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

ALASKA REDISTRICTING BOARD'S
OPPOSITION TO GIRDWOOD PLAINTIFFS' OPENING BRIEF

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I. INTRODUCTION

The Girdwood Plaintiffs' claims that Senate District E violates the Alaska Constitution's equal protection clause and contiguity requirement fail when tested against the rules this Court articulated in evaluating Senate District K in the last round of redistricting. In recognition of this reality, the Girdwood Plaintiffs ask this Court to ignore those rules and to simply hold that residents in the communities of Eklutna, Chugiak, and Eagle River must be segregated from the other voters within the Municipality of Anchorage. The various arguments they urge in support of this position are erroneous.

The Girdwood Plaintiffs' concession that Senate District E is "technically contiguous" is fatal to their claim that it violates Article VI, Section 6. The only substantive requirement Section 6 imposes on senate districts is that they be comprised, as near as practicable, of two contiguous house districts. Because House Districts 9 and 10 *are* contiguous, Senate District E satisfies Section 6.

As to equal protection, the Girdwood Plaintiffs ask this Court to apply a weight-of-testimony rule to its Section 6 claim even though nothing in that provision requires public testimony. The public-testimony requirement is located in Article VI, Section 10, and the Girdwood Plaintiffs have not asserted any violation of Section 10. Further, this Court should not apply that rule because, on appeal, the Supreme Court held that Skagway's house districts were entirely constitutional even though public testimony weighed in favor of a different district.

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This leaves the Girdwood Plaintiffs hoping this Court will rule that the Municipality of Anchorage communities of Chugiak, Eagle River, and Eklutna constitute an inseparable community of interest and order that they must be placed into a senate district together. This argument invites the Court to ignore the constitutional roles Alaskans articulated in Article VI under which the Alaska Redistricting Board ("Board") is delegated the authority of *drawing* election districts[1] and the court is delegated the traditional authority of judicial review of calling balls and strikes on challenged election districts, but does not draw election districts itself.[2] Nothing in Article VI suggests that a court can draw its own districts.[3]

On the merits of equal protection, Senate District E enhances Girdwood's voting power over every other legal pairing alternative. The Board used an open and transparent process in weighing and adopting Senate District E, and the similar interests and commonalities between House District 9 and 10 make it a rational senate pairing.

This Court should reject the Girdwood Plaintiffs' challenges to Senate District E.

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[1] Alaska Const. art. VI, § 4.

[2] Alaska Const. art. VI, § 11.

[3] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 18 (Alaska Super. Ct. Feb. 1, 2002) (citing *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973)).

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II. ARGUMENT

A. The Board has No Constitutional Obligation to Follow the Weight of Public Testimony and Rationally Adopted Senate District E

The Girdwood Plaintiffs spend much of their brief claiming that Senate District E runs afoul of this Court's inapposite public-testimony rule that was rejected by the Alaska Supreme Court. Specifically, the Girdwood Plaintiffs cite and quote from public testimony that favors their preferred senate district and urge the Court to invalidate Senate District E because it disregarded the "weight of testimony."[4] There are multiple problems with the Girdwood Plaintiffs' invitation to apply that rule to their claims against Senate District E.

First, the weight of public testimony is not relevant to the Section 6 and equal protection claims actually pleaded by the Girdwood Plaintiffs. They do not assert a Section 10 or due process claim. In the last round of litigation over the November 2021 Redistricting Plan, this Court interpreted Section 10 and Alaska's due process clause as requiring the Board to make a "good-faith effort to consider and incorporate the clear weight of public comment, unless state or federal law requires otherwise."[5] But the

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[4] Girdwood Plaintiffs' Opening Br. at 13 (May 6, 2022) ("The vast weight of the testimony favored a map that paired the two Eagle River districts together.").

[5] Findings of Fact and Conclusions of Law at 143 (Feb. 15, 2022) ("In other words, the spirit of Article VI, Section 10, if not the plain text, compels the Board to present the public with a number of equally constitutional redistricting plans and then let the people have a say about which plan they prefer. While the Board need not respond to every single comment received, the Board must make a good-faith effort to consider and incorporate the clear weight of public comment, unless state or federal law requires otherwise. . . . Due process likewise requires the Board to make a good-faith attempt to comply with the procedures it has adopted for itself, so long as those procedures are not preempted by applicable state or federal law.").

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Girdwood Plaintiffs do not challenge Senate District E as violating Section 10 or Alaska's due process clause. The only claims asserted by the Girdwood Plaintiffs are Section 6 and equal protection claims.[6] Neither Section 6 nor Alaska's equal protection clause include any public testimony requirement—the public hearing requirement is in Article VI, Section 10. Senate District E cannot be unconstitutional under Section 6 or equal protection because of the weight of public testimony.

Second, the Alaska Supreme Court rejected this Court's due process and Section 10 rule that mandated the Board to follow the public's desired election districts unless those districts were unlawful.[7] In adjudicating Skagway's challenges to the November 2021 Redistricting Plan, this Court held that House Districts 3 and 4 violated Section 10 and due process because they "ignored the clear weight of public testimony from Skagway and Juneau" that preferred a Skagway-downtown Juneau house district.[8] The Board appealed this ruling, arguing that partisan groups could shepherd significant public testimony to support election districts that served their various political objectives and that it would be improvident to require the Board to adopt election districts desired by the public even if the Board thought a different, constitutional

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[6] Complaint, ¶¶ 24-31 (Apr. 25, 2022).

[7] In the appeal, the State of Alaska, which has been part of this case pursuant to Alaska Civil Rule 90.8(b)(2), submitted a response to the petitions for review asking the Alaska Supreme Court not to adopt the superior court's weight-of-public-testimony standard for state agencies "that conduct public hearings or receive public comment." *See* State's Response to Petitions for Review, Supreme Court No. S-18332, at 2 (Mar. 10, 2022).

[8] Findings of Fact and Conclusions of Law at 146-147.

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district was better. The Supreme Court agreed and reversed this Court's holding and upheld House Districts 3 and 4:

> House Districts 3 and 4 are the subject of two petitions, one by the Board and one by the Municipality of Skagway Borough. We AFFIRM the superior court's determination that the house districts comply with article VI, section 6 of the Alaska Constitution and should not otherwise be vacated due to procedural aspects of the Board's work. We REVERSE the superior court's remand to the Board for further proceedings under the superior court's "hard look" analysis relating to public comments on the house districts. There is no constitutional infirmity with House Districts 3 and 4 and no need for further work by the Board.[9]

The Board's adoption of House Districts 3 and 4, that were different than the desires of the plurality of public testimony, resulted in "no constitutional infirmity with House Districts 3 and 4 and no need for further work by the Board."[10] In other words, this Court's public-testimony rule that sought to effectuate the "spirit" of Section 10 and due process was legal error and should not be invoked a second time.

Third, the crux of what the Girdwood Plaintiffs are attempting to do is use public testimony to counter a conclusion compelled by law: that Girdwood and Eagle River are socio-economically integrated. For example, Girdwood's expert witness, Dr. Hensel, discusses how Girdwood public-school students attend schools in South Anchorage, Girdwood residents shop at South Anchorage Fred Meyers, and that South Anchorage and Girdwood share some emergency services.[11] This is all evidence of

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[9] Order on Petitions for Review, Supreme Court No. S-18332, at 2-3 (Mar. 25, 2022).

[10] *Id*. at 3.

[11] Girdwood's Opening Br. at 15.

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socio-economic integration, which looks to the "significant social and economic interaction among the communities within an election district."[12] But this Court cannot rule that Eagle River and Girdwood do not engage in sufficient social and economic interactions to be in a senate district together because the "communities within the Municipality of Anchorage are socio-economically integrated as a matter of law[.]"[13] Public testimony about community interactions and interests cannot override Alaska Supreme Court precedent that all communities in the Municipality of Anchorage share sufficient social and economic interaction to be in election districts together. For purposes of social and economic interaction, the law dictates that the Girdwood neighborhood can be paired with any other part of the Municipality of Anchorage in a senate district.

This Court should reject the Girdwood Plaintiffs' claim that the Board disregarded public testimony because (1) the Girdwood Plaintiffs do not allege a Section 10 or due process claim; (2) the Alaska Supreme Court rejected the weight-of-public testimony rule applied by this Court in the last round of litigation; and (3) the law establishes that Girdwood and Eagle River have sufficient social and economic interactions to be in a house election district together. In fact, the record shows the Board took significant public testimony on both sides of this issue, considered both

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12 *Hickel v. Southeast Conference*, 846 P.2d 38, 46 (Alaska 1992).

13 *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002).

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sides, and reached a rational decision. It is not this Court's role to second guess the sagacity of the Board's plan when it selected a rational option.[14]

B. The Girdwood Plaintiffs' Admission that Senate District E is Comprised of Two Contiguous House Districts Forecloses Their Section 6 Claim

The Girdwood Plaintiffs' claim that Senate District E violates Article VI, Section 6's requirements is meritless given the actual wording of that constitutional provision.[15] Section 6 requires only that senate districts be comprised, as near as practicable, "of two contiguous house districts." It does not require senate districts to be compact. The Girdwood Plaintiffs' arguments to the contrary are legal error.

The Alaska Supreme Court has repeatedly directed that "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. [The courts] are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result."[16] In interpreting the Constitution, a court must "look to the plain meaning and purpose of the provision and the intent of the framers."[17] Specifically, where the "meaning and intent are clear, [courts] do not apply interpretive canons; a canon of construction is

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[14] *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012) ("We may not substitute our judgment as to the sagacity of a redistricting plan for that of the Board, as the wisdom of the plan is not a subject for review.").

[15] Girdwood Plaintiffs' Opening Br. at 20-24.

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

[17] *Id.*; *see also Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994).

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only 'an aid to the interpretation of statutes that are ambiguous or that leave unclear the legislative intent.'"[18]

Starting with the words of the provision itself, Article VI, Section 6 states in relevant part:

> **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.[19]

Whether a senate district is comprised of two contiguous house districts is easily confirmed. "Contiguous territory is territory which is bordering or touching."[20] Thus, "[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)."[21] Contiguity is a visual concept.[22] A district that comprises a single land mass on a map connected by census blocks is contiguous for constitutional purposes, even if transportation barriers such as mountains or waterways physically separate portions of the district.[23]

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[18] *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 993 (Alaska 2019) (quoting *West v. Muni. of Anchorage*, 174 P.3d 224, 229 (Alaska 2007)).

[19] Alaska Const. art. VI, § 6 (emphasis added).

[20] *Hickel v. Southwest Conference*, 846 P.2d 38, 45 (Alaska 1992).

[21] *Id.* (citation omitted).

[22] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 36 (Alaska Super. Ct. Feb. 1, 2002).

[23] Findings of Fact and Conclusions of Law at 74-75 ("This Court agrees with Judge Rindner's analysis.").

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Nothing in Section 6 requires *maximum* contiguity. A senate district that is comprised of two house districts that share a border fulfills the contiguity requirement. The qualification "as near as practicable" means that the Board can pair non-contiguous house districts together if it is not practicable to adopt contiguous pairings. It does not mean that senate districts shall be composed of two house districts that are as contiguous as possible.

In the same vein, it does not matter if, given current roadways, a resident has to drive outside of their district to reach another part of the district. Contiguity is "not dependent on the vagaries of existing transportation systems."[24] As this Court held in rejecting the "transportation contiguity" urged by the Matanuska-Susitna Borough and Valdez in litigation over House District 29:

> The fact that the road connection between Mat-Su and Valdez meanders in and out of two districts as it traverses around the Chugach mountains does not take away from the fact that every part of the district is physically connected. District 29 is contiguous.[25]

The Alaska Supreme Court's affirmance of this Court's ruling about contiguity[26] ends the inquiry because every part of Senate District E is visually and physically connected, and whether a resident has to drive through other districts to get to every portion of the senate district is of no constitutional import. Alaskans in rural portions of the state have to boat or fly to reach other communities in their senate district. Residents of

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[24] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 36.

[25] Findings of Fact and Conclusions of Law at 74-75.

[26] Order on Petitions for Review, S-18332, at 3.

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Anchorage can certainly drive short distances on paved roadways across the municipality to reach other portions of their senate district.

Contrary to the Girdwood Plaintiffs' assertions, the Alaska Constitution does not require senate districts be compact. In *Kenai*, Governor Sheffield's reapportionment plan[27] included a two-member senate district[28]—Senate District E—that was comprised of three house districts:[29] the Prince William Sound District, the North Kenai-South Anchorage District, and the Matanuska-Susitna District.[30] *Kenai*'s Senate District E was known as the "Donut" District[31] because of its ring-like shape. The district was challenged, and the Alaska Supreme Court held that the substantive house district requirements did not apply to senate districts: "Therefore, we hold that the provisions of article VI, section 6 which set forth socio-economic integration, compactness, and contiguity requirements are inapplicable to redistricting and reapportionment of senate

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[27] *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1355 (Alaska 1987) ("On February 16, 1984, Governor William Sheffield issued an Executive Proclamation of Reapportionment and Redistricting adopting the Board's proposed plan.").

[28] The 1998 Amendment eliminated multi-member election districts and drastically simplified the composition of senate districts to be comprised of two contiguous house districts. *See In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at 48-49 (Alaska Super. Ct. Feb. 1, 2002).

[29] *Kenai Peninsula Borough*, 743 P.2d at 1357. A two-member senate district means that the district had two senators elected at-large to serve in the Alaska Legislature.

[30] *Id*. at 1355. The State of Alaska's Brief of Appellee further explains the house districts that comprised Senate District E: "The principal communities involved include Palmer and Wasilla from District 16, Valdez, Cordova, Seward and Whittier from District 6, and Nikiski and a portion of South Anchorage from District 7." Brief of Appellee State of Alaska, *Kenai Peninsula Borough*, at 35, Case No. S-1207 (Sept. 9, 1986) (available in the State of Alaska Law Library).

[31] *Kenai Peninsula Borough*, 743 P.2d at 1357.

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districts."[32] The Court went even further to state that "[e]ven if article VI, section 6 did apply to senate districts, we would uphold Senate District E under its requirements."[33]

If *Kenai*'s donut-shaped senate district that included areas from three different boroughs—Mat-Su, Anchorage and Kenai—as well as Prince William Sound was socio-economically integrated, compact and contiguous, Senate District E easily passes the same test. Senate District E is formed of two house districts that touch and share a 35-mile border, and is therefore contiguous. If this Court chose to ignore the Alaska Supreme Court's holding that socio-economic integration and compactness requirements do not apply to senate districts, Senate District E still meets those requirements.[34] This Court must reject the Girdwood Plaintiffs' attempt to engraft a compactness requirement on senate districts that is not contained in the plain language of the Constitution.

The Girdwood Plaintiffs improperly attempt to slip in new contiguity requirements in the Alaska Constitution through their expert witness, cultural anthropologist Dr. Chase Hensel. Dr. Hensel spends most of his expert report opining on what "practical contiguity" under the Alaska Constitution means.[35] But what Article

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[32] *Id*. at 1365 & n.21.

[33] *Id*. at 1365 n.21.

[34] In 1998, voters approved a constitutional amendment to Article VI to add just the requirement that senate districts be comprised, as near as practicable, of two contiguous house districts.

[35] Expert Report of Dr. Chase Hensel, at 1-5, attached to Girdwood's Opening Brief.

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VI, Section 6 means when it states "[e]ach senate district shall be composed as near as practicable of two contiguous house districts. . . ." is a pure question of law not subject to expert witness debate. In American courts, the only expert on the law is the judge, and the rules of evidence preclude litigants from eliciting expert witness testimony on the meaning of the law: "an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on the ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court."[36] "The reason for this prohibition is because it is the role of the trial judge to explain the law to the jury."[37]

Dr. Hensel's expert testimony regarding "practical contiguity" in his expert report is a legal conclusion about what he believes Article VI, Section 6 requires for senate districts. Black-letter law precludes Dr. Hensel from testifying as to what Article VI, Section 6 means. This Court should not accept testimony that is directly contrary to its own prior holding in this case that contiguity is a "visual concept," not a practical

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[36] *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (emphasis in original) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)); *see also Berckeley Inv. Grp. Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006) ("Although Federal Rule of Evidence 704 permits an expert witness to give expert testimony that 'embraces an ultimate issue to be decided by the trier of fact,' an expert witness is prohibited from rendering a legal opinion.").

[37] *United States v. Xue*, --- F. Supp. 3d ---, ---, 2022 WL 1027634, *5 (E.D. Pa. Apr. 4, 2022) (citing *First Nat. State Bank of New Jersey v. Reliance Elec. Co.*, 668 F.2d 725, 731 (3d Cir. 1981)).

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one,[38] as this Court explained in its prior order.[39] Dr. Hensel's opinion on "practical contiguity" should be excluded or disregarded as legal conclusions are the "distinct and exclusive province of [this] court."[40]

The Girdwood Plaintiffs' admission that House Districts 9 and 10 are "technically" contiguous ends their claim that Senate District E does not meet Section 6's contiguity requirement.[41] The Alaska Constitution does not discuss and does not require "practical" or "meaningful" contiguity, as defined by the Girdwood Plaintiffs. Rather, "contiguity" is a visual concept that is satisfied if a senate district is comprised of a single land mass of touching census blocks, which is why the court easily upheld *Kenai*'s "Donut" District as contiguous. Contiguity is a binary concept: the district is either contiguous or it is not. Two districts are no less contiguous because they share a short border. Senate District E has a long border between House Districts 9 and 10 and meets the criteria for contiguity under the Alaska Constitution.

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[38] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 36 (Alaska Super. Ct. Feb. 1, 2002).

[39] Findings of Fact and Conclusions of Law at 74-75 ("This Court agrees with Judge Rindner's analysis.").

[40] *Nationwide Transport Finance*, 523 F.3d at 1058 (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)); *see also Berckeley Inv. Grp. Ltd.*, 455 F.3d at 217 ("Although Federal Rule of Evidence 704 permits an expert witness to give expert testimony that 'embraces an ultimate issue to be decided by the trier of fact, an expert witness is prohibited from rendering a legal opinion.").

[41] Girdwood Plaintiffs' Opening Br. at 20.

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C. Alaska Courts Cannot Draw Election Districts

Under the auspices of this Court's former rulings, the Girdwood Plaintiffs attempt to segregate parts of Anchorage from being in election districts with others. They assert that in the last round of redistricting litigation, this Court ruled that Eagle River/Chugiak/Eklutna is a "community of interest" that must be paired together in a senate district.[42] True to its constitutional limitations, this Court did not dictate the boundaries of any election districts when it adjudicated the November 2021 Redistricting Plan.

Alaska courts do not dictate the boundaries of any election districts; instead, they adjudicate claims brought to them and *invalidate* unlawful districts. The Alaska Constitution gives the Board, not courts, the authority to draw the district lines for house and senate districts. Article VI, Section 4 unambiguously states:

> The Redistricting Board shall establish forty house districts, with each house district to elect one member of the house of representatives. The board shall establish twenty senate districts, each composed of two house districts, with each senate district to elect one senator.[43]

Under Article VI, Section 11, the Board's redistricting plan is subject to judicial review for "error": "Any qualified voter may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting."[44]

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[42] *Id*. at 25-28.

[43] Alaska Const. art. VI, § 4.

[44] Alaska Const. art. VI, § 11.

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This constitutional structure is why in previous redistricting cycles since Section 11's enactment in 1998 no Alaska court has mandated the Board adopt *any* specific house or senate district. Such a ruling would run afoul of separation of powers and the explicit language of Article VI.

During the 2011 redistricting cycle, the Alaska Supreme Court invalidated the Board's first redistricting plan because the Board did not follow the *Hickel* process, and remanded the case "to the superior court with instructions to further remand to the Board to formulate a plan . . . ."[45] The Board adopted a second plan, legal challenges were filed, and again the Supreme Court invalidated the second plan as failing to comply with the *Hickel* process.[46] Notably, however, after invalidation of the Board's second redistricting plan, the Supreme Court did not direct that the court system should promulgate a third plan. The Court remanded the case for the Board to create a third plan: "We affirm the decision of the superior court and require the board to draft a new plan for the 2014 elections."[47] This history of deference to the Board is consistent with the Alaska Constitution's text that the Board, not the courts, "shall establish forty house districts . . . [and] twenty senate districts."[48]

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[45] *In re 2011 Redistricting Cases*, 274 P.3d 466, 466 (Alaska 2012).

[46] *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1033 (Alaska 2012).

[47] *Id*. at 1033.

[48] Alaska Const. art. VI, § 4.

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In this redistricting cycle, the Alaska Supreme Court demonstrated that the courts' role in redistricting is limited to reviewing challenges to election districts, invalidating any unconstitutional districts, and remanding the case to the Board to fix any issues. It is not the courts' role to substantively decide district lines. During the last round of litigation, the inclusion of the "Cantwell Appendage" in House District 36 was challenged. Ultimately, the Supreme Court ruled that the appendage rendered House District 36 unconstitutionally non-compact and told the Board to fix it:

> The Cantwell Appendage renders House District 36 non-compact without adequate justification. House District 36 reaches across a local borough boundary, within which voters are by law socio-economically integrated with other borough voters, to extract Cantwell residents from District 30 and place them in House District 36, based primarily on the proposition that an apparent minority of Cantwell residents — shareholders of the Alaska Native Claims Settlement Act regional corporation headquartered in House District 36 — are more socio-economically integrated with similar shareholder residents in House District 36. But the Board's briefing about House Districts 3 and 4 argues: "Nothing in [article VI, section 6] states that the Board should disregard compactness to increase an already socio-economically integrated area's integration." The Board mentions in its briefing that House District 30 was about 2% overpopulated and that moving the roughly 200 Cantwell residents eliminated about half the overage to the constitutionally targeted house district population of 18,335. This rendered both House Districts about 1% overpopulated. But House District 30's approximately 2% overpopulation with the Cantwell residents included, and House District 36's nearly perfect population without the Cantwell residents included, are well within constitutionally allowable parameters under our case law. We therefore REVERSE the superior court's determination to this limited extent, **<u>and remand to the superior court to remand this aspect of the house districts to the Board to correct the constitutional error.</u>**"[49]

[49] Order on Petitions for Review, S-18332, at 3-5.

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Like prior redistricting cycles, the Supreme Court adjudicated the constitutionality of House District 36, invalidated it, and remanded the matter to the Board to create a new redistricting plan. The Supreme Court did not order the Board to fix the Cantwell Appendage in any certain way. In any event, the Board fixed this issue on remand and that fix has not been challenged.

The Girdwood Plaintiffs are inviting this Court to engage in legal error by asking the Court to "compel" the Board to adopt a specific pairing of house districts.[50] The Alaska Constitution does not permit Alaska courts to dictate the boundaries of election districts, including whether areas within the Municipality of Anchorage like Eklutna, Chugiak, and Eagle River, must be paired together in a senate district. That authority is reserved to the Board.[51]

D. The Board Adopted Senate District E in Recognition of the Similarities Between House District 9 and House District 10

Hoping this Court will segregate the voters of Anchorage they disfavor from being in election districts with others in the municipality, the Girdwood Plaintiffs seek a ruling that Chugiak/Eagle River/Eklutna must be paired together in a senate district.

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[50] Girdwood Plaintiffs' Opening Br. at 30 ("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.") (emphasis added).

[51] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 18 (Alaska Super. Ct. Feb. 1, 2002) (citing *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973)); *see also In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002) ("While Eagle River-Chugiak area is socio-economically integrated, its residents have no constitutional right to be placed in a single district.").

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This position is contrary to the plain terms of the Alaska Constitution and the Alaska Supreme Court's holding that while the "Eagle River-Chugiak area is socio-economically integrated, its residents have no constitutional right to be placed in a single district."[52]

As demonstrated in the Board's opening brief,[53] the Alaska Supreme Court has already approved the splitting of Eagle River-Chugiak into multiple election districts. The Court applied the simple logic that, as a matter of law, all communities within the municipality share sufficient social and economic interaction to be in an election district together, and no neighborhood in Anchorage has a right to be in a unified election district.[54] That ruling forecloses the Girdwood Plaintiffs' attempt to segregate Eagle River/Chugiak/Eklutna voters from being in election districts with other residents of the Municipality of Anchorage.

On remand, the Board explained its legitimate purpose in adopting Senate District E. The Board adopted Senate District L (House Districts 23 and 24) because the residents of Joint Base Elmendorf-Richardson (JBER) share significant connections to the Eagle River/Chugiak area.[55] The Board recognized that this military population is a community of interest that serves the employer, wears the same uniform, shops in

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52 *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002).

53 Alaska Redistricting Board's Opening Brief on Girdwood Challenge at 18-19 (May 5, 2022) ("Board's Opening Br.").

54 *In re 2001 Redistricting Cases*, 47 P.3d at 1091.

55 *See* Board's Opening Br. at 31-37 (quoting and citing public testimony).

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the same place, and obtains medical care in the same place. The Board adopted Senate District E (House Districts 9 and 10) combining the Hillside with Eagle River, as was the case in House District 32 approved by the Alaska Supreme Court in *In re 2001 Redistricting Cases*, because of the similar attributes, geography, lifestyles, challenges, and demography of the residents in these two house districts.[56]

In an effort to manufacture a constitutional problem with Senate District E, counsel for the Girdwood Plaintiffs attack their former expert witness Randy Ruedrich. In the last round of litigation, counsel for the Girdwood Plaintiffs (then representing Calista Corporation) sponsored Mr. Ruedrich as an expert witness on redistricting.[57] Now the Girdwood Plaintiffs quip that Mr. Ruedrich's proposed senate pairings on remand just happen to match Board Member Marcum's proposed senate pairings,[58] and then go on to describe those pairings as "preserv[ing] the gerrymandered division of Eagle River by pairing Eagle River Valley with South Anchorage/Girdwood/Turnagain Arm, and North Eagle River with North Anchorage."[59] In other words, in the eyes of counsel, Mr. Ruedrich had the redistricting experience and qualifications to make him an expert on redistricting during the last cycle, but now with new clients, Mr. Ruedrich is a gerrymanderer who cannot be trusted. This Court should recognize this

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[56] *See id*. at 31-37 (quoting and citing public testimony).

[57] *See* Calista's Pre-filed Expert Testimony of Randy Ruedrich (Jan. 17, 2022).

[58] Girdwood Plaintiffs' Opening Br. at 6-7.

[59] *Id*. at 7-8.

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inconsistency underscores that the Girdwood Plaintiffs' challenges are motivated by politics, not the Constitution.

To attack Senate District E as "gerrymandered," "illegitimate[]," and "partisan,"[60] the Girdwood Plaintiffs are forced to ignore the Alaska Supreme Court's decision in *In re 2001 Redistricting Cases*. In that case, the Alaska Supreme Court held that House District 32, which included Eagle River and the Hillside, was "not unconstitutional in any respect."[61] As the Supreme Court easily concluded, it is rational and constitutional to pair house districts within the same municipality into a senate district. This Court should decline the Girdwood Plaintiffs' invitation to rule contrary to binding precedent.

The fact that some disfavor Senate District E is to be expected in redistricting. But the Board's rationale for adopting Senate District E was stated on the record and is rational. Opposition to an election district does not change the constitutionality of that district.

E. Senate District E Does Not Dilute Girdwood's or House District 9's Voting Power

Finally, while the Girdwood Plaintiffs set out to prove that Senate District E does not lead to more proportional representation, they end up proving the opposite. According to their own math, Senate District E **does** lead to more proportional

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60 *Id*. at 1-2, 13.

61 *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002).

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representation in the Alaska Senate—they just discount that increased proportionality as "*de minimus*."[62] This portion of the Girdwood Plaintiffs' briefing is riddled with errors and misleading statements.

The challengers attempt to pivot to argue that House District 9 is a "swing" district that cannot be paired with Eagle River that prefers Republican candidates.[63] But this is just a re-packaged argument to segregate Eklutna/Chugiak/Eagle River from being in election districts with other portions of the municipality. As previously discussed, the Alaska Supreme Court has rejected this argument: "While the Eagle River-Chugiak area is socio-economically integrated, its residents have no constitutional right to be placed in a single district."[64] Twenty years ago, the Supreme Court rejected challenges to House District 32 that spanned from Eagle River to the Hillside and held that it was "not unconstitutional in any respect."[65] This Court cannot segregate portions of Anchorage from the rest of its election districts.

Moreover, in no fair sense of the word is House District 9 a "swing" district for Alaska Legislature elections.[66] In the last 20 years, the Anchorage Hillside, in what is

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[62] Girdwood Plaintiffs' Opening Br. at 28 ("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 minimus*. Under Option 2, the average deviation for the five senate districts involved would be -.79%. Under Option 3B, it would be -.72%. The difference of -.07% amounts to a mere 25 voters.").

[63] Girdwood Plaintiffs' Opening Br. at 28-30.

[64] *In re 2001 Redistricting Cases*, 47 P.3d at 1091.

[65] *Id*.

[66] *See* Supplemental Aff. of Peter Torkelson, ¶¶ 3-4 (May 9, 2022).

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now House District 9, has **never** voted for a Democratic candidate for the Alaska Legislature:[67]

Anchorage Hillside Historical Alaska Legislature Election Results		
Election Year	**Senate**	**House**
2002	Con Bunde (R)	Mike Hawker (R)
2004	No race	Mike Hawker (R)
2006	Con Bunde (R)	Mike Hawker (R)
2008	No race	Mike Hawker (R)
2010	Cathy Giessel (R)	Mike Hawker (R)
2012	Cathy Giessel (R)	Mike Hawker (R)
2014	Cathy Giessel (R)	Mike Hawker (R)
2016	Cathy Giessel (R)	Jennifer Johnson (R)
2018	No race	Jennifer Johnson (R)
2020	Roger Holland (R)	James Kaufman (R)

The Anchorage Hillside cannot be reasonably construed as a "swing" district when it reliably elects Republican candidates to represent it in the Alaska Legislature.

The challengers' expert, Dr. Chase Hensel, attempts to get around this inconvenient fact by looking to two elections that have nothing to do with the Alaska Legislature. Specifically, Dr. Hensel points out that in 2014 the Hillside voted for Forrest Dunbar (D) for U.S. Congress and in 2020 for Joe Biden (D) for U.S.

[67] *See* **Exhibit C** attached to Supplemental Aff. of Peter Torkelson.

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President.[68] Dr. Hensel's methodology overlooks that these two victories are outliers, and that the margin of victory in these elections for Dunbar and Biden was smaller than the vote that went to the third-party, Libertarian candidate. Dr. Hensel studiously ignores the election results for the Alaska Legislature where the Hillside elected a Republican candidate every time, and fails to mention that he is plucking outliers from the data and selling that data as a general trend. When it comes to actually electing members to the Alaska Legislature, Dr. Hensel does not claim that House District 9 has ever elected a Democrat to the state legislature.

The Girdwood Plaintiffs make little effort to articulate and apply the "neutral factors" test this Court applied to equal protection claims in the last round of challenges:

> This 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. In making this assessment, the Court looks to the Board's process in making its decision as well as the substance of the decision. The Court will find suggestive of illegitimate purpose any secretive procedures employed by the Board, evidence of regional partisanship, and the existence of district boundaries which "meander and selectively ignore political subdivisions and communities of interest."[69]

The reason that the Girdwood Plaintiffs chose to ignore the neutral factors test is that its application shows that Senate District E does not dilute any area of the Municipality

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[68] Dr. Chase Hensel Expert Report at 7-8 ("The voters in PD 9 have voted largely Republican but voted for the Democratic candidate in the 2014 US House election and for President Biden in the 2020 election.").

[69] Findings of Fact and Conclusions of Law at 54 (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987)).

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of Anchorage's voting power. As shown in the Board's opening brief, Senate District E enhances Girdwood's voting strength relative to its population,[70] and pairing House District 9 with House District 13 (as desired by the Girdwood Plaintiffs) reduces Girdwood's voting strength.[71] The Board's process on remand was transparent and methodical: the Board took public testimony, adopted two proposed plans for Anchorage senate districts, took more public testimony, and voted to approve proposed plan "Option 3B."[72] Senate District E does not split *any* political subdivisions. Under the neutral factors test, Senate District E is constitutional.

The Girdwood Plaintiffs also incorrectly state that the Board's plan gives Eagle River control over 20% of the senate districts in Alaska.[73] There are 20 total senate districts in Alaska.[74] It requires four senators to make up 20% of the Alaska Senate.

There is no evidence, or even argument, on which to conclude that Senate District E's next senator will reside in Eagle River versus the Anchorage Hillside versus Girdwood. Indeed, Representative Mike Hawker represented the Hillside and Eagle River in House District 32 and he resided on the Hillside.[75] Alaska Senator Con Bunde

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70 Board's Opening Br. at 24-25.

71 *Id*. at 24.

72 *Id*. at 4-8.

73 Girdwood Plaintiffs' Opening Br. at 9, 30 (quoting Board Member Borromeo).

74 Alaska Const. art. VI, § 4.

75 Supplemental Aff. of Peter Torkelson, ¶ 5.

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represented Senate District P that covered the Hillside and Eagle River and he likewise lived on the Hillside.[76]

The Girdwood Plaintiffs fail to explain the glaring conflict between their arguments and their expert's conflicting public testimony. In their briefing to this Court, the Girdwood Plaintiffs argue that Senate District E acts to "increase Eagle River's Senate representation,"[77] and they rely on Dr. Chase Hensel's analysis to support their arguments. But less than a month before they filed their complaint, on April 8, 2022, Dr. Chase Hensel submitted public testimony to the Board claiming the exact opposite:

> Eagle River forms an obvious and clearly defined community of interest. It is our opinion that dividing a community of interest creates both dilution and friction in the political process.
>
> Division of the Eagle River community of interest would dilute its voting power by splitting it between two districts. This harms the community thus divided. Residents would lose the ability to have their collective interests efficiently and effectively represented.[78]

According to Dr. Hensel on April 8, Senate District E would *dilute* Eagle River's voting power. But, by May 6, Dr. Hensel has changed his mind and Senate District E would now *enhance* Eagle River's voting power. The Girdwood Plaintiffs dutifully ignore this inconsistency. As with the about-face on the value of Mr. Ruedrich's redistricting

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[76] *Id.*, ¶ 5.

[77] Girdwood Plaintiffs' Opening Br. at 3.

[78] *See* Exhibit E at 5 to East Anchorage Motion to Reject Amended Redistricting Proclamation Plan and for Modification of Order on Remand (Apr. 18, 2022).

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expertise, the Girdwood Plaintiffs' expert's reversal on whether Senate Districts E and L will enhance or diminish Eagle River's voting power reveals that adherence to the Constitution is not the goal of this challenge.

F. Senate District E Does Not Disregard Local Political Boundaries

Grasping for means to show that Senate District E is unconstitutional, the Girdwood Plaintiffs claim that Senate District E "disregards local government boundaries" because it places South Anchorage High students located in House Districts 9 and 13 into two senate districts.[79]

As an initial matter, high-school attendance boundaries within the Anchorage School District are not "local government boundaries" because all students within the Anchorage School District are governed by the same political entity. Anchorage School District students from Chugiak, to South Anchorage, to West are all governed by the Anchorage School District School Board.[80] All members of the school board are elected on an at-large basis from across the municipality so that each member serves all of the municipality's schools, and not just one region of Anchorage.[81] Because the Anchorage School District governs and operates all public schools within the

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[79] Girdwood Plaintiffs' Opening Br. at 24.

[80] *See* Article VI of the Anchorage Municipal Charter (available at: https://library.municode.com/ak/anchorage/codes/code_of_ordinances?nodeId=PTICH_ARTVIED_S6.01PUSCSY) ("The system of public schools for the municipality shall be operated by a school board of seven persons elected at-large from seats designated as seat A, seat B, seat C, seat D, seat E, seat F, and seat G.").

[81] *See* Article VI, Section 6.01 of the Anchorage Municipal Charter.

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Municipality of Anchorage, attendance boundaries for elementary, middle, and high schools within the district are not separate "local political boundaries."

Further, if the Court invalidates Senate District E on the basis it ignores local political boundaries by placing residents whose children attend South Anchorage High into two senate districts, then all of the Anchorage senate districts must be invalidated. Indeed, all of the Anchorage house districts must be re-visited, too. House districts are the building blocks for senate districts and the Anchorage house districts do not conform to Anchorage School District attendance areas for elementary, middle and high schools.[82] The following is a chart showing which senate districts form portions of Anchorage School District attendance boundaries:

ASD High School	**2022 Senate Districts**
Bartlett High	I, J, K and L
Chugiak High	E and L
Dimond High	G and H
East Anchorage High	E, F, G, I, and J
Eagle River High	E and L
Service High	F and G
South Anchorage High	E, F, and G
West High	G, H, I, J and L

The Board's house districts do not respect Anchorage School District attendance boundaries, and therefore neither do the senate districts. If respecting Anchorage

[82] *See* Supplemental Aff. of Peter Torkelson, ¶¶ 6-7.

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School District attendance boundaries is a constitutional requirement of Section 6 or equal protection, Anchorage needs to be re-drawn starting with the house districts.

The Court should reject a new requirement for the Board to draw election districts that respect elementary, middle, and high school attendance area boundaries within a unified school district that would unduly complicate the Board's already Herculean task.

III. CONCLUSION

For the foregoing reasons, this Court should reject the Girdwood Plaintiffs' Section 6 and equal protection challenges to Senate District E.

DATED at Anchorage, Alaska, this 10th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2022, a true and correct copy of ALASKA REDISTRICTING BOARD'S OPPOSITION TO THE GIRDWOOD PLAINTIFFS' OPENING BRIEF (31 pages) was served upon the following by:

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