The general standard of review applied by the courts in exercising jurisdiction under Article VI, Section 11 of the Alaska Constitution involves a careful balance between deference and protection. While the standard of review was established before the law transferred the responsibility of redistricting from the executive branch to an independent body, it remains unchanged. The court reviews the Board's decisions to "ensure that the reapportionment plan is not unreasonable and is constitutional under article VI, section 6 of Alaska's constitution."[11] It examines the Board's decision to determine if it has taken "a hard look at the salient problems and has generally engaged in reasoned decision making."[12] In determining if a "hard look" has been taken by the Board, the court analyzes the Board's *process* rather than its policy and is tasked with asking whether the Board failed to consider an important factor, take a "hard look" at the salient problems or generally engage in reasoned decision-making.[13]

7. The court also considers the challenges posed by Alaska's unique geographic and cultural characteristics and the extremely expedited time period in which

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11 *Kenai Peninsula Borough v. State*, 743 P.2d at 1358 (quoting *Carpenter,* 667 P.2d at 1214, quoting *Groh*, 526 P.2d at 866-67).

12 *Id.* at 693; *see also Alpine Energy, LLC v. Matanuska Elec. Ass'n,* 369 P.3d 245, 251 (Alaska 2016) (explaining that appellate courts considering an agency's decision on issues within its area of expertise must determine whether the agency's decision was "arbitrary, capricious, or unreasonable" and whether the agency "[took] a hard look at the salient problems and … genuinely engaged in reasoned decision making").

13 *Id.*

redistricting must be completed when reviewing the Board's actions.[14] The court has repeatedly acknowledged, however, that these challenges "do not absolve th[e] court of its duty to independently measure each district against constitutional standards."[15]

8. Alaska courts have repeatedly held that the standard of review in redistricting cases is to "ensure that the reapportionment plan under review is not unreasonable and is constitutional under Art. VI, Section 6 of Alaska's Constitution." In determining if a plan or portion of a plan is unreasonable, the "Court must examine not policy *but process* and must ask whether the agency has not really taken a 'hard look' at the salient problems or has generally engaged in reasoned decision making."[16]

III. STATEMENT OF THE CASE

9. Redistricting in the State of Alaska has been riddled with unique challenges since its inception, with redistricting Board members struggling to balance loyalties to political parties, communities, and the public at large as they take on what the courts have recognized as a "Herculean feat of public service."[17] At first glance, it appeared the 2021 Board would follow its predecessors, inadvertently violating process on occasion but curing missteps through public deliberations and lawful decision-making before promulgation. As the Board delved into drawing new house districts, its members fiercely

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[14] *In re 2011 Redistricting Cases,* 274 P.3d 466, 468 (Alaska 2012) (recognizing that the Board is "faced with a difficult task in attempting to harmonize the requirements of the Alaska Constitution" and federal law, but emphasizing that "these difficulties do not limit the Board's responsibility to create a constitutionally compliant plan …").

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

[16] *In Re 2011 Redistricting, Order regarding Summary Judgment Motions*, 7, *citing* to Superior Court's February 1 Order.

[17] *In re 2001 Redistricting Cases,* 44 P.3d 141, 147 (Alaska 2002) (*quoting Egan v. Hammond,* 502 P.2d 856, 865–66 (Alaska 1972)).

debated the relevant constitutional criteria and absorbed days of public testimony from across Alaska. Ultimately, Board members Budd Simpson, Nicole Borromeo, and Melanie Bahnke voted for a map based, first and foremost, on the constitutional requirements.

10. It appeared that the 2021 Redistricting Board would be the first to curb partisan efforts and political pressures to adopt a constitutional map out the gate. Unfortunately, the adoption of a lawful and somewhat nonpartisan house map came at a severe cost; a cost born by the voters of Anchorage's diverse East Anchorage community.

11. The Board systemically deprived the voters in the East Anchorage communities of interest paired with Eagle River districts of adequate and true representation in the Alaska State Senate in direct contravention of Alaska's redistricting goals. Unexpectedly and with little explanation, the Board abandoned its process and transparency during the senate pairings meetings, and ultimately adopted, without public input, pairings that unconstitutionally divided one of the most diverse communities of interest in Alaska, and perhaps the country, to increase Eagle River's senate representation from one to two seats. The Board's actions shocked not only the public, but members of the Board itself, as the majority of Board members silently approved districts that split "Eagle River" from "Eagle River," and "Muldoon" from "Muldoon". The fracture of the Muldoon community of interest and the Board's lack of rationale for such fracture was exacerbated by the Board's sudden refusal to follow its own policies and procedures with the public, and even among its own members.

12. Ultimately, the Board failed to take a "hard look" at the pairing of House District 21-S. Muldoon with House District 22-Eagle River Valley and House District 23-

Government Hill/JBER/Northeast Anchorage with House District 24-North Eagle River/Chugiak, which are arbitrary and wholly unreasonable in violation of the substantive due process clause of the Alaska Constitution. The Board's errors in procedure and process regarding the senate pairings directly violated numerous provisions of the Due Process Clause of the Alaska Constitution and with it the Alaska Open Meetings Act ("OMA" or "Open Meetings Act") and Article VI, Section 10 of the Alaska Constitution. Additionally, and perhaps most egregiously, the Board violated the Equal Protection Clause of the Alaska Constitution. Board members intentionally misrepresented their considerations of partisan motivations, misrepresented their use of partisan data to select their pairings to even their own Board members, concealed their analysis of the risk of dilution in the districts at issue, misconstrued testimony by East Anchorage community members to serve their impermissible objective, and held secret deliberations and meetings to veil their partisan and discriminatory goals. While these actions undoubtedly violate the core principles guiding the redistricting process, it is, in some ways, the Board's seemingly calculated use of the highly discretionary senate pairing process to veil its discriminatory conduct and the extreme resulting erosion of public trust that is most alarming.

IV. ARGUMENT

A. THE BOARD EMPLOYED UNLAWFUL PROCESS AND PROCEDURES RESULTING IN ADOPTION OF SENATE PAIRINGS THAT VIOLATED THE DUE PROCESS CLAUSE OF THE ALASKA CONSTITUTION

13. While the court appropriately affords the Board flexibility in redistricting, this flexibility only works where the Board's process is lawful and its deliberations are rooted in the overarching purpose of redistricting in Alaska and the goals iterated by the Alaska

legislature. "The goal of an apportionment plan is simple: the goal is adequate and true representation by the people in their elected legislature, true, just, and fair representation."[18] The Alaska Supreme Court in *Hickel v. Southeast Conference* reminded Alaska's leaders:

> in deciding and in weighing this plan, never lose sight of that goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government.[19]

14. Here, the majority of the Board lost sight of this overarching purpose when adopting the East Anchorage/Eagle River Pairings, drastically shifting away from their purpose-grounded considerations during the house district process. Instead of looking to create "true, just, and fair" pairings, the majority members sought to create pairings that served their partisan interests and personal objectives, so long as they were not outright illegal. This reactive shift in purpose by the Board led to distorted decision-making riddled with fallacies and bias and in direct violation of the due process clause of the Alaska Constitution. The degradation of the decision-making process was so palpable it showed up in the Board's interactions with the public and with one another. Unfortunately, it also showed up in the Board's final decision, which led to tangible harm for voters in the Muldoon community of interest and the East Anchorage voters. This decision was ultimately wholly irrational, arbitrary, and without reason.

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[18] *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992) *as modified on reh'g.* (Mar. 12, 1993).

[19] *Hickel, quoting from* 3 Proceedings of the Constitutional Convention (PACC) 1835 (January 11, 1956).

15. Unlike the cases that came before it, the fundamental failures in the process of this Board during its senate pairing proceedings directly resulted in its unreasonable and arbitrary decision-making regarding such pairings. The Board's deviations from lawful procedures and process created, at best, the appearance of improper efforts to increase the strength of the majority at the cost of the minority. At worst, the Board's actions appear calculated, with members intentionally using the less-scrutinized senate pairings process and violating the OMA to sneak senate pairings past the public for the express purpose of diluting votes from residents in one of Alaska's most ethnically, racially, and economically diverse neighborhoods in order to amplify the power of votes in one of the most fiercely unified and autonomous house districts in Alaska.[20]

16. Despite the court's repeated application of the "hard look" standard to Board proceedings, it has not yet rejected a redistricting plan or portion of a plan based upon an error in "process." Arguably, it was precisely the court's hesitance to void an action by the Board under the laws governing process that has emboldened the Board to disregard these laws entirely in its 2021 redistricting process. But, in the absence of adequate process, the Board's arbitrary and capricious East Anchorage/Eagle River Pairings are unsupportable and must be corrected.

17. Further, any expectation that the Board may have had that its process errors were without consequence ignores the substantial shift in public interest when correcting

[20] Prior to the commencement of this practice, the ADP, proactively and out of an abundance of caution, sent a letter to the Board to alert it to the possibility that its practices were violating the OMA. After receiving this letter, the Board deliberately disregarded its cautionary message and instead began engaging in even more dramatic OMA violations — namely, repeated and prolonged executive sessions began replacing public deliberation as a matter of course.

senate pairings as opposed to house districts. Just as it took the Board less than 24 hours to err in its pairings, it would take no more than a week to correct that error. Unlike the house redistricting plans, the Board can provide public notice and hold a senate pairing hearing to correct the impacted districts within a week and still afford the public the right to participate. As a consequence, the public interest in this case, unlike those that came before it, weighs heavily in favor of correcting the intentional, blatant, and directly harmful procedural errors of the Board.

18. The Board's record, the deposition testimony of its Board members, and the testimony submitted by its members and staff all demonstrate numerous and sometimes intentional violations of due process. The Board's violations involved both the procedural and substantive due process requirements imposed upon redistricting boards during the redistricting process. More specifically, the Board engaged in the following impermissible Board actions:

a. Holding executive sessions and work sessions that are not permitted under the Open Meetings Act (AS 44.62.310, *et.seq.*);

b. Adopting final senate pairings that were not presented to the public during the public hearing process in violation of Article VI, Section 10 of the Alaska Constitution;

c. Adopting final senate pairings that violated the Board's own adopted policies and procedures;

d. Adopting senate pairings which the public did not have access to view;

e. Adopting final senate pairings that were not one of the senate pairings options published by the Board for public comment and testimony;

f. Adopting pairings without regard to public testimony or relying upon misrepresentation of public testimony to justify pairings;

g. Failing to maintain and produce an administrative record that would aid in judicial and public review and assessment; and

h. Failing to adopt findings that would permit judicial and public review and assessment.

19. According to the Alaska Supreme Court, "[t]he crux of due process is opportunity to be heard and the right to adequately represent one's interests." In order to determine what procedural process is due, the Alaska Supreme Court has generally considered three factors:

a. "[T]he private interest affected by the official action;"

b. "[T]he risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and"

c. "[T]he government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail."

20. While the Board certainly has authority to adopt its own policies and procedures, it still must comply with the OMA, the Public Records Act, and Article VI, Section 10 of the Alaska Constitution.

21. The Court has also recognized that due process entails not only a procedural component, but also a substantive one. Substantive due process protections insulate the public from unfair or unfounded state action: "A due process claim will stand if the state's actions 'are so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice.'" While the Board is free to adopt its own procedures, it is not afforded unfettered discretion during the redistricting process. The Board must comply with the OMA, the Public Records Act, and Article VI, Section 10 of the Alaska Constitution.

22. Due process involves both the public's ability to observe and participate in government process as well as the public's ability to trust government's representations in that process. The Board's procedural errors were magnified by the Board's direct and express misrepresentations to the public during the Senate District Hearings and the public's perception of the Board's sudden refusal to engage the public in the redistricting process. Board members Marcum and Simpson both expressly and repeatedly represented on November 9, 2021 that they did not have knowledge regarding incumbents and yet a careful review of the video of the meeting and direct admissions by Marcum herself demonstrate that these representations were patently false.[21] These misrepresentations, combined with the Board's excessive use of executive sessions to mask the Board's consideration, magnified by the Board's ultimately unreasonable East Anchorage/Eagle River senate pairings with total disregard for public comment, warrants a finding that these pairings were, as a matter of fact, law, and policy, wholly unreasonable and the procedures and process used to adopt them directly violates the due process clause of the Alaska Constitution.

1. Holding Executive Sessions and Work Sessions that are Not Permitted Under the Open Meetings Act

23. In its attempt to conceal its rationale and protect itself from scrutiny, the Board engaged in numerous violations of the Open Meetings Act throughout the redistricting process.[22] The Open Meetings Act is a state law requiring that meetings held

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21 See Findings of Fact at ¶¶ 124-130, 140-141.

22 East Anchorage Plaintiffs incorporate into this brief the pleadings filed in its Motion for Rule of Law and Motion to Separately Consider Board's Process and Procedure Allegations at Closing Argument and the statements of law and fact in that pleading practice.

by a government body be properly noticed and open to the public. According to AS 44.62.312, while a government unit's purpose is to "aid in the conduct of the people's business," this purpose does not result in a forfeiture of the people's sovereignty or right to determine what information they can access. Further, the people have a right to be informed so that they have the power to "control…the instruments they have created."[23] engaged in numerous violations of the Open Meetings Act, including holding meetings subject to the OMA without affording the public to meaningfully view these meetings and unlawfully using executive sessions to conceal the Board's deliberations from the public. The OMA provides that the meetings of a government body are open to the public unless the meeting falls within certain exceptions.[24]

24. The Board held "work sessions" during the November 8, 2021 senate pairing meeting that the Board advertised as "open to the public" but in reality, the public could not meaningfully hear or see view this work session because of the use of a visual system that obscured both the audio and visual appearance of the meeting.[25] While virtual meetings may not be a necessity in most redistricting cycles, the existence of a global and active pandemic during this redistricting cycle necessitated a virtual meeting option that the public could see, hear, and participate. The Alaska Supreme Court has previously acknowledged the importance of protecting the public from increased exposure to COVID-19 when exercising important voting rights. The Alaska Division of Elections was ordered by the Alaska Supreme Court to waive witness signature requirements on

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23 *See* AS 44.62.312.

24 Alaska Statute 44.62.310, *et seq.*

25 See generally, Findings of Fact, ¶¶ 69-87.

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.[26]

25. In addition to the insufficiencies of the hearing in light of the pandemic, the Board's deviation from past procedures solely for the senate pairing meetings was also suspect under the OMA and contributed to the due process clause violation resulting from the Board's conduct. David Dunsmore has testified to the shift in transparency from house district meetings to those on senate pairings.[27] Instead of considering expressly identified and circulated senate plans, Board members entered into pairings sessions riddled with hour-long executive sessions.[28] After reviewing the facts and relevant case precedent, our team has determined that while the house districts were drawn with little room for challenge, there is a colorable argument.

26. In contrast to the Board's largely public discussions regarding House districts (with the exception of extended executive sessions to discuss VRA compliance

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26 *See State v. Arctic Village*, 495 P.3d 313 (2021)

27 *See* Finding of Fact ¶ 59; *see also* Dunsmore Aff., ¶¶ 24-25 ("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."

28 See Findings of Fact, ¶¶ 44-51.

with counsel as well as “other lawful purposes”), the Board deliberated almost entirely in executive session and off the record regarding senate pairings. Even Board Members Borromeo and Bahnke appeared to be taken by surprise when the Board reconvened on November 9, 2021 to adopt senate pairings and the other three members of the Board indicated that they had changed their approach since the previous day.

27. These failures of process are pervasive throughout the Board’s proceedings, and are not limited to those raised in East Anchorage Plaintiffs’ Application. For example, during his deposition, Board Chair Binkley stated that, although the Board did not 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.[29] Yet, at the November 9, 2021 Board meeting, the majority board members violated Robert's Rules by shutting down debate regarding senate pairings without a 2/3 vote (i.e., four board members), as Article VII, Section 44 of Robert's Rules requires.[30] Although Board members 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.[31] As Board member Bahnke remarked in her closing comments on November 10, 2021, this procedural violation "resulted in a

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29 *See* Findings of Fact ¶¶ 35, 40-41. Board Chair Binkley testified in his deposition that the Board “determined we were going to operate under Robert’s Rules of Order” but did not adopt any other ethical rules, stating that “we left that up to each board member, individually … hopefully they were all ethical and conducted themselves in that manner. J. Binkley Dep., at 198:25-199:24.

30 ARB007044.

31 ARB007044.

silencing or muzzling or muffling" not only of minority members of the Board, but also "of a particular segment of Alaska voters."[32]

28. The Board's use of work sessions to permit Board members to congregate outside the view of the public, both when attending in-person and virtually, constitutes a violation of the public's right to be present at a meeting.[33]

29. The Board's overuse of executive sessions also violated the OMA. The Board was often vague about the purpose and scope of its executive sessions and failed to provide reasons justifying the use of the executive sessions to select senate pairings or house districts outside the public purview. While the East Anchorage Plaintiffs recognize that the Board generally cured its unlawful executive sessions regarding the house districts through its discussions on the record and exhaustive public testimony, the Board wholly failed to extend or apply any cures during the senate pairing proceedings. Further, attorney-client written advice impacting the Board's deliberations on senate pairings were unlawfully protected by misapplication of the attorney-client privilege.[34]

30. The use of an executive session will be strictly construed by the courts in favor of open sessions. Further, the use of executive sessions is both limited to a discrete set of exemptions under the Act, and those exemptions "shall be construed narrowly in order to effectuate" the broader policy of the Act, which is the people's access to the

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32 *See* Findings of Fact at ¶ 117.

33 *See* Dunsmore Aff. at ¶¶ 9-10.

34 East Anchorage Plaintiffs incorporate into this brief, the statements of facts and law as well as the arguments contained in its Motion to Amend its Application and related pleadings.

people's business as done by these governmental bodies.[35] Distilled, the OMA directs that all of the Board's meetings should be open, except under the limited circumstances where executive sessions are allowed.

31. The subjects that may be considered in executive sessions, per the OMA are: (1) information which could have an immediate adverse impact on the finances of the public entity; (2) information that could prejudice the reputation and character of a person; (3) information required to be confidential by law; and (4) information involving consideration of government records that are not subject to disclosure (i.e., confidential information).[36]

32. The attorney-client privilege certainly exists and "operates concurrently with the OMA although it is not an expressed exception."[37] It is, however, a narrower privilege in the OMA context and cannot be used as a blanket protection to discuss legislative matters. This is especially true here where the Alaska Constitution expressly protects the public's right to participate in the redistricting process.[38] A broader application of the attorney-client privilege to cloak the Board's unvetted decision-making would violate the policies codified in the purpose of the Act.[39] One of the most basic tenets of the OMA, as expressly acknowledged by the legislature, is that "the people's right to remain

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35 *See* AS 44.62.312.

36 Alaska Statute 44.62.310(c).

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

38 Article IV, Section 10 of the Alaska Constitution.

39 Alaska Statute 44.62.312.

informed shall be protected so that they may retain control over the instruments they have created."[40] The Alaska Supreme Court has determined that:

> It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies.[41] The principles of confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential.[42]

The Court goes on to state that:

> [p]ublic board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.[43] … The exception is not appropriate for 'the mere request for general legal advice or opinion by a public body in its capacity as a public agency.'[44]

33. On November 8, 2021, the Board convened to consider senate pairings for the first time in the redistricting process. Unlike meetings on the house districts, the Board abandoned its practice of presenting its proposed plan to the public for comment before

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40 Alaska Statute 44.62.312(a)(5).

41 *Channel 10*, 215 N.W.2d at 825–26. *See also City of San Antonio v. Aguilar*, 670 S.W.2d 681, 686 (Tex.App. 1984) (holding that a conference on decision to appeal deserves confidentiality); *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw.App. 304, 666 P.2d 177, 183–84 (1983) (holding that a settlement conference deserves confidentiality).

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

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

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

adoption.[45] It appears from the evidence that Marcum was so eager to ensure additional Republican seats in the senate and the increased representation of Eagle River, a longstanding Republican stronghold, that she misrepresented testimony by East Anchorage voter, Major (Ret.) Felisa Wilson, to further her partisan objectives. Unlike house district sessions where public testimony was provided before and after each session and most meetings were presented via functional virtual outlets, Board members foreclosed public testimony on the senate pairings before their adoption and used a virtual streaming system that prevented the public from fully seeing or hearing the Board members' discussions during its work sessions.[46]

(a) The Appropriate OMA Remedy is Remand for Correction of Error in Eagle River/East Anchorage Senate Pairings

34. While actions taken contrary to the Open Meetings Act are voidable under Alaska law, Alaska courts have been reticent to declare a redistricting plan void on the basis of an OMA violation. The courts have, when faced with missteps by previous redistricting boards, weighed the harm to the public of a voided plan against the nature and scope of the violation and determined instead that the mere declaration of the violation and direction to the offending board to correct the improper conduct was sufficient.

35. The court considers the following when determining whether or not to void Board action due to an OMA violation:

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

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45 *See generally* Findings of Fact at ¶¶ 52-57.

46 *Id.*

b. the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;
c. the degree to which the public entity, other governmental bodies, or individuals may be exposed to additional litigation if the action is voided;
d. the extent to which the governing body, in meetings held in compliance with the Open Meetings Act, has previously considered the subject;
e. the amount of time that has passed since the action was taken;
f. the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;
g. whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of the Open Meetings Act;
h. the degree to which violations of the Open Meetings Act were willful, flagrant, or obvious; and
i. the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).[47]

36. The Board, and its counsel, appear to take great solice in the presumption that the public interest will here, as always in redistricting cases, weigh in favor of excusing the violation without consequence. This presumption ignores the narrow scope of the action challenged by East Anchorage Plaintiffs and the Board's ability to cure its procedural and process violations in a very short time period that would not interfere with redistricting or disturb the house district maps. It ignores the ability to revisit the East Anchorage/Eagle River Senate Pairings within in a short time period. The Board also forgets that it's willful, flagrant, and obvious violations weigh in favor of voiding its action along with its blatant violation of the stated purpose of the OMA.

[47] Alaska Statute 44.62.310(f).

2. The Board Violated Article VI, Section 10 of the Alaska Constitution by Failing to Adopt Senate Pairings Within 30 Days of Receiving Census Data and Failing to Hold Public Hearings on Such Pairings

37. Article VI, Section 10 of the Alaska Constitution provides that the Board must adopt a proposed redistricting plan within 30 days of receipt of census data. This constitutional provision also mandates that the Board hold public hearings on the proposed plan or, if no single proposed plan is agreed upon, on all plans proposed by the Board. The evidence presented in the record, and at trial, demonstrates that although the Board did so with regard to its house districts, no proposed plan for senate pairings was properly and timely presented to the public before its adoption. In failing to adopt proposed senate pairings within the required 30-day window, and in failing to hold any hearings on any senate pairing plan, the Board violated this constitutional provision.

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

39. After the Board received census data on August 12, 2021, it invited members of the public to provide proposed redistricting plans. Several groups provided the Board with proposed house district maps, among them AFFER, AFFR, the Senate

Minority Coalition, the Doyon Coalition, and the Alaska Democratic Party. The Board adopted each of these maps but that proposed by the Alaska Democratic Party, in addition to two maps created by the Board itself: "Proposed Plan v.3" and "Proposed Plan v.4."[48] The Board announced the adoption of these proposed plans on September 20, 2021.[49] Although the Board's own plans did not include suggested senate pairings, the third-party plans did. However, in the 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."[50] The announcement was devoid of any mention of senate pairings, televising to the public that no proposed senate pairings had been adopted.

40. Indeed, at the Board's "road show" across the state, senate pairings were not discussed, and proposed senate pairing charts were not printed and posted on the wall as house district maps were. Testimony submitted to the Board is riddled with references to this significant omission: as early as September 16, 2021, and as late as November 5, 2021, members of the public repeatedly wrote to and orally requested the Board to disclose its senate pairing proposals to the public.[51] Yet, despite these repeated requests, the Board never issued a corresponding announcement providing the public

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48 Findings of Fact at ¶ 21.

49 Findings of Fact at ¶¶ 21-23.

50 Findings of Fact at ¶ 23.

51 *See, e.g.* Findings of Fact at ¶ 66.

with any indication that it had adopted any proposed plan for senate districts as the Constitution requires.[52]

41. Likewise, the Board never offered an opportunity for the public to comment on its senate pairings proposal that paired East Anchorage with Eagle River. While the public was permitted to testify while the Board was in the process of "workshopping" senate pairings, it did so blind, without any direction as to what the Board was considering.[53] Not only did this error in process preclude the public from meaningful involvement in the Board's decision-making process, but it also prevented the public from reacting to the work of the Board and correcting its errors before the final proclamation plan was adopted. For example, in her affidavit, Felisa 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. 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

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[52] The Board has previously argued that the trial court's decision in the *In re 2001 Redistricting Cases* litigation is determinative of East Anchorage Plaintiffs' Article VI, Section 10 claims because the court opined that this constitutional provision does not mandate that the Board must hold hearings regarding its final proclamation plan. Not only is this statement dicta from a trial court without binding force or precedential effect (*see United States v. K.A. Tucker Truck Lines, Inc.,* 344 U.S 33, 38 (1952) (concluding that an issue not raised or discussed in an appellate opinion is not binding precedent on that point); *see also* 21 C.J.S. Courts § 206 (explaining that a court's prior decision is not a binding precedent on points or propositions that were not raised in briefs or argument, considered by the court, or discussed in the opinion)), but it is also inapposite where, as here, the Board failed to hold public hearings on *any* senate pairing plan.

[53] *See generally* ARB006496; ARB007032 (transcripts of Board meetings on November 8-9, 2021).

Anchorage districts."[54] 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."[55] Likewise, Yarrow Silvers testified in her affidavit that "[t]he Board did not provide the public with any proposed senate pairings for its consideration before the November 8, 2021 meeting, and only permitted public testimony before revealing the Board's pairing proposals, unlike the house map process which allowed testimony before the adoption of the final house map."[56] The Board did not cross-examine with Ms. Wilson or Ms. Silvers as to this testimony; it therefore remains unrebutted and conclusive.

42. This absence of a meaningful public hearing process is especially egregious because the Board failed to provide the public with any indication that the Board was contemplating splitting the East Anchorage and Eagle River communities of interest before the November 8 meeting. This arrangement was not reflected in any of the senate pairings provided to the Board by third parties at the beginning of its process, and was not discussed at any public hearing prior to November 8. Although the Board previously argued in its Motion to Dismiss East Anchorage Plaintiffs' Article VI, Section 10 Claim Pursuant to Civil Rule 12(b)(6) that such a pairing was submitted with AFFER's proposed plan, the Board is mistaken. As the following graphic demonstrates, AFFER's proposal "carves out" the vast majority of Eagle River, places it with JBER, and pairs the resulting house district north into a senate district with the Chugiak/Birchwood/Peters Creek area:

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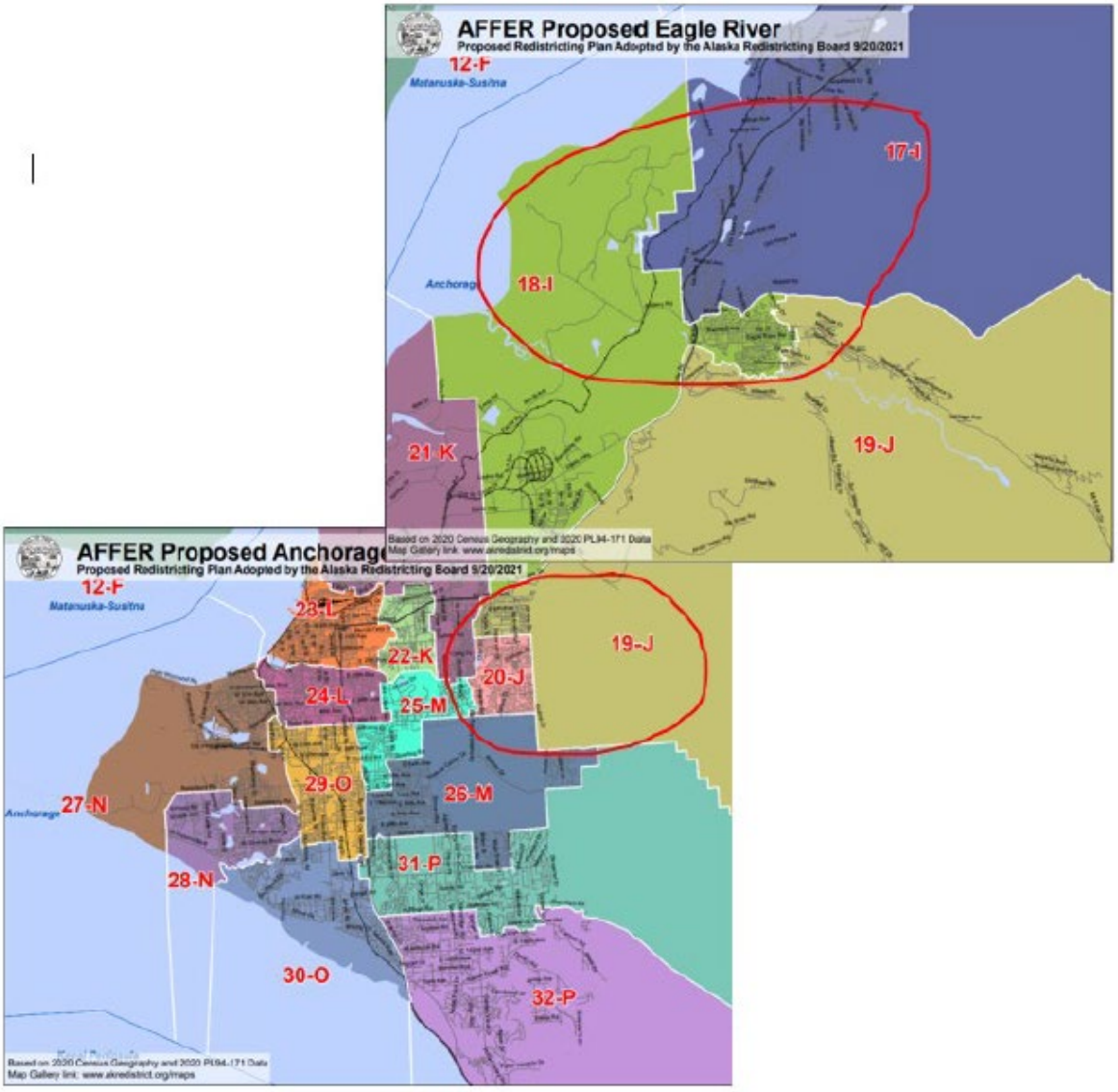
54 F. Wilson Aff., ¶ 19.

55 *Id.* at ¶ 21.

56 Y. Silvers Aff., ¶ 36.



43. In short, not one piece of evidence exists in the record which supports the notion that the Board complied with the mandates of Article VI, Section 10 of the Alaska Constitution and provided the public with an adopted senate district plan within 30 days of receipt of census data — in fact, the overwhelming evidence demonstrates that the Board never adopted any such plan, and further never held a single public hearing on any senate district plan. The total absence of any attempt at complying with this constitutional

mandate deprived the public of any opportunity to meaningfully inform the Board's senate pairing process, which appears to have directly led to the Board's uninformed decision to pair East Anchorage house districts with those in Eagle River. Thus, this procedural error mandates correction of the resulting substantive error in the Board's Anchorage senate pairings.

3. The Board Violated Its Own Policies and Procedures During the Senate Pairing Adoption

44. While the Board's violation of the OMA and the application of the OMA to the Board is irrefutable under current Alaska law, the Board's adoption of the OMA through its own policies and the publication of those policies on its website also obligate the Board to follow the OMA. Further, the Board Chair admitted to the adoption of Robert's Rules of Order.[57] During his deposition, Board Chair John Binkley stated that, although the Board did not 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.[58]

45. 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.[59] 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

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57 *See* Findings of Fact at ¶¶ 69-87.

58 *See* Findings of Fact at ¶¶ 35, 40-41.

59 November 9, 2021 Board Meeting Tr. p. 11, ARB007043; Article VII, section 44 of Robert's Rules of Order.

continue debate.[60] 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."[61] Further, the Board adopted the Open Meetings Act and yet implemented a Request for Proposal process in retaining legal counsel that unlawfully excluded the public.[62]

46. The Board's adoption of policies and procedures and then wholesale abandonments of those procedures when they no longer suit their needs constitutes a violation of due process.

4. Failing to Maintain and Produce an Administrative Record that Would Aid in Judicial and Public Review and Assessment

47. The application process to correct an error is an administrative appeal process. While the Board is given the opportunity to advocate for and defend its redistricting plan, the Board does not have the authority or right to interfere with the creation of the administrative record and disclosure of administrative documents to thwart the efforts of applicants. The Board's obligations under the Alaska Constitution and due process do not disappear solely because the Board ssued a decision. It remains a government body subject to the obligations of due process, equal protection, and various

60 *See* Findings of Fact at ¶¶69-87.

61 *Id.*

62 *Id.*

other constitutional and statutory provisions. Thus, while it certainly has a right to fiercely advocate for its findings, it does not have the right to obscure the administrative record to interfere with the right of the applicants to participate in the application process. As the Court is aware, the applicants in this case have been attempting to discover information and documents relating to the Board's decision-making process since the inception of the application process. The Board has consistently refused to provide the information requested in a usable form or in any form at all. There are substantive and necessary documents still at large and no time given the current structure to engage in the additional motion practice necessary to receive those documents and certainly no time to process the importance of them.[63] This obstructive conduct included failing to respond appropriately to East Anchorage Plaintiffs' discovery requests, precluding counsel from inquiring as to non-privileged topics at Board member depositions, and withholding from production on attorney-client privilege grounds numerous documents which the Court later found to be non-privileged.

48. After trial began, pursuant to an order following this Court's in camera review of these withheld documents, relevant and discoverable email correspondence among Board staff members and counsel was produced to East Anchorage Plaintiffs. This correspondence provided evidence, despite representations by the Board suggesting otherwise, that the Board relied on and had access to minority race data when conducting its Anchorage pairings and may have relied on incorrect data in doing so.

63 *E.g.* East Anchorage Plaintiffs have been unable to find the Redistricting Planning Committee Report in the production, the finalized Board policies and procedures are not in the record, and the Board produced documents in its exhibits that were not produced during production.

Throughout these proceedings, the Board appears to have made every effort to obfuscate efforts by the applicants to get basic information regarding the Board's rationale underlying its decision and its findings, or rather its lack thereof. East Anchorage Plaintiffs recognize that the Board faces extremely challenging time constraints in completing its mapping duties. However, in this election cycle, the substantial delay in the release of the census data in many ways substantially burdened the court and the application for correction of error process. The Board, through its legal counsel, capitalized on this burden, aggressively engaging in adversarial tactics that required applicants to repeatedly move for access to records and documents even where such documents were clearly subject to disclosure as a matter of law. The Board had over a year to develop, finalize and preserve the vast majority of its documents. The court and the applicants had only weeks to review and process this data. The Board's failure to prepare, retain, and preserve an administrative record extremely burdened the applicants and the court.[64] A superior court judge or a decision maker in a quasi-judicial hearing before a government body cannot, under any circumstances, muddle the record on appeal to increase its chances of surviving remand. The Board, as a government body with a decision before this court on appeal, should be held to the same standard.

49. Unlike a standard court proceeding, the application of error process is but a component of the redistricting process as a whole. Thus, intentional and bad faith efforts by the Board to derail that process, especially in a cycle like this where the court

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64 *See* Motion to Supplement Record; Motion for Rule of Law; Mat-Su Borough Motion Joining in Motion for Rule of Law; Motion

has closer to two rather than six months to issue a decision, constitutes an independent procedural due process violations by the Board.

50. Similarly, the Board's efforts to withhold documents that are, as a matter of law, subject to disclosure and continued refusal to produce the most basic requested documents, such as email correspondence between and by Board members *with* attachments also interfered with East Anchorage Plaintiffs' ability to present its case. Again, the Board had over a year to develop a process for preserving and preparing Board correspondence for disclosure. Past redistricting boards have, for example, prepared, maintained, and disclosed a reading file containing such email correspondence to the public. The Board however, not only failed to create a reading file, it denied its record retention duties when the applicants requested that it, at the least, produce an administrative record documents as mandated by the State's statutory retention requirements.[65]

5. The Board Failed to Adopt Findings Regarding Senate Pairings Necessary to Judicial Review

51. While the Alaska Supreme Court does not require the Board to issue findings for each election district, the Alaska Supreme Court has repeatedly recognized the value and need of findings in the redistricting process. Like the hybrid administrative appeal/trial model imposed by Alaska Civil Rule 90.8, the court creates a hybrid process model for the redistricting board, which includes some of the fundamental procedural due process protections afforded the public in quasi-judicial proceedings as well as the

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65 *See generally* Joint Motion to Include Certain Categories of Documents in Administrative Record, filed December 17, 2021, and related pleadings.

substantive due process protections imposed upon legislative bodies. Unfortunately, the Board failed to comply with both the procedural and substantive due process requirements imposed upon it, ultimately resulting in the irrational Eagle River/East Anchorage Pairings and the substantial loss of the public's trust in the Board and the integrity of the redistricting process.

52. Well-made findings are necessary. They benefit the body making them, the appellate body reviewing them and the parties to the action in which they are made. Findings ground a body, helping it to avoid making decisions based on irrelevant or unsubstantiated factors. The act of making findings requires a body to focus its attention on the evidence presented and how this evidence reflects on each of the elements required in an ordinance or statute. The act of making findings not only helps a body formulate the basis for its decision but also helps the body communicate that basis to an appellate body. Well-drafted findings allow a reviewing court to understand why a body made a certain decision rather than having to guess as to the basis for a certain ruling. Findings also provide the parties to an action with guidance, giving these parties insight into the basis for the body's decision, which in turn allows them to make strategic decisions about whether or not to appeal the body's action. *Mobile Oil Corp. v. Local Boundary Commission*, 518 P.2d 92 (Alaska 1974); *see also Faulk v. Board of Equalization*, 934 P.2d 750 (Alaska 1997).

53. While there has been little discussion of what constitutes sufficient findings in redistricting actions, the importance of findings and standard of review applied to them

is evident in laws governing quasi-judicial bodies, which requires such bodies to issue findings.[66]

54. In *Fields v. Kodiak City Council*, the court required findings in a variance action, stating that:

> The statute requires an aggrieved party seeking review to specify the grounds for the appeal. AS 29.33.130(b) [now, AS 29.40.040(b)]. This requirement is also found in the governing local ordinance. KIBC 17.69.030. A board's failure to provide findings, that is, to clearly articulate the basis of its decision, precludes an applicant from making the required specification and thus can deny meaningful judicial review. We believe that implicit in AS 29.33.130(b) is the requirement that the agency rendering the challenged decision set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order. Only by focusing on the relationship between evidence and findings, and between findings and ultimate action, can we determine whether the board's action is supported by substantial evidence. Thus we hold that regardless of whether a local ordinance requires findings, a board of adjustment ruling on a variance request must render findings "sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action."[67]

55. According to the court in *Fields*, "[a]bsent findings, a court is forced into 'unguided and resource-consuming explorations,' groping through the record to determine 'whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order and decision' of the board."[68]

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

67 *Fields v. Kodiak City Council*, 628 P.2d 927, 933 (Alaska 1981) (citations omitted).

68 *Fields*, 628 P.2d at 934 (citations omitted).

56. Despite the court's general requirement of findings, there are cases in which the court determines that findings are unnecessary to decipher a board or commission's decision and upholds the decision in question despite the lack of findings.[69] However, even in the cases where the court upholds a commission or board's decision without adequate findings, the court invariably reiterates the general findings requirement.

B. THE BOARD'S EAST ANCHORAGE/EAGLE RIVER PAIRINGS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE ALASKA CONSTITUTION

57. Senate District K cannot withstand scrutiny under the Equal Protection Clause of the Alaska Constitution. The Equal Protection Clause provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[70] "In the context of voting rights in redistricting and reapportionment litigation," the Alaska Supreme Court has held that "there are two principles of equal protection, namely that of 'one person, one vote' — the right to an equally weighted vote — and of 'fair and effective representation' — the right to group effectiveness or an equally powerful vote."[71] The former is quantitative, or purely numerical, in nature; the latter is qualitative.[72]

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69 *See Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 940 (Alaska 2001). *See* also *Fields*, 628 P.2d at 932; *Galt v. Stanton*, 591 P.2d 960, 962-965 (Alaska 1979).

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

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

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

58. Both the Alaska and federal due process clauses impose a guarantee of fair representation which mandates overturning certain apportionment schemes that "systematically circumscribe the voting impact of specific voter groups" even where these schemes would otherwise be "mathematically palatable."[73] This principle recognizes the danger that certain groups – community, political, racial, or of other varieties – may be "fenced out of the political process and their voting strength invidiously minimized" by redistricting and reapportionment schemes which violate the Equal Protection Clause.[74]

59. While the United States Supreme Court has indicated that "a mere lack of proportional representation will be insufficient to support a finding of unconstitutional vote dilution,"[75] and that Plaintiffs must prove a pattern of intentional discrimination against a group and discriminatory effect on that group,[76] the Alaska Equal Protection Clause imposes a stricter and more protective standard than its federal counterpart.[77]

60. To determine whether a redistricting plan runs afoul of Alaska's guarantee of equal protection, courts look to the Alaska Supreme Court's three-step equal protection analysis.[78] The first step of this analysis is to determine the weight of the constitutional interest that is impaired by the challenged state action. Guidance from the high court is

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73 *Id.* at 48-49.

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

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

76 *Id*. at 133.

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

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

clear: the right to a geographically equally effective vote, while not a fundamental right, is "a significant constitutional interest."[79] Where a governmental action impairs a significant individual right, the second step of the equal protection analysis requires the court to determine whether the action was taken in order to serve a legitimate and important governmental interest — in other words, where a threshold showing of impairment of a right is made, the burden shifts to the government to demonstrate that there was some legitimate and important policy consideration which necessitated the impairment of that right.[80] In the voting context, if the record demonstrates that the Board's intent was to dilute the voting power of a geographic group compared to another, that is a per se illegitimate purpose, and the equal protection challenge prevails.[81] In light of Alaska's protective equal protection jurisprudence, the Court deliberately does not require a showing of a pattern of discrimination, and does not consider *any* effect of disproportionality *de minimis* when determining the legitimacy of the Board's purpose.[82]

61. Actual discriminatory intent need not be directly proven — rather, if there is even an appearance of an intent to dilute the voting strength of one group compared to

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

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

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

82 *Id*.

another, then the burden will also shift to the Board to prove it had a proper purpose.[83] For example, in *Kenai Peninsula Borough v. State,* the Alaska Supreme Court expressly held that "Senate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska Equal Protection clause."[84] Similarly, the Court has approved of and incorporated trial court dicta explaining that "[t]here is an Alaska equal protection guarantee against hodge-podge senate pairings."[85]

62. Discriminatory intent may also be inferred from the process followed by a governmental entity. In *Kenai Peninsula Borough*, looking to both "the process followed by the Board in formulating its decision" and to "the substance of the Board's decision," the Court found that "it [was] evident that the Board sought to prevent another Anchorage senate seat in the state legislature," thereby demonstrating that the Board impermissibly acted against "the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community."[86]

63. While federal courts require proof of both intentional discrimination against a politically salient group and demonstration of an actual discriminatory effect upon that group to prove a prima facie equal protection violation, Alaska courts do not. Instead, the Alaska Supreme Court opted to adopt the "neutral factors test" propounded by Justice

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83 *Id.* at 1372.

84 *Kenai Peninsula Borough,* 743 P.2d at 1365, n.21 (Alaska 1987).

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

86 *Id.*

Powell in *Davis v. Bandemer.*[87] Under this standard — black letter law in Alaska — "district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation."[88] Therefore, Alaska law, by design, does not require that challengers to a redistricting plan demonstrate that a plan has a discriminatory impact on a particular class of voters in order to succeed on the merits — discriminatory intent is enough.

64. This precedent creates protection for the interest of communities in their "right to an equally powerful and geographically effective vote in the state legislature."[89] Notably, this right protects *community interests* — not merely interests stemming from race, political affiliation, or other suspect classes. Again, "upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation."[90]

65. The Board will no doubt assert, with reference to federal law, that an equal protection violation cannot exist without evidence that the minority which has been discriminated against votes in a predictable, uniform manner. The Board is mistaken as a matter of law: in Alaska, geographic discrimination claims may involve racial and partisan aspects — as here – but are justiciable in their own right as a consequence of Alaska's non-partisan redistricting process.

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

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

89 *Id.*

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

66. Partisan gerrymandering is a redistricting process and outcome which "operates through vote dilution — the devaluation of one citizen's vote as compared to others."[91] Mapmakers draw district lines to "pack" and "crack" voters likely to support the disfavored party.[92] Supermajorities of the disfavored party are "packed" into relatively few districts in far greater numbers than needed for preferred candidates to prevail, and the remaining voters from the disfavored party are "cracked" among remaining districts. Regardless of whether an individual voter has been "packed" or "cracked," his or her vote carries less weight, and less consequence, than it would under a non-partisan, neutrally-drawn map.[93] In short, "the mapmaker has made some votes count for less, because they are likely to go for the other party."[94] This vote dilution inherently presents an equal protection problem, though it is perhaps more subtle than the equal protection problem presented by violations of the "one person, one vote" requirement.

67. In 2019, the United States Supreme Court decided *Rucho v. Common Cause,*[95] a landmark decision which held that claims of partisan gerrymandering presented a non-justiciable question beyond the reach of the federal courts. In so holding, the Court carefully distinguished among various impermissible actions by redistricting entities, and carefully clarified the role of federal courts in the redistricting process. The Court wrote:

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

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

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

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

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

> Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.
>
> Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in *Baker v. Carr,* for example, could be decided under basic equal protection principles. 369 U.S. at 226. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. *See Gomillion v. Lightfood,* 364 U.S. 339, 340. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because 'a jurisdiction may engage in constitutional political gerrymandering.' *Hunt v. Cromartie,* 526 U.S. 541, 551. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities…[96]

Thus, in the aftermath of *Rucho*, resolution of the equal protection problem presented by partisan gerrymandering has been left to the province of the state courts. And in Alaska, the problems identified by the *Rucho* court as weighing against justiciability are simply not present. Where, in other jurisdictions, redistricting is an inherently political process, the Alaska redistricting board is, by design, a non-partisan entity. Article VI, Section 8 of the Alaska Constitution states that appointments to the Board shall be made "without regard to political affiliation," and mandates that none of the members of the Board "may be public employees or officials at the time of or during the tenure of appointment." There is simply no barrier – legal, jurisdictional, or otherwise — to Alaska courts exercising their authority to identify and correct errors by the Alaska Redistricting Board which constitute partisan gerrymandering.

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96 *Id.*

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

69. Consistent with its constitutionally-mandated nonpartisanship, the Board began its work by proclaiming that it would not be considering political information in its decision-making process.[97] The Board made this statement repeatedly, and publicly.[98] Yet, at deposition, Board members Marcum and Simpson both admitted to receiving a spreadsheet from Randy Ruedrich which provided incumbent information for the Board's final house districts, suggested senate pairings, and a column indicating whether an incumbent could be reelected from the new districts selected by the Board.[99] 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. This fact was never revealed to the public: indeed, later in the process, when discussing the senate term

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97 *See* Findings of Fact ¶ 163.

98 *See* Findings of Fact ¶ 163.

99 *See* Findings of Fact ¶ 164; *see also generally* B. Marcum Dep; B. Simpson Dep.

truncation cutoff, Marcum took it upon herself to "just state for the record [the Board has] not been provided with any incumbent information."[100] When placed in this context — particularly in light of the Board's failures in process — Marcum's statement that her pairings would provide Eagle River with the opportunity for more representation makes clear that her senate pairings were engineered as a partisan gerrymander to dilute the efficacy and strength of East Anchorage voters' community voice.

70. Having shown that the Board intentionally acted to dilute the efficacy of East Anchorage voters, the onus shifts to the Board to show that "its plan will lead to greater proportionality of representation."[101] The Board cannot do so. The Board has not offered the testimony of any expert witness in this proceeding, and has not otherwise attempted to meaningfully rebut or engage with East Anchorage Plaintiffs' equal protection arguments. Instead, throughout its substantive filings in this matter, the Board has attempted to undermine the credibility of the East Anchorage Plaintiffs' equal protection claims by misleadingly and inaccurately characterizing them as alleged violations of the "one person, one vote" requirement.[102] The Board's position ignores every Alaska and

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100 *See* Findings of Fact ¶ 166.

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

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

federal case to have ever considered qualitative theories of equal protection in the redistricting context.

71. Indeed, an analysis of the testimony presented to the Court demonstrates that 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, "[b]ecause peoples' needs arise in specific settings and must be addressed in ways that suit those settings, political representation is most effective where constituents share a sense of place."[103] This is because, as Dr. Hensel describes, discrete communities have different needs which are not interchangeable with those of other communities. This dichotomy is particularly evident when one contrasts Muldoon/Northeast Anchorage communities with Eagle River:

> Muldoon/Northeast Anchorage areas self-represent and are referred to in the language of urban community. Neighborhoods are the common socio-geographic expression of diversity in urban spaces. Cities are typically described as having a particular character; so are the neighborhoods that constitute them, wherever populations, activities, and structures make such areas distinctive. An urban sense of place is often rooted in one's neighborhood. The experience of living in an urban neighborhood closely bordered by other neighborhoods differs from living in a discretely bounded and more rural town; Muldoon, unlike Eagle River, has an integral relationship with the rest of Anchorage.[104]

Likewise, Muldoon/Northeast Anchorage is astonishingly diverse in a way that Eagle River simply is not. As Dr. Hensel remarked, in East Anchorage — particularly in House District 20 (N. Muldoon) and 21 (S. Muldoon), "multiple minorities live together in an urban

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103 *See generally C. Hensel Aff.*; *see also* Findings of Fact ¶¶ 167, 180-181.

104 *Id. See* C. Hensel Aff. At ¶ 48.

setting with the employment and living conditions that accompany poverty and low educational attainment."[105] In contrast, as Eagle River resident Sean Murphy testified, "Eagle River commerce continues to grow and thrive, even during the pandemic" and "Eagle River residents are generally more affluent and educated per capita than East Anchorage and … Eagle River residents have the same or very similar religious beliefs"[106] compared to the diverse origins and beliefs of East Anchorage residents.

72. Recognizing the notably diverse composition of East Anchorage districts, NAACP Anchorage, through its president Kevin McGee, took an interest in the Board's work early on. On October 4, 2021, Mr. McGee wrote a letter to the Board encouraging the Board to "protect[] every Alaskan's vote, with low population deviation, compactness, socioeconomic integration, and contiguity."[107] Mr. 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."[108] By way of example, Mr. 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."[109] Later, on November 8, 2021, Mr. McGee again

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105 *Id.* at ¶ 61.

106 *See generally* S. Murphy Aff; *see also* Findings of Fact ¶ 168.

107 Findings of Fact ¶ 169

108 Findings of Fact ¶ 169.

109 Findings of Fact ¶ 169.

testified against pairing Eagle River House districts with those in East Anchorage to protect the voting rights of East Anchorage.[110] In this written testimony, Mr. McGee provided two alternate pairing proposals 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.[111]

When the Board disregarded this sound testimony, and Mr. McGee was forced to participate in this litigation to protect the rights of East Anchorage communities of color, he provided, thorough thoughtful testimony about his own background, the work and history of the NAACP, and his observations regarding the redistricting process. This testimony demonstrates, like the testimony of Dr. Hensel and others, that the senate pairings adopted by the Board "established a clear disadvantage to the Northeast

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110 Findings of Fact ¶ 170..

111 *Id.*

Anchorage community of color by the senate pairings of the Muldoon community with that of Eagle River."[112]

73. Consistent with Member Marcum's stated intent to disenfranchise East Anchorage voters for the benefit of those residing in Eagle River, the Board remarkably sought to exclude Mr. McGee's affidavit in its entirety, and characterized his statements regarding the work and history of the NAACP as somehow "prejudicial to the Board."[113] The Court denied these baseless objections, and is entitled to consider Mr. McGee's testimony regarding the impact of the Board's plan on minority voters in East Anchorage. But this attempt by the Board to shield information regarding the racial impact of its proclamation plan from the public is not an isolated incident: rather, it is reflective of the Board's larger, and more pervasive, aggressive position that racial information and legal discussions regarding race are subject to carte blanche protection from disclosure to the public by virtue of the attorney-client privilege. The Board asserted this position in response to the East Anchorage Plaintiffs' Motion for Rule of Law Regarding Scope of Attorney-Client Privileged Communications with Government Entities, and that position was rejected by the Court.

74. The harm McGee alludes to in his affidavit is not speculative. As discussed extensively in the Brief in Amici filed by Amici, the Alaska Black Caucus, National Association for the Advancement of Colored People Anchorage, Alaska Branch #1000, Enlaces, and the Korean American Community Association, and joined by

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112 Findings of Fact ¶ 171.

113 Alaska Redistricting Board's Objections to Plaintiffs' Pre-Filed Direct Testimony at pp. 32-34.

Native Movement, East Anchorage voters have experienced the very real impact of the dilution resulting from an Eagle River/East Anchorage pairing. Senator Bettye Davis, Alaska's first Black woman senator, was elected in 2001 to serve as Senator in Senate District K, which covered neighborhoods in central and East Anchorage as well as parts of the Chugach State Park. When Senator Davis' district was paired with Eagle River under the 2011 interim plan, Senator Davis lost her seat. Numerous residents of East Anchorage communities of interest submitted comments to the Board warning of the impact resulting from Senator Davis' defeat.[114]

75. But even if it was not the Board's conscious intent to conceal its consideration of racialized aspects of the East Anchorage community of interest from the public, the Board did so inadvertently, contributing to the inequitable outcome of its senate pairings. Although, as Member Bahnke testified at deposition, 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,"[115] the Board had the ability to access racial data through its AutoBound Edge software throughout its mapping process.[116] However, as the Board's executive director Peter Torkelson testified in his January 27, 2022 supplemental affidavit, the software's "default matrix" undercounted minority voters by excluding those who self-identified as "white with Hispanic heritage"

[114] Findings of Fact ¶ 171.

[115] M. Bahnke Dep., pp. 77-78.

[116] Findings of Fact ¶ 174.

from its calculation of the minority composition of a particular area.[117] Although some limited information about minority populations in Anchorage was released to the public,[118] 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.[119]

76. Thus, although 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 — providing myriad examples of the separate and distinct nature of the East Anchorage and Eagle River communities of interest, it is possible that the Board's misunderstanding of the statistical diversity of Anchorage neighborhoods contributed to its mistaken conclusion that it was appropriate to pair East Anchorage house districts with those in Eagle River when crafting senate districts. This confusion is reflected in the record — when the Board's "default matrix," Ex. 6004, is compared with the more inclusive calculation provided in Ex. 1007, it becomes apparent that Anchorage house districts were depicted as approximately 2 percent less diverse than they actually are.[120] 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

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117 Findings of Fact ¶ 174.

118 Findings of Fact ¶ 174.

119 Findings of Fact ¶ 174.

120 Findings of Fact ¶ 175.

49.31 percent minority voting age population.[121] 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.[122] In contrast, when these diverse house districts are paired with Eagle River districts, their minority population plummets.[123]

77. Although it is possible that this under-reporting of diversity information contributed to a misunderstanding as to the impact of the Board's adopted senate pairings, the record does not reflect that the Board believed these pairings were appropriate and legal. Rather, Members 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"[124] — in other words, the majority Board members, in adopting these senate pairings, were doing so against the advice of their retained independent counsel. Likewise, Member Binkley — one of the majority Board members who voted in favor of the Marcum proposed pairings — never made any statements indicating why he believed Marcum's pairings were more lawful or correct than those proposed by member Bahnke. He simply stated, at the November 8, 2021 meeting, that "[t]here's good justification from all different ways … all of these [senate pairing plans] are very justifiable, in my opinion.

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121 Findings of Fact ¶ 175.

122 Findings of Fact ¶ 175.

123 Findings of Fact ¶ 175.

124 Findings of Fact ¶ 177.

It's a question of what you think is the most reasonable…"[125] In short, only Members Marcum and Simpson — both of whom had access to incumbent information, which was concealed from the public — were openly in support of the Board's adopted senate pairings. The Board has taken no steps to supplement or clarify its record to provide additional evidence in support of the East Anchorage/Eagle River pairings.

78. The overwhelming evidence presented at trial demonstrates that, by fragmenting the East Anchorage community of interest for senate pairing purposes, the Board acted intentionally to dilute the voting power of this geographic group in favor of voters in Eagle River. Under the Alaska Supreme Court's guidance in *Kenai Peninsula Borough*[126] and *Braun v. Borough,*[127] this is an illegitimate purpose which impairs the significant constitutional interest of East Anchorage voters to a geographically equally effective vote. Having proven this actual discriminatory intent, East Anchorage has proven that this error in the Board's proclamation plan is violative of Alaska's equal protection guarantee and must be corrected. The Board's secretive process in deliberating and evaluating these senate pairings, together with its decision to disregard the wealth of public testimony submitted in opposition to East Anchorage/Eagle River senate pairings, provides additional evidence from which the Court can infer an intent to discriminate against the East Anchorage community of interest.

79. 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

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125 Findings of Fact ¶ 178.

126 743 P.2d at 1372.

127 193 P.3d 719 (Alaska 2008).

proportionate representation.[128] The Board had provided not one piece of evidence to meet this burden. No one at any stage of this proceeding has offered an explanation as to why the splitting of two distinct, defined communities of interest was necessary to achieve proportionate representation, and no case precedent protects this unreasonable pairing when other, constitutionally palatable options are available. For these reasons, this Court must find that the decision of the Alaska Redistricting Board to pair East Anchorage and Eagle River house districts into senate districts was made with an improper purpose, and has the effect of diluting the voices of voters from the East Anchorage Community of Interest in favor of Eagle River voters. This decision is violative of the equal protection rights of East Anchorage voters, and cannot stand.

C. THE BOARD'S EAGLE RIVER/EAST ANCHORAGE SENATE PAIRING VIOLATED ARTICLE VI, SECTION 6 OF THE ALASKA CONSTITUTION BECAUSE THE PAIRINGS DID NOT SATISFY THE CONTIGUITY CRITERION "AS NEARLY AS PRACTICABLE"

1. Senate District K is an Unconstitutional Senate District Because it Geographically is Not "Composed as Near as Practicable of Two Contiguous House Districts"

80. Article VI, § 6 of the Alaska Constitution provides:

> Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.[129]

When interpreting provisions of the Alaska Constitution, courts "look to the plain meaning and purpose of the provision and the intent of the framers."[130]

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

129 Article VI, Section 6, Alaska Constitution (emphasis added).

130 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017).

81. The Alaska Supreme Court has quoted with favor a practical definition of contiguity in the context of house districts: "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)."[131] As the article from which the definition that was selected by the Court notes, "there may be a dispute about contiguity if the only route between two places in the district is via roads which do not lie entirely within the district."[132]

82. The Redistricting Board apparently believed the only express requirement of the Alaska Constitution applicable to senate districts is that they be composed of house districts that "touch."[133] That narrow view ignored the Constitution's command that the board must use "drainage" and "geographic features" when describing boundaries, and it failed to account for the fact that the Alaska Supreme Court has held that constitutional contiguity is not a bright line rule satisfied by the mere intersection of lines on a map.

83. In *Hickel*, the Alaska Supreme Court addressed house districts that encompass archipelagos and open sea. Despite the fact that open sea could make every portion of single district theoretically "reachable" from any other portion, the Court held

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131 *Hickel*, 846 P.2d at 45 (citing Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 84 (1985)) (emphasis added).

132 Grofman, 33 UCLA L. Rev. at 184 n.37.

133 *See, e.g.,* Findings of Fact at ¶ 106; *see also* ARB007049 (transcript of November 9, 2021 Board meeting) (comments of Executive Director Torkelson: "The Board has adopted Senate pairing assignments. That's where you take two of the new House districts, and they must be touching, and you assign those to one Senate seat"; cf. ARB006684 (transcript of November 8, 2021 Board meeting) (comments of Member Marcum: "So all three of those are physically contiguous too. And, as we know, that is the primary constitutional requirement we have in our state Constitution for determining Senate pairings").

that it would recognize limits on the broadest interpretation of contiguity to avoid concluding, for instance, that "any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim."[134]

84. The Court's conclusion in *Hickel* that contiguity is "not without limits,"[135] comports with minutes from the 1955 Alaska Constitutional convention that indicate "contiguity" was viewed as something different than mere adjacency.[136] It also made practical good sense.

85. In this case, Senate District K violates the Supreme Court's previous interpretation of contiguity. For all practical purposes for the voters of Senate District K, their district is "divided into two . . . discrete pieces." The inhabited portion of House District 21-K South Muldoon is not practically "reachable" from the inhabited portions of House District 22-K Eagle River Valley portions "without crossing the district boundary."

86. Indeed, public roads that connect the house districts paired in Senate District K require travelers to leave the senate district to transit from one house district to the other, as is evident from the Board's maps.[137] No road or trail contained entirely within Senate District K connects any residential address in House District 21 with a residential

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134 *Hickel*, 846 P.2d at 45.

135 *Id.*

136 *See* Proceedings of the Alaska Constitutional Convention (1956) at 1838 (comments of Delegate Hellenthal, who introduced the Article on Reapportionment) discussing how, in a specific scenario, a district could be "combined with a district adjacent to it and contiguous to it until its population again grows", available at: http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf.

137 Findings of Fact ¶¶ 110-111.

address in House District 22.[138] Moreover, the populated portions of the house districts paired in Senate District K are separated from one another by restricted-access military lands.[139]

87. Further, in violation of the Constitution's express command, there is no evidence that the Board used "drainage" or "geographic features" to identify or describe the boundaries of Senate District K. The inhabited areas within Senate District K are located in separate drainages: House District 21 South Muldoon is in the Chester Creek drainage; House District 22 Eagle River Valley is in the Eagle River drainage; and the two are separated by the Ship Creek drainage.[140] Perhaps most clearly illustrating the Board's disregard of "geographic features," House Districts 21 and 22 are also separated by the Chugach Mountain Range, as a dissenting Board Member noted.[141]

88. The "drainage" and other "geographic features" that separate House District 21-K South Muldoon from House District 22-K Eagle River Valley are in no practical or legally relevant sense different from the portions of "open sea" that the Alaska Supreme Court has expressly held cannot be including in a single contiguous district "without limit."

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138 *See* East Anchorage Plaintiffs' Ex. 6015.

139 *See* East Anchorage Plaintiffs' Ex. 6017.

140 *See* East Anchorage Plaintiffs' Ex. 6015.

141 *See* ARB007041 (transcript of November 9, 2021 Board meeting) Comments of Member Borromeo:

> It defies logic that we would do a minority reach into South Muldoon and pair it with a very right district eight miles away on a highway that crosses one mountain range and expect the court to believe with any satisfaction that we have satisfied the public trust in the process.

See also ARB006685, (transcript of November 9, 2021 Board meeting), pp. 19-20 (comments of Member Borromeo).

Indeed, while geographical contiguity does not itself turn on questions of socio-economics, socioeconomic realities are probative of whether particular geographic features actually have effectively divided an area: as the East Anchorage plaintiffs' expert has averred, the Eagle River community developed as a separate and distinct community of interest, in part, because it was physically separated from other parts of Anchorage.[142] That the geographic separation was occasioned by mountains (the Chugach front range) and a fresh-water river drainage (Ship Creek), as opposed to a salt-water "open sea" feature, should not change the analysis. The Constitution contains no language to support such a distinction.

89. The plain meaning of the Constitution's command that senate districts be composed "as nearly as practicable" of "contiguous" house districts required the Board, when viable alternatives were available, to avoid creating from two house districts a single senate district that, for all practical purposes and from the perspective of drainage other geographical features, is composed of two separate and "discrete" pieces.

90. Senate District K as defined by the Final Redistricting Map fails to meet the criteria under Art. VI, §6 of the Alaska Constitution and should be invalidated. Senate District K is not composed as "near as practicable of two . . . house districts" that are constitutionally "contiguous."

142 *See* C. Hensel Aff. at ¶¶ 11-31.

2. The Board had No Rational Basis for its East Anchorage/Eagle River Pairing

91. It is undisputed that absolute contiguity means "territory which is bordering or touching."[143] The Board, through its majority members, suggests both through its actions during the redistricting process and now at trial, that house districts that touch automatically satisfy Article VI, Section 6 of the Alaska Constitution. Despite the Board's understandable desire for bright line rules, Alaska redistricting cannot and does not deal in absolutes. Instead, the Alaska legislature has consistently grounded its redistricting criteria in standards that are possible to achieve and informed the application of these standards through general statements of purpose and common-sense expectations. To this end, both house districts and senate districts must meet their respective constitutional criteria as nearly as practicable. House District 21-South Muldoon may "touch" House District 22-Eagle River Valley, but the senate district created through their pairing certainly does not meet the constitutional criteria "as nearly as practicable."

92. The court has repeatedly determined that the Board's obligation to meet the constitutional criteria in Article VI, Section 6 of the Alaska Constitution is infused with the ultimate goal of redistricting, which is the creation of "fair and effective" election districts.[144] Accordingly, the constitutional qualifier "as near as practicable" serves two juxtaposed purposes; It permits the Board to deviate from constitutional criteria when

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143 *See Hickel*, 846 P.2d at 45.

144 *See, e.g., Hickel*, 846 P.2d at 44-45, n.25 (footnote 25 of the Superior Court's Memorandum and Order notes that "requirements of compactness and contiguity are meant to be read to avoid geographic manipulation of districts for voter dilution or enhancement. By requiring physical limits, those requirements avoid sacrificing groups for the benefit of those doing reapportionment. Contiguity is widely recognized as an important consideration in redistricting").

necessary to maximize constitutionality while also obligating the Board to make choices, when such choices exist, to advance the constitutional goals of redistricting. In essence, the "as near as practicable" language gives the Board some breathing room when the challenges of redistricting Alaska force them to draw otherwise non-ideal districts. At the same time, the court relies on this qualifier to protect the voter's right to a "fair and effective" vote by obligating the Board to make decisions that further the ultimate goals of the constitution.

93. In practice, the balancing act between flexibility for the Board and protection for the voters often results in the court deferring to the Board's decisions so long as these decisions demonstrate a genuine "hard look" by the Board of its options and rational considerations for making its specific choice. In other words, like due process and equal protection considerations, the Board's process, rather than its policy, directly impacts its compliance with Article VI, Section 6 of the Alaska Constitution.

94. In *In Re 2001 Redistricting Cases*, the court found that because the Board mistakenly limited the options it considered in its pairings, remand was necessary.[145] The court was careful to explicitly recognize that it was not directing the board to join parts of Anchorage with the Mat-Su Borough in a single house district.[146] The court only wanted to ensure that the board gave its pairings the "hard look" required by law and it could not perform this "hard look" if the Board failed to consider certain pairing options because it mistakenly believed such options to be unlawful.[147] In the same case, In Re 2001

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145 44 P.3d 141, 143 (Alaska 2002).

146 *Id*. at 144.

147 *Id.*

Redistricting Cases, the board's decision to divide the Lake and Peninsula Borough among two house districts was challenged.[148] The court ultimately determined that the board's decision was permissible because the board took the action for a specific reason, namely because the Kodiak Island Borough did not have sufficient population to support its own house district and thus the board had to take population from either Lake and Peninsula Borough or Kenai Peninsula Borough.[149] The court noted that:

> the board offered an uncontroverted, non-discriminatory motivation for its action-it needed the population to complete District 36-and made a reasonable decision to favor dividing the Lake and Peninsula Borough over further fragmenting the Kenai Peninsula Borough.[150]

The court that heard the challenges to the 1991 redistricting plan applied a similar analysis, invalidating districts where the Board "'needlessly nullified Alaska constitutional requirements' in its attempt to reach its various policy goals." [151]

95. Similarly, in *Hickel v. Southeast Conference*, the Alaska Supreme Court overturned the superior court's finding of an equal protection clause violation where the board failed to exclude non-resident military personnel from the population considerations. The Court found that while the impact of non-resident military personnel registered to vote outside Alaska was certainly a challenge, the board had considered "alternatives and expert advise [sic]" before including all military personnel in its population count thereby satisfying the "hard look" requirement.[152]

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148 *Id*. at 145.

149 *Id.*

150 *Id.*

151 *Hickel*, 846 P.3d at 43 (quoting the Superior Court's Order below).

152 *Id*. at 56.

96. Here, unlike the election districts previously upheld by the courts, the Board has presented no rational basis for pairing House District 21-South Muldoon with House District 22-Eagle River Valley. Neither the geographic factors (discussed below) nor the promotion of fair and effective voter representation supports the pairing. While the Board's absolutist and reductive approach to contiguity would permit the Board to discard these considerations, the constitutional parameters of Article VI, Section 6 and the court's consistent interpretation of those parameters do not.

3. Marcum's Reliance on Eagle River's Relationship with JBER, Above all else, was Irrational

97. The Board failed to consider any alternatives to Board Member Marcum's Eagle River/East Anchorage pairing. In fact, Member Marcum made it clear that the only consistent pairing she was proposing across her four senate pairing configurations was Eagle River with East Anchorage.[153] Member Marcum irrationally emphasized the connection between Eagle River and Joint Base Elmendorf/Fort Richardson over East Anchorage residents. The majority Board members ignored volumes of testimony opposing the pairing and the vehement objections from the minority Board members who warned of dilution and disenfranchisement as a result of the pairing. Board Member Marcum even went so far as to bifurcate a statement made by East Anchorage Plaintiff Wilson adamantly opposing the pairing to recast it as a statement of support.[154]

98. The Board's consideration of contiguity was complicated by the Board's irrational reliance and consideration of the relationship between Eagle River with the

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153 Findings of Fact at ¶ 132.

154 Findings of Fact at ¶¶ 88, 134-137, 160..

military base. Board Member Marcum's emphasis on that relationship above and at the expense of the Muldoon community of interest was also without reason and turned basic principles of redistricting on their head. Historically, the proper treatment and consideration of military bases in the redistricting process has been a challenge for Alaska redistricting boards. Although the Superior Court in Hickel v. Southeast Conference upheld the redistricting board's decision to include the non-resident military personnel in the population base, it recognized that military bases function, in many ways, separately and distinctly from the election districts that surround them.[155] Board Member Marcum's sole expressed reason for pairing Eagle River with Muldoon, despite the public outcry and evidence against such a pairing, was the connections between Eagle River and Joint Base Elmendorf/Fort Richardson[156].

99. While there are many active and engaged Alaska residents living and working on Alaska's military bases, as demonstrated by East Anchorage Plaintiff Major (ret.) Felisa Wilson, there are also realities associated with military bases that impact the districts with which they are included. As explained by the Superior Court in Hickel v. Southeast Conference, "including non-resident military personnel in the population base (people who, because they claim residency elsewhere, may have little interest in Alaska affairs), creates odd situations, with legislators representing large populations on paper

155 *See Hickel*, 846 P.2d at 70-71.

156 Findings of Fact ¶ 132.

but relatively few actual voters."[157] The court noted that this issue "could perhaps be profitably addressed by the legislature."[158]

100. The *Hickel* court further explained that the Adak Native Air Station is a military outpost on the Aleutian Chain.[159] In 1993 over 5,300 people lived on Adak but only 2,000 were registered to vote in Alaska.[160] Voter turnout was "abysmal" with fewer than 400 voters going to the polls in a regular election.[161] The court acknowledged that military bases are "US Government reservations with limited access. Airplanes cannot land without prior permission. Because federal law prohibits government employees from standing for state or national office, only a dependent of a military or civilian employee could run for state office from the three bases."[162] The court went on to explain "Adak, Shemya, and Attu have little or no socio-economic integration with any place else on the Aleutians. In many ways residents of these islands have more in common with military personnel on Elmendorf Air Force Base or Ft. Richardson near Anchorage or even with those at Eielson Air Force Base or Ft. Wainwright near Fairbanks than they do with the residents of the Aleutian Islands and the Alaska Peninsula."[163] Interestingly, the court referenced a letter from the commander of Adak recommending the placement of Adak

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157 *Hickel*, 846 P.2d at 70.

158 *Id.*

159 *Id*.

160 *Id.*

161 *Id*.

162 *Id*. at 846 P.2d at 70-71.

163 *Id.*

with Elmendorf.[164] Similarly, Dr. Chase Hensel, a cultural anthropologist retained by East Anchorage Plaintiffs and qualified as an expert to define and discuss the Eagle River and Muldoon communities of interest and the impact of the East Anchorage/Eagle River senate pairings on these districts.

101. Ultimately, the 2021 Redistricting Board needlessly adopted Eagle River/East Anchorage Pairings despite alternative pairings that had much greater contiguity. The Board's intent and objectives in adopting these pairings served no public purpose or constitutional principle. The Board not only failed to take a "hard look" at the pairings, it made every effort to prevent the public and the court from doing so as well.

VI. CONCLUSION

102.. The Board's decision to pair the House District 21–South Muldoon with the geographically and demographically distinct House District 22–Eagle River Valley to create Senate District K resulted in arbitrary and unreasonable decisions regarding senate pairings that constitute unlawful political gerrymandering and violate the equal protection clauses of the Alaska Constitution as well as Article VI of the Alaska Constitution. The failure of the Board to follow a lawful process and procedure coupled with its decisions to reject the only constitutional senate pairings before it for the Eagle River and East Anchorage Districts justifies the remand of the plan to the Board to correct its errors.

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164 *Id.* 846 P.2d at n.24.

DATED this 9th day of February, 2022.

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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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