

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the

2021 REDISTRICTING PLAN.

)
)
)
)
)

Case No.: 3AN-21-08869 CI

GIRDWOOD PLAINTIFFS' OPENING BRIEF

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

TABLE OF CONTENTS

I.	INTRODUCTION.....	3
II.	FACTUAL AND PROCEDURAL BACKGROUND.....	4
III.	LEGAL STANDARDS.....	10
IV.	ARGUMENT	13
A.	The Board Exceeded Its Discretion by Disregarding the Weight of the Evidence.	13
B.	The Board Chose a Technically but Minimally Contiguous Pairing that Is Not Compact.....	20
C.	The Board Adopted the Amended Proclamation with Illegitimate Purpose.	25
D.	The Amended Proclamation Does Not Lead to More Proportional Representation and Dilutes the Vote of Girdwood and District 9.....	28
V.	CONCLUSION	30

I. INTRODUCTION

Plaintiffs Louis Theiss, Ken Waugh, and Jennifer Wingard (“Girdwood Plaintiffs”) ask the Court to reject the Alaska Redistricting Board’s (“Board”) April 13, 2022 Amended Proclamation and compel the Board to adopt the constitutional map it considered as an alternative.

The Board has now *twice* gerrymandered the Anchorage senate maps. On February 16, 2022, this Court ruled that the Board—the entity charged under the Alaska Constitution with making fair, equitable, representative legislative maps for the State of Alaska—had engaged in partisan gerrymandering in violation of the Constitution’s Equal Protection Clause.¹ Specifically, it found that the Board intentionally and illegitimately divided the two Eagle River house districts to increase Eagle River’s Senate representation and dilute the vote in East Anchorage for partisan political reasons. Notably, the Court determined that the Board had reached a secret agreement not on the entirety of the Senate map, but on a single component of it: the treatment of the Eagle River districts. It remanded the senate pairings to the Board “to craft a pairing that complies with Alaska’s Equal Protection Clause.”² Its determination was upheld on review by the Alaska Supreme Court.

On remand, the Board—instead of correcting its error by pairing Eagle River with itself—pushed through a map that brazenly repeated its prior gerrymander. Against the

¹ Findings of Fact and Conclusions of Law (“FFCL”), Feb. 15, 2022, at 73.

² FFCL at 73.

vast weight of public testimony, based on the thinnest of rationales, the same Board majority that had voted for the prior map again demonstrated a single-minded commitment to splitting Eagle River and increasing its representation. This time, it paired one Eagle River district (District 10) with the swing district of South Anchorage/Girdwood/Turnagain Arm (District 9) to create Senate District E, and the other (District 24) with downtown Anchorage/Government Hill/JBER (District 23) to create Senate District L. In other words, the Board *did exactly what it had done before*. The only difference between November 2021 and April 2022 is that the second time around, the Board slapped a veneer of public process on its gerrymander.

If the Amended Proclamation is allowed to stand, it will send a clear message that gerrymandering is allowed in the State of Alaska so long as it has been laundered through the courts—that the price of a gerrymander, paid by the taxpayers of Alaska, is an appeal and remand.

Article VI, §11 of the Alaska Constitution gives the Superior Court the authority “to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting.” The Girdwood Plaintiffs ask the Court to exercise the full force of its constitutional powers to compel the Redistricting Board to adopt the other, constitutional map it considered on remand.

II. FACTUAL AND PROCEDURAL BACKGROUND

The background of this case up until remand is well known to this Court. The Girdwood Plaintiffs will therefore rely on the Court’s extensive findings in its February

16, 2022 decision rather than reiterate the facts here. It bears repeating, however, that in its prior decision, this Court found that the Board had engaged in partisan gerrymandering, specifically that it had split Eagle River into two senate districts to increase its representation, and decrease Muldoon’s representation, for illegitimate, partisan purposes. It found that the Eagle River pairings, “while contiguous in the strict definition of the word, ignore the communities of interest in Eagle River and Muldoon”³ and that they were made contrary to the “vast majority” of the public testimony.⁴ The Court found, among other deficiencies, that the pairing had violated the East Anchorage Plaintiffs’ right to Equal Protection under the Alaska Constitution, and ultimately ordered that the matter “be remanded to the Board to address the deficiencies in the Board plan consistent with this order.”⁵ The Board appealed this decision to the Alaska Supreme Court, which affirmed this Court’s ruling on the Anchorage senate pairings, and the matter was subsequently remanded to the Board for correction.

On Saturday April 2, 2022, the Board convened for its first meeting after remand.⁶ During the bulk of the meeting, the Board took public testimony regarding the senate pairings on remand; the majority of the testimony favored quickly adopting senate pairings that complied with the remand order, pairing the Muldoon house districts

³ FFCL at 69.

⁴ FFCL at 51.

⁵ FFCL at 170.

⁶ This procedural history section relies on the transcripts of the Board’s proceedings on remand, ARB2000084-20001083.

together and the Eagle River house districts together, though there was other testimony from around the state regarding a variety of issues, including issues beyond the scope of the Board’s authority on remand. Towards the close of the meeting, the Board’s attorney provided a litigation summary, stating in relevant part that the Court ordered the Board to “address the constitutional deficiency in Senate District K (Eagle River Valley and South Muldoon) . . . recognizing that those changes will impact – they’ll have some ripple effects.” The Board’s counsel proposed a process that would involve inviting the public to offer solutions to the unconstitutional Senate District K, offer feedback on proposed solutions, and then the Board would adopt a final plan.

On April 4, 2022, the Board adopted a procedure to address the discrete Cantwell issue that had been remanded and resolve it at the meeting on Wednesday, April 6. The Board then discussed options for senate pairings, including the pairings previously proposed by Member Bahnke, then took public testimony, which largely favored the “Bahnke map.”

On April 5, 2022, the Board took additional public testimony. The majority of the testimony was, again, in regard to senate pairings and favored the “Bahnke map.” Toward the end of the meeting, the Board discussed specific senate pairing proposals—to include Member Bahnke’s proposal, a proposal by the East Anchorage Plaintiffs, and a proposal by Randy Ruedrich. The Board established a schedule for hearings to receive public comment on senate pairings before making its decision, and adjourned for the day.

On April 6, 2022, the Board began its meeting with the Cantwell issue. After receiving limited public testimony on the issue, the Board quickly debated the issue and reached a proposed solution. All Board members supported the solution except Chair Binkley, who expressed that he “disagreed with [the Alaska Supreme Court’s order],” and therefore he could not support removing Cantwell from District 36.⁷ The motion to adopt the solution passed, with four Board members voting yes and Chair Binkley voting no.

The Board then moved on to public testimony regarding the senate pairings. Randy Ruedrich of Alaskans for Fair and Equitable Redistricting (“AFFER”) testified regarding his proposed plan, which would pair Eagle River Valley with South Anchorage/Girdwood/Turnagain Arm, and North Eagle River with North Anchorage, a district that stretched from Fourth Avenue downtown through Ship Creek and Government Hill to JBER. Mr. Ruedrich’s proposed pairings were a modification of the plan he had previously submitted. Member Marcum stated that by coincidence, she had independently developed the same plan that Mr. Ruedrich was then proposing.

After receiving further testimony regarding senate pairings, the vast majority of which favored pairing the two Eagle River house districts as a senate district and the two Muldoon districts as a senate district, the Board unanimously voted to discard Member Bahnke’s plan, which was then known as Plan 1, because it would involve changing more senate districts than necessary on remand, and adopt two senate pairings maps for official

⁷ ARB2000455, ARB2000460.

consideration: **Option 2**,⁸ the plan proposed by the East Anchorage Plaintiffs to cure the prior gerrymander by pairing the Muldoon house districts together, the Eagle River house districts together, downtown with North Anchorage, and South Anchorage/Girdwood/Turnagain Arm with another South Anchorage district; and **Option 3B**,⁹ the AFFER/Marcum plan, which preserved the gerrymandered division of Eagle River by pairing Eagle River Valley with South Anchorage/Girdwood/Turnagain Arm, and North Eagle River with North Anchorage.

On April 7, April 8, and April 9, 2022, the Board met to receive live public testimony regarding Option 2 and Option 3B. The Board also received written testimony from the public. Again, the vast majority of the comments favored Option 2, as it preserved the Eagle River community of interest within a single senate district, while maintaining other sensible pairings that preserved downtown communities and the logical connection between South Anchorage, Girdwood, and Turnagain Arm. When the Board adjourned on Saturday, April 9, 2022, it planned to begin its deliberations at its next meeting on April 13, 2022.

Throughout these meetings, from the time the two plans were adopted for consideration, it was clear that Members Bahnke and Borromeo favored Option 2, while Member Marcum and Chair Binkley favored Option 3B. Member Simpson remained largely silent.

⁸ Complaint Exhibit 2.

⁹ Complaint Exhibit 3.

On April 13, the Board convened to deliberate and all Board members had an opportunity to share their thoughts. The deliberations were heated. Members Bahnke and Borromeo vigorously urged the Board to do its duty on remand and not perpetuate its gerrymander by continuing to split Eagle River to increase its representation. In her efforts to sway the Board, Member Borromeo foreshadowed this suit, challenging the members who had insisted that the new pairings would not benefit Eagle River:

And we need to look at what the Court is going to do when they get this case back again, which they will. Page 56, Judge Matthews is instructing what the Court is going to do when they look at this new pairing that once again splits Eagle River. Quote, “The Court employs a neutral factors test to assess the legitimacy of the Board's purpose in creating a Senate district. The Board's purpose would be illegitimate if it diluted the power of certain voters 'systematically by reducing their senate representation below their relative strength in the state's population.’”

So going back to the census data, which we may not have looked at for some time, Eagle River is about 7 percent of the state's population. But yet, under this new plan we are going to give them 20 percent of the Senate. It makes no sense, no sense whatsoever. [...]

The Court's also going to look at the substance of the decision. I haven't heard anything in the rationale that has bolstered splitting Eagle River. Instead, Budd says things like: Well, last time we split Eagle River it came at the expense of South Muldoon, and we're not doing that this time. Well, it's coming at the expense of South Anchorage. Is that any better? It's not better.¹⁰

Member Borromeo went so far as to call on this Court to intervene:

[P]lease exercise your Article VI, Section 11 powers. Do not send this back to us when you find it invalid, which you will. Draw the boundaries yourself. This board will continue to gerrymander. We will continue to hurt voters. We will go ahead and pick different districts next time so that Eagle River

¹⁰ ARB2000977-978.

remains split. Don't send it back. We are defunct. We are derelict in our duties.¹¹

Ultimately, the Board voted 3-2 to adopt Option 3B, with the same three Board members who had adopted the original map (Marcum, Simpson, Binkley) voting in favor.¹² The Board then renumbered the districts to suit the new pairings, conducted some housekeeping business, and issued its Amended Proclamation.

The East Anchorage Plaintiffs promptly filed a motion on (which remains undisposed) asking this Court to intervene,¹³ which the Board opposed on largely technical grounds, such as standing and untimeliness. This suit followed. In an effort to resolve this challenge prior to the impending June 1, 2022 filing deadline for legislative candidates, the parties stipulated to submit the case in writing (rather than by trial) on an expedited timeframe, with the Board providing the record from its remand proceedings on April 28, additional supplementation on May 2, and opening briefs due on May 5.

Together with his brief, the Girdwood Plaintiffs submit and rely on their own affidavits and the expert report of Dr. Chase Hensel.

III. LEGAL STANDARDS

The Court articulated the legal standards applicable to this case in its February 16, 2022 decision.

¹¹ ARB2000979.

¹² ARB2001015-16.

¹³ East Anchorage Plaintiffs' Motion to Reject Amended Redistricting Proclamation Plan and for Modification of Order on Remand, April 18, 2022.

Regarding the scope of the Board's discretion, the Court held:

*The Board must resolve redistricting conflicts by determining what is the "fairest" resolution for the people. The Board is "not given wide discretion" and its decisions must be informed by "public opinion." Rather than drawing districts based on individual prerogatives, the Board must make a good-faith effort to harmonize both "the greater good of the State" and the desires of each community "to the greatest extent possible."*¹⁴

*While each Board member is an Alaskan with knowledge about the State and its regions in their own right, that fact does not give the Board the discretion to make decisions based on personal preference when that preference is directly contrary to the overwhelming majority of public testimony. . . . T]he Board must make a good-faith effort to incorporate the clear weight of public testimony.*¹⁵

Regarding contiguity, compactness, and Senate districts, the Court held:

*[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). . . [but] without limitations on the definition of "contiguous," a coastal district could be considered contiguous with any other coastal district by reason of sharing the open sea. For example, District 37 covering the Aleutian Islands could permissibly be paired in a Senate district with District 2 in Southeast Alaska despite being separated by the Gulf of Alaska. In Kenai, the Supreme Court noted this anomalous result, and determined that contiguity could not be separated from the concept of compactness when crafting senate districts.*¹⁶

Regarding local government boundaries, the Court held:

*[T]he Court has said "that respecting local government boundaries is discretionary." But the Court has also noted that "the division of a borough which otherwise has enough population to support an election district will be an indication of gerrymandering," in which case "some legitimate justification" is required.*¹⁷

¹⁴ FFCL at 133 (internal quotation marks omitted).

¹⁵ FFCL at 52.

¹⁶ FFCL at 28.

¹⁷ FFCL at 29-30.

Regarding the Equal Protection Clause of the Alaska Constitution, the Court held:

Equal protection analysis under Article I, Section 1 of the Alaska Constitution applies "an adjustable 'uniform-balancing' test ... depending on the importance of the individual right involved" to determine the applicable level of scrutiny, which is then balanced against the government's purpose and "the state's interest in the particular means employed." In Kenai Peninsula Borough v. State, the Court concluded that "a voter's right to an equally geographically effective or powerful vote ... represent[s] a significant constitutional interest." The Court therefore applied a "stricter equal protection standard when assessing the constitutionality of a reapportionment plan." In that context, "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." In light of the stricter constitutional standard, no "pattern of discrimination" is required, and the de minimis nature of any imbalance is not considered "when determining the legitimacy of the Board's purpose."¹⁸

In determining whether the Board crafted the challenged senate seats with illegitimate purpose, the Court looks to whether there were secret procedures in the contemplation and adoption of those senate districts, whether there is evidence of partisanship, and whether the adopted senate boundaries selectively ignore political subdivisions and communities of interest.¹⁹

If the Court determines that the Board created the challenged districts with discriminatory intent, the Board's "purpose in redistricting will be held illegitimate unless that redistricting effects a greater proportionality of representation."²⁰ In other words, "[t]he Board's purpose would be illegitimate if it diluted the power of certain voters 'systematically by reducing their senate representation below their relative strength in the state's population.'"²¹

These standards are applied to the facts of this case below.

¹⁸ FFCL at 33 (citations omitted).

¹⁹ FFCL at 56.

²⁰ FFCL at 54.

²¹ FFCL at 54.

IV. ARGUMENT

The totality of the evidence in the record demonstrates that, once again, the Board engaged in partisan gerrymandering to adopt senate pairings that violate the Alaska Constitution.

A. The Board Exceeded Its Discretion by Disregarding the Weight of the Evidence.

Heading into the remand, the Board should have known one thing beyond doubt: that Eagle River, composed of its two house districts, was a unified community of interest that should be kept together. This was clearly established in the Court's February 16, 2022 ruling, as affirmed by the Alaska Supreme Court. In reaching this conclusion, the Court relied on the testimony of East Anchorage Plaintiffs' expert Dr. Chase Hensel, who has now submitted testimony in support of the Girdwood Plaintiffs as well.

The evidence received by the Board between April 2 and April 13 was in harmony with the Court's ruling. The vast weight of the testimony favored a map that paired the two Eagle River districts together. For example, of the oral testimony presented live to the Board on the map options, 70% of the testimony was in favor of pairing Eagle River with itself, and only 30% was in favor of splitting it.²² Of the written testimony submitted

²² ARB 200084-1083 (transcripts); ARB 2001094-1226 (oral testimony summaries).

on the map options, approximately 57% was in favor of pairing Eagle River with itself while approximately 43% was in favor of splitting it.²³

The testimony in support of pairing Eagle River with itself was by and large factual and identified not just commonalities, but *actual connections* between the South Anchorage/Girdwood/Turnagain Arm district and South Anchorage, and the lack of connection with Eagle River.

Some testified to the practical difficulties of the pairing. For example, a representative of AHLOA, the Home and Landowners Association, Inc. of the Anchorage Hillside in District 9, testified in support of Option 2, explaining that there were few similarities between the Hillside and Eagle River. She stated that AHLOA expected to see its senators in person at its meetings when the Legislature was not in session, and that it would not be feasible to have Eagle River-based representatives driving to and from meetings on the Hillside.²⁴ A Girdwood resident testified to the Board that based on his phone's location data, in the prior four years, he had been to Eagle River once—but had visited South Anchorage at least weekly, often multiple times a week.²⁵ Others testified to their concern that being paired with Eagle River would deprive them of a voice, leaving them unrepresented.²⁶ Others testified to the close connections between Girdwood and

²³ ARB2001227-1824 (written testimony).

²⁴ ARB2000729- ARB2000731.

²⁵ ARB2000894.

²⁶ *E.g.*, ARB2000902; ARB2000903.

South Anchorage, explaining that the areas “link together well” because they share schools, shops, and infrastructure.²⁷

In their attached affidavits, the Girdwood Plaintiffs expand on these themes as they related to Girdwood. Dr. Hensel addresses them in his report as well:

Plaintiffs in this case reference and describe a finely-honed, strategic and mutual relationship with urban Anchorage. One stated that his pattern of being back and forth from South Anchorage three or four times a week is not atypical. K-8 education is available in Girdwood, but children need to attend high school and may pursue post-secondary education in Anchorage. South Anchorage High School is the neighborhood school for Girdwood. Parents coordinate resources and carpool to and from Anchorage for their children’s extracurricular activities, such as sports training and team participation. Classmates from Anchorage attend birthday parties in Girdwood. Girdwood depends on Anchorage’s medical facilities but provides the training ground for South Anchorage firefighters. South Anchorage and Girdwood emergency services back each other up, and both respond to accidents that may occur near the Mile 100 boundary of their respective service areas.

There is thus a two-directional flow between Girdwood and the city, and Girdwood does not think of itself as a suburb of Anchorage. Plaintiffs variously described the relationship that has developed in terms of “a natural affinity,” “mutual support,” and “a bond [that] goes both ways.” Some people live in Anchorage and commute to work in Girdwood; others live in Girdwood and commute to Anchorage. Residents of both areas recreate in Girdwood and patronize its businesses. As happened recently, a Girdwood constituent might run into their representative while shopping at Fred Meyer in South Anchorage and discuss legislative concerns.²⁸

The majority of the comments supporting Option 3B, the Eagle River split, were cursory and provided little to no factual information in support. For example, numerous individuals called or wrote in merely to state that they opposed Option 2, with no

²⁷ ARB2000367.

²⁸ Hensel Report at 6-7.

explanation given;²⁹ or that they opposed it because it was “partisan” or “political,” without further explanation.³⁰ Many of the written comments used the same language, indicating they were part of a coordinated campaign to flood the Redistricting Board with “votes” for Option 3B rather than provide factual information for the Board to consider. Where there was substantive testimony in favor of pairing Eagle River with South Anchorage/Girdwood/Turnagain Arm, it focused on tenuous similarities between the districts rather than substantive connections: individuals testified that both districts were concerned about things like fire danger, snow, and bears.³¹ In some cases, the individuals testifying were blatant about their desire to achieve greater representation for Eagle River. Anchorage Assembly Member Crystal Kennedy was clear that her goal was to achieve increased representation for Eagle River in her written comments:

For at least the past 40 years, as the community of Chugiak Eagle River has grown, the area has been represented by two senators. For almost three of those decades the community was represented in these seats by people who lived in either Chugiak, Peters Creek or Eagle River specifically. With Option 2, all of the Chugiak Eagle River area becomes encased in one senate district and essentially the entire area (MOA’s District 2) will have one senator.³²

On remand, the Board also had the benefit of a separate but relevant record from the recent Municipality of Anchorage (“MOA”) reapportionment process, which had

²⁹ *E.g.*, ARB2001685; ARB2001687; ARB2001689; ARB2001692; ARB2001695; ARB2001696; ARB2001697; ARB2001699 (small sampling of comments).

³⁰ *E.g.*, ARB2000260; ARB2000294; ARB2001690; ARB2001693

³¹ ARB2000356; ARB2000363; ARB2000483-84; ARB2001617.

³² ARB2001698.

concluded on March 23, 2022 with the adoption of a new map for municipal elections. Draft MOA maps were released on December 29, 2021, and town halls and constituent meetings were held from January 26 to February 5, 2022.³³ Assembly Member Christopher Constant, who had chaired the MOA reapportionment process, submitted a letter to the Board explaining the process.³⁴ His letter explained that MOA had considered an option that would pair Eagle River with a South Anchorage neighborhood, and that it had been a “lightning rod” for overwhelming opposition:

One of the maps drafted by the contractors and an additional map submitted by a member of the public paired Chugiak Eagle River with Hillside in South Anchorage. That pairing was a lightning rod causing scores and scores of comments in opposition from the public. The comments came in through all channels. Phone calls to members, emails through our regular email system. Comments posted to the portal, and substantial in person testimony in opposition. The opposition was overwhelming that the pairing of Eagle River and Hillside is inappropriate and shouldn’t be promulgated.³⁵

Assembly Member Constant included with his letter extensive documentation of comments the Assembly had received on the Eagle River issue.³⁶

³³ Anchorage Assembly, Anchorage Reapportionment Summary Report at 2, “Timeline and Public Outreach Process, April 14, 2022, *available at* <https://www.muni.org/Departments/Assembly/ReapportionmentCommittee/Documents/2022-0414%20Anchorage%20Reapportionment%20Report.pdf>.

³⁴ ARB2001391-1481.

³⁵ ARB2001392.

³⁶ ARB2001391-1481.

In his report, Dr. Hensel reached the following conclusion regarding Girdwood and Eagle River, which comports with the testimony the Assembly received during its reapportionment:

As communities of interest, Girdwood and Eagle River are dramatically different. One sees its strengths in terms of connectedness and the other in terms of self-sufficiency. A community that operates as independent and separable, and one that operates as interdependent and inseparable, would find it difficult to coordinate in the solution of problems. Each of these communities – Eagle River and Girdwood – has its own set of shared issues. Whether they choose to address solutions through affirming bonds or other means, however, relates strongly to these measures of self-perceived independence and interdependence, as well as their sense of which issues should be addressed through public funding and which should be addressed by other means, such as volunteerism or private donation. Political leanings are clearly related to such preferences.

The Board appears to have disregarded the extensive evidence of this lack of affinity between District 9 and District 10, and the close relationship between District 9 and 13.

The Board also disregarded the stated “desires of each community,”³⁷ contrary to the guidance this Court had provided. The record contained extensive evidence that the affected communities strongly preferred Option 2 over Option 3B. The Anchorage Assembly passed a resolution in support of Option 2.³⁸ It stated that Plan 2 involved “highly contiguous pairings that maintain communities of interest, keeping neighbors with neighbors,” and noted that during the recent municipal reapportionment process, “residents from Eagle River, South Anchorage and Girdwood spoke out overwhelmingly

³⁷ FFCL at 133 (internal quotation marks omitted).

³⁸ Complaint Exhibit 5.

against proposals that would combine these communities with scores of comments opposing the combination[.]” The resolution further commented that “Option 3B offers pairings with only second-class contiguity that connects Chugiak with Government Hill and Downtown, Eagle River with Girdwood, Portage, and Whittier which all have substantial geographic barriers including the Chugach Front Range Mountains, the federally secured borders of JBER, and in some cases hours of highway time[.]” It cited, in turn, resolutions that five individual community councils in South Anchorage had passed during the MOA process, along with comments from “scores of individuals” in “opposition to grouping Eagle River and South Anchorage on the basis that these are distinctly different regions with few shared communities of interest.”³⁹ The Girdwood Board of Supervisors (“GBOS”) passed a similar resolution that stated “maps 1 & 2 maps combine the geographically contiguous and culturally & socio-economically coherent communities of the Hillside, South Anchorage and Turnagain Arm/Girdwood/Whittier into senate seats[.]”⁴⁰ Both of these resolutions were provided to the Board during its proceedings but were evidently disregarded by the Board majority.

Finally, at the conclusion of the Board’s remand proceedings, during deliberations, two Board members vociferously opposed splitting Eagle River a second time, citing the testimony and evidence that had been presented during the lengthy public process—but the Board majority disregarded their comments.

³⁹ *Id.* at 2.

⁴⁰ Complaint Exhibit 4. This resolution was vetoed by the Mayor but the veto was subsequently overridden by the Assembly. *Id.* at 1 (notation in upper left corner).

Overall, the situation on remand was thus identical to the situation in November 2021: once again, the Board made “a concerted effort to push a pairing through that split the Eagle River house districts into two senate districts amidst staunch pushback from a minority of Board members and the vast majority of public comment.”⁴¹

B. The Board Chose a Technically but Minimally Contiguous Pairing that Is Not Compact.

Article VI, §6 of the Alaska Constitution requires Alaska senate districts to “be composed as near as practicable of two contiguous house districts.” The Board’s pairing of Districts 9 and 10 is technically but not meaningfully contiguous and is not compact.

The Board’s revised Senate District E is constitutionally infirm because the Board created an unnecessarily sprawled district in service of the same illegitimate purpose of improperly increasing Eagle River’s representation that this Court and the Supreme Court have already rejected. Instead of placing the Eagle River community of interest that this Court previously recognized in one senate district, the Board created Senate District E, spanning hundreds of unpopulated square miles of Chugach State Park to link South Anchorage and the Turnagain Arm communities with Eagle River.

This Court recognized that compactness has a role to play when evaluating contiguity, as mere contiguity could result in sprawling, illogical pairings that use, e.g., the open sea to satisfy the requirement. The Court stated that “contiguity could not be separated from the concept of compactness when crafting senate districts.”⁴²

⁴¹ FFCL at 73.

⁴² FFCL at 28.

Compactness in the context of districting “means having a small perimeter in relation to the area encompassed... Compact districting should not yield bizarre designs.”⁴³ The Court looks “to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact.”⁴⁴ The “requirements for compactness and contiguity are meant to be read to avoid geographic manipulation of districts for voter dilution or enhancement.”⁴⁵ “The compactness inquiry thus looks to the shape of a district. Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, ‘corridors’ of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement.”⁴⁶

The Board itself has acknowledged this. In closing arguments before the Court after trial in the prior proceeding, Board counsel used the following analogy to characterize an argument that had been made by another plaintiff:

[T]o bring Skagway's preference closer to home, it would be like taking Girdwood and then using the waterway of the Turnagain Arm, coming up and wrapping -- out into Cook Inlet, wrapping around Earthquake Park and into Knik Arm, and combining Girdwood with residents of downtown Anchorage, bypassing all the folks who live in between. On its face, that approach is just less compact than pairing people from one town with the folks in the next town with whom they live more closely, with whom they are geographically closer.⁴⁷

⁴³ *Hickel v. Southeast Conference*, 846 P.2d 38 at 45 (1992) (internal citations and quotation marks omitted).

⁴⁴ *Id.*

⁴⁵ *Id.* at 71 (Appendix E, Superior Court Decision upheld by Supreme Court).

⁴⁶ *Id.* at 45-46.

⁴⁷ February 11, 2022 Tr. at 2288.

When the Board chose to pair Districts 9 and 10, it knowingly created a senate district with unusual obstacles to practical contiguity that reveal a lack of compactness, in essence a “bizarre design.” Several hundred miles of uninhabited state park, including the Chugach Mountains, divide the actual population centers contained in Senate District E. Mr. Thiess explained this in his affidavit testimony:

The only geographic connection between District 9 (South Anchorage/Girdwood/Turnagain Arm) and District 10 (Eagle River Valley) is the uninhabited, uninhabitable, inaccessible mountainous wilderness of Chugach State Park. In a practical sense, connecting District 9 to District 10 using Chugach State Park would be like connecting us to District 24 using Turnagain Arm and Cook Inlet. The park may as well be open sea.⁴⁸

Dr. Hensel addresses this problem in his report:

Notably, in all other Anchorage Senate pairings, a constituent can drive, often along more than one route, directly from one half of their Senate district to the other. In contrast, for constituents to get from one half of Promulgated Senate District E (PD 9 and 10) to the other – that is, from Girdwood or South Anchorage to Eagle River Valley – they must travel on the main route of Alaska Highway 1 through or along the boundaries of every other Senate District in Anchorage (F, G, I, J, K, and L) except H.”⁴⁹

He further addresses the reason contiguity is a requirement for senate pairings: “Implicit in the requirement for contiguity as a pairing criterion is also an assumption that political representation is facilitated by the proximity – as near as practicable – of the populations sharing representation... The practicability clause in this respect is not a loophole but an exhortation.”⁵⁰ “Consequently, if a pairing presents particularly unnecessary obstacles to

⁴⁸ Thiess Aff. at ¶6.

⁴⁹ Hensel Report at 3.

⁵⁰ *Id.* at 2.

the population that a district encompasses, and there are other pairings that do not present such difficulties, and the people who have chosen the pairing also have previously engaged in partisan gerrymandering, it raises the question of “why this pairing, and not that?”⁵¹

The question is an apt one. Based on the record, there was little reason provided for the chosen pairing. Rather, the testimony before the Board emphasized the “false contiguity” of the pairing. One individual described the pairing as a “geographical nightmare” that would lead to ineffective representation:

I've lived in Eagle River for 40 years. In 2000 or so we were paired with the Hillside all the way to Hope, and it was a geographical nightmare. We had Con Bunde and Cathy Giessel both try to represent Eagle River, but never really connected with what was important to the community out here.⁵²

This echoed what had been said during the recent municipal reapportionment process. For example, Assembly Member Jamie Allard stated the following at a January 27, 2022 Town Hall:

And I also wanted to point out, [Assembly Member Crystal] Kennedy had brought up the fact that if we are connected to Hillside or we're connected to Girdwood, we would literally have to ride a Dall sheep in order to get to those areas unless we drove approximately from our location almost an hour – probably 45 minutes just to get to Hillside and approximately an hour and a half to get down to Girdwood. And I would also point out that when folks are saying we have things in common over there I would point out – look who their elected officials are. Suzanne LaFrance and Jon Weddleton – wonderful people, but you still have to say okay – what do we really have in common with those areas. We don't.⁵³

⁵¹ *Id.* at 3.

⁵² ARB2000147.

⁵³ MOA Town Hall Meeting, January 27, 2022, at 1:53, *video available at* <https://www.youtube.com/watch?v=s2dqRZjlwnM&t=689s>.

Particularly when viewed in light of the illegitimate purpose this Court has already found in the Board's treatment of Eagle River, the strained pairing of Eagle River with South Anchorage, Girdwood, and beyond appears to be a geographic manipulation for the purpose of voter enhancement. In analyzing the compactness of Senate District E, it is appropriate for the Court to compare the promulgated district with other proposed and possible districts. The Board's Option 2, or even Option 1, would have created Anchorage senate pairings that do not include a senate district where the only population centers in the constituent house districts are separated by vast, uninhabited, impassable tracts. While such expanses may be unavoidable in rural areas of our large state, this Court should look warily upon the creation of such a district in urban/suburban Anchorage by a Board already found to have acted with illegitimate purpose in this exact area.

Similarly, the Court should look circumspectly at a pairing that disregards local government boundaries. While all districts under discussion are technically within the Municipality of Anchorage, the Board's pairing disregarded a significant boundary within that one: the South High school zone, which extends from District 13 through District 9. As the Girdwood Plaintiffs have testified, the connection between Girdwood and the South Anchorage school district is a strong one.⁵⁴ The Board should not have disregarded this significant unifying boundary that ties Girdwood, Turnagain Arm, and South Anchorage together and the fact that it did so is further evidence of its improper purpose.

⁵⁴ Waugh Aff. ¶7.

C. The Board Adopted the Amended Proclamation with Illegitimate Purpose.

To determine whether the senate pairings were made with illegitimate purpose, the Court considers “whether there were secret procedures in the contemplation and adoption of those senate districts, whether there is evidence of partisanship, and whether the adopted senate boundaries selectively ignore political subdivisions and communities of interest.”⁵⁵ A lengthy analysis here is not required because the Board majority that voted for Option 3B on April 13, 2022 is the same majority that voted for the prior Anchorage senate pairings. The Court *has already found* that that Board majority engaged in secret procedures, and that there was evidence of partisanship. The Court has also *already found* that placing Eagle River into two senate districts selectively ignored the strong, coherent Eagle River community of interest. Because the Board majority did *the same thing* on remand, these findings need not be revisited.

To the extent the Board may argue that it had no secret meetings or secret agreements during the remand proceedings, that argument misses the point. The Board did not *need* to have secret meetings or secret agreements on remand; those meetings had already taken place, and the agreements had already been made, in November 2021. The Board majority already knew what its goal was. The Board merely chose a different means of effectuating its illegitimate purpose, this time at the expense of District 9 and Girdwood instead of Muldoon.

⁵⁵ FFCL at 56.

The effect of the Board’s adoption of Option 3B was to give Eagle River more representation. It achieved this by dividing Eagle River into two Senate districts. This is precisely what the Court found to be the heart of the Board’s secret agreement in November 2021:

It seems that what the three Board Members had reached a majority [on] was the only element of the map that was consistent between them: that Eagle River was split and North Eagle River was paired with JBER.⁵⁶

This secret agreement was made with the illegitimate purpose of increasing Eagle River’s representation at the expense of other districts’ voting power. This illegitimate purpose did not evaporate on remand, nor did the remand wash it away.

Instead, the Board paid little attention to the Court’s detailed findings about what went wrong in November 2021. Notably absent from any of Board counsel’s litigation summaries was any direct reference to the Court’s ruling that the Anchorage senate parings had been gerrymandered for partisan reasons. Likewise, when the Board reconvened, it made no apology to the public, or effort to take responsibility for its prior actions. To the contrary, Member Marcum repeatedly refused to accept the Court’s ruling. On April 6, in a discussion with Member Borromeo, Member Marcum insisted that “This has never been about more representation for Eagle River.”⁵⁷ Two days later, during an exchange with a testifying member of the public, she again insisted that she had never intended to give Eagle River more representation: “The intent was not to give

⁵⁶ *Id.* at 66.

⁵⁷ ARB2000526.

anyone more representation than any others. That is words that other people have put in my mouth.”⁵⁸

On remand, the Board once again selectively ignored communities of interest. It insisted on dividing Eagle River, despite the Court’s clear finding that Eagle River was a strong community of interest, and split District 9 from South Anchorage. The Court previously found “that the vast majority of public commenters were in favor of keeping Eagle River and Muldoon, both communities of interest, together in their own respective Senate seats.”⁵⁹ With regard to Eagle River, this did not change on remand; as explained above in Section IV.A, the vast majority of public comment—both in the Board proceedings directly and in the prior municipal reapportionment—was supportive of preserving Eagle Rivers integrity, and keeping District 9 with its closely-connected community of South Anchorage. This was true not only for individual testimony, but also for formal resolutions adopted by MOA, GBOS, and numerous affected community councils in South Anchorage. In addition, the Board disregarded the local government boundaries of school districts, such as the South High school zone, which unites District 9 with District 13.

All of this demonstrates that the Board’s purpose on April 13, 2022 was just as illegitimate as it was on November 10, 2021. The veneer of public process did not cure

⁵⁸ ARB2000711. Chair Binkley adopted a similar approach with his vote against correcting the Cantwell appendage, stating that he disagreed with the courts and could not vote to make the court-mandated correction. ARB2000455, ARB2000460.

⁵⁹ FFCL at 68.

the gerrymander, especially when the Board—once again—disregarded the weight of the evidence presented during that process.

D. The Amended Proclamation Does Not Lead to More Proportional Representation and Dilutes the Vote of Girdwood and District 9.

As demonstrated above, the Board acted with discriminatory intent in adopting Option 3B in its Amended Proclamation. The Court must therefore hold that its purpose was illegitimate unless Option 3B achieves “greater proportionality of representation.”⁶⁰ As explained in Dr. Hensel’s report, it does not.

In terms of straight population numbers, Dr. Hensel calculated that the difference between Option 2 and Option 3B for the five affected senate districts is *de minimis*.⁶¹ Under Option 2, the average deviation for the five senate districts involved would be -.79%.⁶² Under Option 3B, it would be -.72%. The difference of -.07% amounts to a mere 25 voters.⁶³ For numerical proportionality, therefore, Option 3B is not better than Option 2.

In terms of relative voting strength, however, there is a marked difference between the two options. Dr. Hensel examined historical voting data to determine how the District 9/10 pairing would affect each district’s voting power. He determined that District 10’s strong majority party vote would overwhelm the voting power of District 9, which is

⁶⁰ *Id.* at 54.

⁶¹ Hensel Report at 4.

⁶² *Id.*

⁶³ *Id.*

majority-leaning but not always majority-electing.⁶⁴ In other words, the pairing would overpower the more moderate “swing” vote of District 9, ensuring that the new Senate District E always elects a majority-party candidate—just as Eagle River Valley would have overwhelmed the swing vote of South Muldoon in the previous map.⁶⁵

Dr. Hensel also examined voting data from a non-partisan perspective and reached the same conclusion. Specifically, he looked at how District 9 and 10 have voted on bond issues. He determined that the two Eagle River districts (10 and 24) had similar lower levels of bond support than either the municipality of Anchorage in total or South Anchorage.⁶⁶ On municipal bonds, District 10 votes 3% more negatively on bond issues than District 9.⁶⁷ Given that municipal bonds typically pass or fail on razor-thin margins,⁶⁸ this difference is a meaningful one.

Dr. Hensel’s opinion on a district-wide level comports with the Girdwood Plaintiffs’ personal experience on a community level. Mr. Thiess testified that Eagle River and Girdwood are politically disparate, citing as an example Eagle River’s consistent practice of voting against Girdwood’s school bonds. Ms. Wingard testified that Eagle River voted against these bonds *even though there was no financial cost* to Eagle River.⁶⁹ Mr. Thiess also testified that, in general, Eagle River votes against areawide

⁶⁴ *Id.* at 7-8.

⁶⁵ *Id.*

⁶⁶ *Id.* at 8.

⁶⁷ *Id.*

⁶⁸ Aff. of Thiess ¶4.

⁶⁹ Aff. of Wingard ¶6.

bonds because it does not consider itself a part of Anchorage and therefore is unwilling to support initiatives that do not directly benefit it, whereas Girdwood votes for them because it considers itself connected with urban Anchorage.⁷⁰

As Member Borromeo pointed out, Option 3B as adopted in the Amended Proclamation gives Eagle River—a single community of interest whose voting strength would easily overpower its paired district—extraordinarily disproportional representation. The two Eagle River districts contain just 7% of state population, but Option 3B would give them control of 20% of the Alaska Senate.⁷¹ The Amended Proclamation certainly does not lead to more proportional representation.

V. CONCLUSION

As Dr. Hensel asks in his report, “why this pairing, and not that?” The record shows that the Board had every legitimate reason to adopt Option 2, and virtually none to adopt Option 3B. The explanation now is the same as it was on February 16, 2022: because the Board majority was committed to increasing Eagle River’s representation, at the expense of other districts.

For the foregoing reasons, this Court should rule that the Board has again engaged in improper gerrymandering and again adopted an unconstitutional senate map, reject the Board's Amended Proclamation, and compel the Board to adopt Option 2 to ensure Alaskans are represented consistent with the requirements of the Alaska Constitution.

⁷⁰ Aff. of Thiess at ¶5.

⁷¹ ARB2000977-78.

ASHBURN & MASON, P.C.
Attorneys for Louis Theiss, Ken Waugh, and
Jennifer Wingard

DATED: May 6, 2022

By: s/Eva R. Gardner

Eva R. Gardner
Alaska Bar No. 1305017
Michael S. Schechter
Alaska Bar No. 1405044
Benjamin J. Farkash
Alaska Bar No. 1911095

CERTIFICATE OF SERVICE

On May 6, 2022, a copy of the foregoing was served by e-mail on:

Schwabe Williamson & Wyatt

Matthew Singer

Lee Baxter

Kayla J. F. Tanner

msinger@schwabe.com

lbaxter@schwabe.com

ktanner@schwabe.com

jhuston@schwabe.com

Holmes Weddle & Barcott, PC

Stacey Stone

Gregory Stein

sstone@hwb-law.com

gstein@hwb-law.com

mmilliken@hwb-law.com

Brena, Bell & Walker, P.C.

Robin Brena

Laura S. Gould

Jake Staser

Jack Wakeland

rbrena@brenalaw.com

lgould@brenalaw.com

jstaser@brenalaw.com

mnardin@brenalaw.com

mhodsdon@brenalaw.com

jwakeland@brenalaw.com

Sonosky, Chambers, Sachse, Miller & Monkman, LLP

Nathaniel Amdur-Clark

Whitney A. Leonard

nathaniel@sonosky.net

whitney@sonosky.net

State of Alaska, Department of Law

Thomas S. Flynn

Rachel Witty

thomas.flynn@alaska.gov

rachel.witty@alaska.gov

Birch Horton Bittner & Cherot

Holly Wells

Mara Michaletz.

Zoe Danner

hwells@bhb.com

mmichaletz@bhb.com

zdanner@bhb.com

tevans@bhb.com

pcrowe@bhb.com

tmarshall@bhb.com

ASHBURN & MASON

By: s/Eva R. Gardner

Eva R. Gardner