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
	)	

ORDER DENYING EAST ANCHORAGE MOTION TO REJECT AMENDED REDISTRICTING PLAN BUT GRANTING IN PART CLARIFICATION

I. INTRODUCTION

On April 18, 2022, the East Anchorage Plaintiffs filed a *Motion to Reject Amended Redistricting Proclamation Plan and for Modification of Order on Remand.* The following day, the Alaska Redistricting Board (Board) filed its Opposition, and East Anchorage filed its Reply April 20, 2022. East Anchorage asks the Court to reject the Amended Proclamation plan for failure to comply with the March 30, 2022 Order as it relates to the Anchorage Senate Districts. East Anchorage also moves the Court to modify the Order to adopt a proposed map identified as "Option 2." Otherwise, East Anchorage Plaintiffs ask the Court to modify the Order to clarify that "all the unconstitutional pairings underlying Senate District K must be corrected."

II. ARGUMENT

A. The Court Resolves East Anchorage's Motion Upon Review of the Entire Record

As a threshold matter, the Court is cognizant of the Board's assertion that it should wait for the record to proceed with a decision on East Anchorage's motion. The parties' positions were clarified at oral argument to reflect the shared sentiment that, to the extent that the Court resolves the motion by simply clarifying the its past Orders, it is not necessary to wait to receive and review the record. By contrast, parties seem to agree that should the Courts' resolution more accurately be described as a review of the April 15, 2022 Proclamation Plan, the Court should do so only once it has had the opportunity to review the full record.

In light of East Anchorage's arguments and the questions they raise, it would insufficiently address the entirety of East Anchorage's motion if the Court were to resolve the Motion with only an order clarifying the confines of past Orders. Therefore, the Court opted to hold off on a decision until receiving the record, and sets forth its decision having reviewed and considered the record submitted by the Board.

B. The Court's Orders Did Not Mandate that the Board Pair, or Decline to Pair, any Specific Districts as Such a Mandate would Fall Outside of this Court's Authority

East Anchorage interprets this Court's February 15, 2022 Order to mandate that House District 24, Eagle River Valley, and House District 10, North Eagle River/Chugiak, be combined into one Senate District. Plaintiffs clarified at oral argument that they understood the Court's Order to conclude that any senate district that split House Districts 24 and 10 was unconstitutional. The Court notes that house district 24, North Eagle River, remains paired with House District 23, the JBER District, comprising Senate District L. House District 10 is no longer paired with South Muldoon, but is now paired with House District 9, which comprises a portion of South Anchorage and Girdwood.

By contrast, the Board argues that East Anchorage challenged Senate District L, the JBER/Eagle River district that is still paired in the final plan, and the Court did not determine it was unconstitutional.[1] Likewise, the Court did not conclude that the two Eagle River house districts must be paired into one senate district, or otherwise conclude that any other pairing was unconstitutional. In so doing, the Board argues that the East Anchorage Plaintiffs were denied the relief they seek, said relief being that the Court pair certain house districts together, and as such as such cannot bring it in a subsequent action, as they are attempting to do here.

East Anchorage's argument emanates from its interpretation of this Court's February 15, 2022 Order, and subsequent March 30, 2022 Order. Thus, it is necessary to briefly clarify the confines of both. The Court's past orders do not, and cannot, set forth a mandate that any district must, or cannot be paired. The Court's Order only declared

[1] ARB's Opposition to East Anchorage Plaintiff's Motion to Reject Amended Proclamation Plan at 2 [hereinafter Opposition].

Senate District K in violation of Alaska's Equal Protection Clause and required changes be made to bring it into compliance with the Constitution. To the extent that either party argues that the Court did, or did not, require a particular pairing, they are mistaken. The Court is precluded from drawing districts.[2] Thus, the Court cannot, and did not, mandate that any districts be paired, or specifically decline to do so. The Court can only review the map for constitutionality. It is the Board's duty to draw the boundaries.

C. The Board Did Not Exceed its Authority on Remand

East Anchorage argues that the Board exceeded its authority on remand, arguing that the Board was limited to disrupting the Senate Districts only to the extent necessary to fix the constitutional infirmity.[3] The bigger question seems to be when the Board receives a remand, what the scope of that remand is. It is unclear to what extent the Board can make changes that go beyond what is necessary to correct the constitutional defect, and deciding this issue would require the Court to determine where the line is.

To be sure, the Court reviews the Board's plan "to ensure that the Board did not exceed its delegated authority and to determine if the plan is 'reasonable and not arbitrary.'"[4] In the context of a remand to the trial court from an appellate court, "[w]hen an appellate court issues a specific mandate a trial court has no authority to deviate from it."[5] The Court cannot mandate that the Board draw districts with specific boundaries or pair particular house districts.[6]

In 2011, the Board was required to redraw House Districts. However, the Board was required to redraw all House Districts, even unchallenged districts, in order to follow

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[2] *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012) (The Court may not "substitute its judgement 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."); *Groh v. Egan*, 526 P.2d 863, 889 (Alaska 1974) ([I]t is not our function to develop apportionment schemes for the State of Alaska. We are limited in review to determining whether a plan adopted by the governor suffers state or federal constitutional defects alleged by the parties in the litigation before us. . . . [p]articularly where specific objections have not been presented to us, we do not believe it appropriate to substitute ou[r] judgment for that if the constitutionally empowered authority regarding the wisdom of delicate adjustment to be made in political boundaries.").
[3] Motion to Reject Proclamation Plan at 9.
[4] *In Re 2011 Redistricting Cases* 294 P.3d 1032, 1037 (Alaska 2012).
[5] *State Com. Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 873 (Alaska 2003).
[6] *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012).

the *Hickel* process, which it failed to do the first time. *Hickel's* strictly procedural mandate is in contrast to the situation here, where the Board was directed to correct a specific unconstitutional pairing, not redraw districts with a different process. The Court in *In Re 2011* found that because the Board declined to redraw all districts that were originally drawn considering the VRA first, rather than following the *Hickel* process, and only redrew a small amount, the Court was left with "nothing to show that if the Board had considered the Alaska constitutional requirements first, as instructed, these districts would have remained the same."[7]

Yet, the remand before this Court is dissimilar to *In Re 2011*. *In Re 2011* required the Board to effectively go back to the drawing board. This Court's Order did not require that. It also did not preclude that. The Court cannot dictate the specific changes that occur; it can only determine whether a redistricting map is constitutional or not. It does not comport with that principle to interpret the Order to dictate that Option 2 had to be adopted.

Further, even assuming this Court had effectively mandated a specific pairing by concluding that any pairing but Eagle River and Eagle River would be unconstitutional, creating that pairing would have created a cascading effect on the map and required a number of other districts to be changed as well. It is of note that both map 2 and map 3B both changed only four Senate Districts.[8] There is an equal cascading effect evident to both maps. It is unlikely the Court could have mandated the Board correct the constitutional infirmity, but limited the Board to a specific number of changed districts. That would likely be beyond the Court's authority. The Court declared Senate District K was unconstitutional, and the specific constitutional infirmity identified by the Court has been remedied. To the extent that parties argue that Option 2 was the better option, that is not for the Court to decide.

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[7] *Id.* at 1038.
[8] Tr. 19:16-21 (April 13, 2022); ARB 2000966.

D. The Court's Previous Finding of Illegitimate Purpose May be a Consideration Upon Review of a New Pairing, but Does Not Justify Forgoing the Remaining Analysis Under the Equal Protection Clause

East Anchorage also contends that the revised Proclamation Plan "accomplishes the Board's unrelenting mission to provide Eagle River voters with more representation than other Anchorage residents."[9] Plaintiffs argue that this is a "continuation of intent," intent which has already been proven, akin to the Fruit of the Poisonous Tree.

In response, the Board works through the Equal Protection Analysis in light of what it insists are new facts and a new record that was developed on remand. The Court, in concluding there was illegitimate intent, applied the neutral factors test set forth in *Kenai Peninsula Borough.* This Court found evidence of secretive procedures, regional partisanship, and boundaries that inexplicably ignored communities of interest.

The Board asserts that in creating the amended Proclamation Plan, there is no longer evidence of secretive procedures. Whereas in creating the initial Plan, the Board did not make clear which proposals it was considering adopting, took minimal public testimony, and seemed to come to some kind of agreement between a majority of parties, all of which left the Court with the distinct impression that there were secretive procedures that took place. On remand, the Board publicly deliberated and proposed two plans, "Option 2" and "Option 3B," the latter of which was ultimately adopted as the final proclamation. The Board published these plans to the public,[10] noticed the public of the opportunity to provide testimony,[11] and took ample written and spoken testimony.[12] A majority of the Board then voted to adopt Option 3B, though two Board members objected.[13] This open process, the Board now argues, belies any argument that secretive procedures were at play.

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[9] Motion to Reject Proclamation Plan at 8.
[10] Tr. 113:24-25, 114:1 (April 6, 2022); ARB 2001828.
[11] ARB 2001831; ARB 2001828.
[12] ARB 2001227-2001824; *see* ARB 2000076-ARB 2000083.
[13] Tr. 68:16-69:8 (April 13, 2022), ARB 2001016.

The Board continues to argue that there is no evidence of regional partisanship regarding JBER, or any other district that is potentially impacted by Eagle River's Senate pairings. It argues that the same is true as to evidence of communities of interest. Finally, the Board argues that the Court cannot revisit East Anchorage's grievances, as East Anchorage is asking the Court to provide relief on issues it already considered, and already declined to provide.

East Anchorage, however, takes a different approach, relying on the Court's initial conclusion that Senate District K was drawn with illegitimate purpose. East Anchorage argues that the intent behind the illegitimate purpose carries over where the Board continued to attempt to find a way to keep Eagle River split into two districts and allow it "more representation."[14] The premise is so long as the intent continues, the constitutional violation continues as well. Pertinent to this analysis is that no finding of dilutive effect is required in the neutral factors test set forth in *Kenai.* Once illegitimate *purpose* is found, the burden shifts to the Board.

i. Discriminatory Intent in Alaska and Related Federal Cases

Under Alaska's Equal Protection Clause, challengers of otherwise neutral state action must show that the government acted with "a discriminatory purpose."[15] In the redistricting context, the Alaska Supreme Court has described "a voter's right to an equally geographically effective or powerful vote" as "a significant constitutional interest."[16] The Alaska Redistricting Board ("Board") therefore "cannot intentionally discriminate against a borough or any other 'politically salient class' of voters by invidiously minimizing that class's right to an equally effective vote."[17] Whether the Board's purpose is discriminatory depends on any "proof of a legitimate purpose" or "a substantial relationship between the Board's means and ends."[18] The Court has

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[14] Motion to Reject Proclamation Plan at 8.
[15] *State v. Schmidt*, 323 P.3d 647, 659 (Alaska 2014).
[16] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987).
[17] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002). The Court cited the concurring opinion in *Karcher v. Daggett* for the notion that a "group of voters must establish that it belongs to [a] 'politically salient class' as [the] first element of [a] claim of invidious discrimination." 462 U.S. 725, 754 (1983) (Stevens, J., concurring).
[18] *Kenai Peninsula Borough*, 743 P.2d at 1373 n.40.

recognized that one way to "raise an inference of intentional discrimination" is by showing that "a redistricting plan unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters."[19] Such regional gerrymandering can be rebutted by showing that the "intentional discrimination resulted in increased proportionality of geographic representation in the state legislature."[20] *In re 2001 Redistricting Cases* also clarifies that this inference extends to any "politically salient class," not just boroughs and municipalities.[21] Although the Court has previously confronted arguments of "regional partisanship," *i.e.*, favoring certain geographic communities over others, in the equal protection context, "political partisanship" has not yet been squarely addressed.[22]

There are multiple ways of proving discriminatory intent. While the easiest may be direct evidence of discriminatory intent,[23] intent can be shown through circumstantial evidence as well. The Court has previously pointed to the existence of "secretive procedures" and boundaries that "selectively ignore political subdivisions and communities of interest" as indicia of "an illegitimate purpose."[24] And in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[25] the U.S. Supreme Court detailed several factors that it had previously used when determining the existence of discriminatory intent. These factors include: (1) discriminatory effect;[26] (2) the historical background, *i.e.*, whether the action is the latest in "a series of official actions taken for invidious purposes"; (3) the preceding sequence of events, *i.e.*, the timing of the action relevant to other events; (4) departures from normal procedures; (5) departures from substantive norms, *i.e.*, whether the factors normally relevant would counsel a different

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[19] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002); *accord Kenai Peninsula Borough*, 743 P.2d at 1370-73.
[20] *Kenai Peninsula Borough*, 743 P.2d at 1372.
[21] *In re 2001 Redistricting Cases*, 44 P.3d at 144.
[22] *Cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2498-502 (2019) (holding that partisan gerrymandering claims are nonjusticiable under the federal Equal Protection Clause).
[23] *See, e.g.*, *Kenai Peninsula Borough*, 743 P.2d at 1372 ("A totality of the circumstances assessment of the Board's reapportionment process is unnecessary here because the Board's intent was discriminatory on its face.").
[24] *Id.*
[25] 429 U.S. 252 (1977).
[26] There are also rare cases where "a clear pattern" emerges in the application of an otherwise facially neutral law that is "unexplainable on grounds other than [intentional discrimination]," and thus proof of discriminatory effect alone is sufficient. *Id.* at 266; *see also Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (laundromat licensing); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (redistricting).

conclusion; and (6) legislative history, *e.g.*, "contemporary statements by members of the decisionmaking body."[27] And federal appellate courts have also recognized additional factors: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives."[28]

ii. This Court's FFCL and Order and the Effect of the Alaska Supreme Court's Decision on Appeal

Although not explicitly stating as much, this Court previously relied on three of the types of circumstantial evidence described in *Arlington Heights* to reach its conclusion that the Board acted with discriminatory intent.[29] For example, the Board never stated that its intent was to create two solidly Republican senate districts, but Member Marcum's statements on the record strongly support this inference.[30] The use of executive sessions and the immediate adoption of senate pairings without discussion on the record likewise evinced departures from the usual procedures.[31] And the reasons the Board Members gave to explain the pairings departed greatly from public testimony and from the relatively limited factors that govern senate pairings under the Alaska Constitution.[32]

Several of this Court's findings, affirmed on appeal, are also relevant here. First, this Court found that both Eagle River and Muldoon constitute distinct "communities of interest."[33] Although it was ostensibly part of the first round of litigation, the parties presented no evidence on JBER and this Court never found that JBER was itself a "community of interest." Regardless, JBER is largely self-contained within its own house district, so there is no danger of it being split and paired with other districts in such a way as to dilute its voting strength.[34] And although the Alaska Supreme Court affirmed the

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[27] *Arlington Heights*, 429 U.S. at 267-68; *see also Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 960-62 (Alaska 2005) (applying *Arlington Heights* framework).
[28] *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1322 (11th Cir. 2021).
[29] This Court also applied the *Arlington Heights* analysis in its decision on the Girdwood challenge, also issued today.
[30] Findings of Face and Conclusions of Law and Order at 68-69. Relying on *Kenai*, this court described such statements as evincing "regional partisanship." [hereinafter FFCL and Order].
[31] FFCL and Order at 65-66.
[32] FFCL and Order at 70; *see also* Alaska Const. art. VI, § 6.
[33] FFCL and Order at 68.
[34] This is particularly telling as Board Members after remand repeatedly referred to JBER as a "community of interest" to justify pairing it with Eagle River. The Board may be estopped from asserting such rationales

"determination that the Board's Senate K pairing of house districts constituted an unconstitutional political gerrymander," nothing in the order addresses the Court's reasoning.[35]

Second, this Court held that "the Board intentionally discriminated against residents of East Anchorage in favor of Eagle River, and this intentional discrimination had an illegitimate purpose."[36] This Court described that the Board's purpose in creating Senate District K was to "give[] Eagle River more representation,"[37] whereas the dilution of Muldoon was "a down-the-road consequence."[38] In other words, this Court never explicitly ruled that Muldoon was an intended target of the Board's improper purpose, but that any dilution was essentially collateral damage. Again, the Alaska Supreme Court affirmed that Senate District K "violat[ed] equal protection under the Alaska Constitution," but it did not expressly identify the Board's discriminatory purpose.[39] The Court cited *Hickel*'s definition of gerrymandering, which in turn quoted the concurrence from *Carpenter v. Hammond*.[40] That definition states that gerrymandering requires acting "with the purpose of bestowing advantages on some and thus disadvantaging others," while observing that the intent "to benefit the political party in power" is an improper motive that may be relatively easy to prove.[41] Although the Board did its utmost to dispel any such negative inference by at least eliminating the appearance of secretive procedures and not holding executive sessions this time, the fact that the Board did so before cannot be ignored.

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now that were not actually proven, much less asserted, in the first round of litigation.

[35] Order, *ITMO 2021 Redistricting Cases*, S-18332, at 6 (Alaska Mar. 25, 2022). Nor did the Court use the term "regional partisanship." Without the Court's full opinion, this court is left to an educated guess at what precise "constitutional error" must be fixed on remand.

[36] FFCL and Order at 70.

[37] FFCL and Order at 69.

[38] FFCL and Order at 68.

[39] Order, *ITMO 2021 Redistricting Cases*, S-18332, at 6 & n.14 (Alaska Mar. 25, 2022) (supporting conclusion that "partisan gerrymandering" is cognizable under the Alaska Constitution).

[40] *See Hickel v. Se. Conf.*, 846 P.2d 38, 45 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).

[41] *Carpenter v. Hammond*, 667 P.2d 1204, 1220 (Alaska 1983) (Matthews, J., concurring).

iii. The Lingering Effect of Prior Discriminatory Intent

The East Anchorage plaintiffs (and the Girdwood challengers) raise an interesting argument, *i.e.*, that the JBER-Eagle River pairing was the result of a tainted process and thus "fruit of the poisonous tree." In essence, because this court already found that the Board acted with discriminatory intent by creating Senate District K to give Eagle River more representation, the Board cannot dispel this unconstitutional intent by simply readopting the same JBER-Eagle River pairing with more discussion.

Courts applying the *Arlington Heights* factors have likewise concluded that subsequent events cannot always remove the effect of prior discriminatory intent. In *Hunter v. Underwood*, the U.S. Supreme Court confronted a provision of the Alabama Constitution of 1901 that disenfranchised those with convictions for crimes of "moral turpitude."[42] Although the Court reasoned that the language was facially neutral, the challengers provided ample evidence under the *Arlington Heights* factors that the voting restriction "was enacted with the intent of disenfranchising blacks."[43] Indeed, the original language of the provision included the crime of "miscegenation," although later courts had apparently already struck down that crime and others.[44] The State thus argued that despite the obvious discriminatory intent in 1901, "events occurring in the succeeding 80 years had legitimated the provision."[45] But the Court was not convinced:

> Without deciding whether [the constitutional provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.[46]

And more recently, district courts applying *Arlington Heights* and *Hunter* have struck down longstanding immigration laws, initially passed in the 1920s and 1950s amid

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[42] 471 U.S. 222, 224 (1985).
[43] *Id.* at 229.
[44] *Id.* at 226, 233.
[45] *Id.* at 233.
[46] *Id.*; *cf. Cotton v. Fordice*, 157 F.3d 388, 391 n.8 (5th Cir. 1998) (distinguishing *Hunter* by noting that the Court only discounted "involuntary" pruning of the language by courts as opposed to legislative or voter-approved amendments and reenactments).

widespread, open animus toward immigrants.[47] But, the US Supreme Court has also cautioned against imputing the motivations of prior legislatures to subsequent acts. *Abbott v. Perez* is particularly relevant as it deals with discriminatory intent in redistricting.[48] This Court has discussed *Abbott* and its holding on bad intent in more detail in the decision issued today in the Girdwood challenge, so that explanation and discussion is simply incorporated here.

In summary, the Board's prior discriminatory intent remains a "factor" to be considered alongside all other *Arlington Heights* factors, but the bad prior intent is not dispositive. East Anchorage, like the Girdwood challengers still ultimately bears the burden of proving that discriminatory intent was a "motivating factor" for the subsequent action.[49]

Returning to the question presented here, this Court found that the Board was motivated by a desire to effectively bolster the voting strength of Eagle River and give it two Senate seats. In light of secretive procedures employed in the first round of redistricting, this Court reasoned that the Board (or at least three members thereof) acted with discriminatory intent. The Alaska Supreme Court then affirmed that Senate District K was a "political gerrymander." Thus, prior intent that has been held unconstitutional is certainly a factor that must be considered when reviewing the Board's updated map.

But East Anchorage's arguments go too far. East Anchorage argues that it has already proven that the Board's intent was "unlawful," and thus "there is no requirement" that they must "continue to prove the dilutive and discriminatory effect resulting from the Board's unconstitutional and discriminatory intent." Because "the Board's intent was to dilute the voting power of a geographic group compared to another," East Anchorage

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[47] *See, e.g.*, *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1019 (D. Nev. 2021) (finding that Congressional reenactment of immigration laws in 1952 "not only failed to reconcile with the racial animus of the Act of 1929, but was further embroiled by contemporary racial animus"). *But see United States v. Hernandez-Lopez*, No. CR H-21-440, 2022 WL 313774, at *5-6 (S.D. Tex. Feb. 2, 2022) (refusing to consider the intent of the 1929 Congress and finding no discriminatory intent in the same statute).
[48] *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018).
[49] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (clarifying that discriminatory intent need not be the "dominant" or "primary" concern, but must be a "motivating factor").

argues that "[t]he only way to cure this illegitimate 'purpose' is to undo its execution."[50] But this position is largely identical to that rejected by the *Abbott* Court. East Anchorage asks this Court to impute the Board's prior intent to its subsequent acts and shift the burden onto the Board to explain how it "cured" any constitutional infirmities. In effect, East Anchorage is now asking the Court to foreclose any further inquiry. That is simply a step too far. Instead, this Court must evaluate the actions of the Board following remand in light of the entire record.[51] Even a gerrymandering Board is entitled to Due Process and an opportunity to defend its record on remand. Under the circumstances, it would thus be improper to apply the Board's intent from November 2021 as the sole deciding factor when reviewing the Board's subsequent actions.

III. CONCLUSION

Ultimately, this Court does not agree with East Anchorage's premise that this Court's illegitimate purpose finding carries over in a dispositive fashion to any decision made on remand. Therefore, East Anchorage's Motion to Reject Proclamation Plan is DENIED. Yet, plaintiffs are encouraged to review the Court's Order relative to the Girdwood plaintiffs challenge, as the conclusion of that order resolves issues important to East Anchorage's motion here.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16th day of May, 2022.

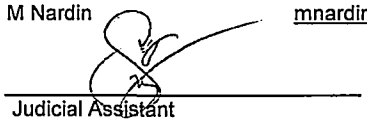
Thomas A. Matthews
Superior Court Judge

[50] Motion to Reject Proclamation Plan at 13.

[51] *Abbott*, 138 S. Ct. at 2324 (recognizing a "presumption of legislative good faith" when reviewing redistricting plans); *cf. Luper v. City of Wasilla*, 215 P.3d 342, 345 (Alaska 2009) (applying "a presumption of validity" to agency decisions); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004) ("A duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional.").

I certify that 5/16/22 a copy of this Order
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

ORDER RE GIRDWOOD CHALLENGE TO AMENDED PLAN

This is the second time this year that this Court has been called upon to determine whether the Alaska Redistricting Board fulfilled its constitutional responsibility in drawing the Senate map for Anchorage voters. After this Court found the Board failed in its first attempt, the Alaska Supreme Court confirmed the board had engaged in partisan gerrymandering. Following remand to the Board, a new map was drawn. This time, the process occurred mostly in public. But the Amended Plan still provides Eagle River with effective control of two senate seats. Girdwood Plaintiffs have challenged the map claiming it still amounts to a partisan gerrymander. This Court agrees.

At the outset, it is worth restating the fundamental goal of redistricting and legislative reapportionment: to ensure that all citizens of the state have a fair and equal opportunity to choose their elected representatives. The right to vote is one of the essential rights guaranteed by both the U.S. and Alaska Constitutions, and is essential to the principal of our democratic government. In the process of redistricting, the Board is required to produce a plan and draw a map which fairly divides Alaska into legislative seats using criteria set forth in the Alaska Constitution. In doing so, the Board must avoid partisan gerrymandering and adhere to the principles of equal protection. "There are two basic principles of equal protection when it comes to voting rights, namely that of 'one person, one vote'—the right to an equally weighted vote—and of 'fair and effective representation'—the right to group effectiveness or an equally powerful vote."[1]

[1] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987).

This litigation has centered on this fundamental constitutional right. Having once again considered the record as a whole, this Court is left with the firm conviction that the Board's 2022 Amended Proclamation Plan of Redistricting violates the equal protection rights of the Girdwood plaintiffs and should not be implemented.

I. BACKGROUND AND HISTORY OF THE BOARD'S WORK

A. The 2021 Proclamation

On November 10, 2021, the Board adopted its 2021 Final Redistricting Plan and Proclamation ("2021 Redistricting Plan").[2] As it relates to the present challenge, the November 10 Redistricting Plan contained Senate District L, consisting of the pairing of the house districts encompassing Joint Base Elmendorf-Richardson ("JBER") with Eklutna/Chugiak/North Eagle River, and Senate District K, which paired the Eagle River Valley (South Eagle River) house district with the East Anchorage house district.

B. The Litigation

Multiple legal challenges were filed against the 2021 Redistricting Plan,[3] and after a trial on those challenges, on February 15, 2022, this Court issued its Findings of Fact and Conclusions of Law. As it relates to these proceedings, the Court concluded that Senate District K was invalid as a result of partisan gerrymandering.[4]

This Court provided an extensive discussion of the Board's work leading to the 2021 Proclamation in its initial decision. The following discussion provides context for the analysis which follows. As the Court has considered the entire record of these proceedings in addressing the Girdwood challenge, the Court's previous Findings of Fact and Conclusions of Law are incorporated by Reference.[5]

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[2] Findings of Fact and Conclusions of Law, at 21 (Feb. 15, 2022) ("FFCL").
[3] FFCL at Appendix D.
[4] FFCL at 169-70.
[5] This decision incorporates and builds upon the Court's FFCL, with respect to all parts except the limited portions of the rulings on House Districts 3, 4, and 36 that were reversed by the Alaska Supreme Court in

As a brief overview of the context in which this challenge was brought, on February 15, 2022, this Court ruled that the Redistricting 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.[6] Specifically, the Court determined the Board had impermissibly 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.[7] While the Court upheld the vast majority of the Board's work, particularly with respect to redistricting of the 40 House districts, the Court noted the "substantial evidence of secretive procedures, regional partisanship, and selective ignorance of political subdivisions and communities of interest" on a component of the senate map: the favorable treatment of the Eagle River districts to the detriment of East Anchorage.[8] It remanded the Anchorage Senate Pairings to the Board "to craft a pairing that complies with Alaska's Equal Protection Clause."[9]

C. Alaska Supreme Court Review

Following expedited review by the Alaska Supreme Court, this Court's conclusion "that the Board's Senate K pairing of house districts constituted an unconstitutional political gerrymander violating equal protection under the Alaska Constitution" was upheld by the Alaska Supreme Court.[10] The matter was then remanded to this Court for further action.

D. Remand to the Board

On March 30, 2022, this Court remanded the matter to the Board with instructions:

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its March 25, 2022 Order.
[6] FFCL at 73.
[7] FFCL at 69-70.
[8] FFCL at 70.
[9] FFCL at 73.
[10] ITMO 2021 Redistricting Cases, S-18332 Order at 6 (March 25, 2022).

> 1) To correct the Constitutional errors identified by this Court and the Supreme court in Senate District K; 2) To redraw House District 36 to remove the "Cantwell Appendage", and 3) To make other revisions to the proclamation plan resulting or related to these changes.

This Court retained jurisdiction to address any further issues arising from the Board's corrections or related issues in a timely manner and directed the Board to submit a status update by April 15, 2022.

II. THE BOARD'S WORK FOLLOWING REMAND

As explained in further detail below, upon remand, the Board adopted a more public process and took extensive public testimony on two map options. Ultimately, the Board (by a the same 3:2 majority) members adopted the plan option which once again provides Eagle River control of two senate seats. This time, the Board paired one Eagle River district (District 10) with the district of South Anchorage/Girdwood/Turnagain Arm (District 9) to create Senate District E, instead of pairing it with East Anchorage. The Board also paired North Eagle River/Chugiak (District 24) with JBER/downtown Anchorage/Government Hill (District 23) to once again create Senate District L.

On April 2, 2022, the Board met and reviewed the Alaska Supreme Court's decision and this Court's remand order.[11] The Board also took public testimony at this April 2 meeting.[12] Much of the testimony favored quickly adopting senate pairings that complied with the remand order, pairing the Muldoon house districts together and the Eagle River house districts together. 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."[13] The Board's counsel proposed a process that would involve inviting

[11] ARB2000076 (April 2 Meeting Agenda); *see also* ARB2000084-000177 (April 2 Meeting Transcript).
[12] ARB2000076 (April 2 Meeting Agenda); *see also* ARB2000084-000177 (April 2 Meeting Transcript).
[13] ARB2000153.

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.[14]

On April 4, the Board met to discuss and adopt the process by which it would take public testimony and adopt revisions to the 2021 Redistricting Plan that complied with the courts' orders.[15] 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.[16] The Board then discussed options for senate pairings, including the pairings previously proposed by Member Bahnke.[17] It then took public testimony, much of which largely favored the "Bahnke map."[18] Other members of the public were opposed to both the pace of the process, and the substance of the Bahnke map. One witness who called and wrote comments several times argued the Bahnke map had been "secretly orchestrated" and amounted to partisan gerrymandering because of the "one-sided testimony" the previous day.[19] Similar sentiments were expressed by Assembly Member Jaime Allard. Member Allard also urged the board to "slow the process down" to allow time for additional plans to be developed and for additional public input.[20]

On April 5, 2022, the Board took additional public testimony.[21] The majority of the testimony related to senate pairings and favored the "Bahnke map."[22] 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.[23] The Board established a schedule for hearings to

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[14] ARB2000153-54.
[15] ARB2000077 (April 4 Meeting Agenda); *see also* ARB2000178-000284 (April 4 Meeting Transcript).
[16] ARB2000214, ARB2000222.
[17] ARB2000247-50.
[18] ARB2000261-66.
[19] ARB2000258-259.
[20] ARB2000259-261.
[21] ARB2000287, ARB2000291.
[22] ARB2000292-384.
[23] ARB2000408-13.

receive public comment on senate pairings before making its decision, and adjourned for the day.[24]

On April 6, the Board again met and took public testimony on changes to House Districts 29, 30, and 36 to fix the "Cantwell Appendage."[25] The Board also discussed different Anchorage senate pairings proposals.[26] Randy Ruedrich of Alaskans for Fair and Equitable Redistricting ("AFFER") testified and offered his proposed plan, which would pair Eagle River Valley with South Anchorage/Girdwood/Turnagain Arm, and North Eagle River with North Anchorage/Government Hill/JBER.[27] Member Marcum also noted that she had independently developed the same pairing plan that Mr. Ruedrich was then proposing.[28]

The Board originally planned to adopt three proposed plans to pair the 16 house districts within the Municipality of Anchorage and Whittier into 8 senate districts: "Option 1," "Option 2," and "Option 3B."[29] But, after considering that Option 1 broadly re-paired senate districts in Anchorage unrelated to and not resulting from fixing Senate District K, the Board voted to withdraw Option 1 from its consideration.[30]

This left the Board considering Option 2 and Option 3B as the Board's proposed plans for Anchorage senate pairings.[31] Both proposed plans resulted in four new senate districts stemming from the revision to Senate District K, but the plans differed

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[24] ARB2000413-17.
[25] ARB2000079 (April 6 Meeting Agenda); *see also* ARB2000446-000599 (April 6 Meeting Transcript). 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. ARB2000455, ARB2000460.
[26] ARB2000079 (April 6 Meeting Agenda); *see also* ARB2000446-000599 (April 6 Meeting Minutes).
[27] ARB2000461-68
[28] ARB2000470.
[29] ARB2000533 (April 6 Meeting Transcript).
[30] ARB2000559-ARB2000560 (April 6 Meeting Transcript).
[31] ARB2000559-ARB2000560 (April 6 Meeting Transcript) (Chairman Binkley: "If there's no objection to the motion, the motion is adopted, and we now have before us two plans, option 2 and option 3 bravo.").

in composition.[32] Both proposed plans also resolved the problems with Senate District K in the same manner by pairing North and South Muldoon into a senate district.[33]

Option 2 proposed four new Senate districts, comprised of: (1) JBER/Downtown district, pairing House Districts 23 and 19; (2) an Eklutna/Eagle River/Chugiak district, pairing House Districts 10 and 24; (3) Mountain View/U-Med district, pairing House Districts 20 and 18; and (4) Senate District K, pairing North Muldoon and South Muldoon.

Option 3B's four new Senate districts that differed from the previous 2021 Redistricting Plan were: (1) Senate District K, pairing House Districts 21 and 22 (North Muldoon and South Muldoon); (2) Senate District E, pairing House Districts 9 (South Eagle River) with and House District 10 (South Anchorage/Girdwood/Whittier); (3) Senate District F, pairing House Districts 11 and 12 (Abbott Loop/Elmore with O'Malley); and (4) Senate District G, pairing House Districts 10 and 13 (Oceanview and Taku).

On April 7, 8, and 9, the Board met and took additional public testimony on Options 2 and 3B.[34] Neither option garnered total support of all the public. There was public testimony in favor of and against both proposals.[35]

The Board also received written testimony from the public. Again, numerically, the majority of the substantive comments favored Option 2, as it preserved the Eagle River community of interest within a single senate district, while maintaining other pairings that preserved downtown communities and the logical connection between South Anchorage, Girdwood, and Turnagain Arm.

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[32] ARB20001828 (ARB Website Showing Options 2 and 3B).
[33] ARB20001828 (ARB Website Showing Options 2 and 3B).
[34] ARB2000080 (April 7 Meeting Agenda); *see also* ARB2000600-000696 (April 7 Meeting Transcript); ARB2000081 (April 8 Meeting Agenda); *see also* ARB2000697-000813 (April 8 Meeting Transcript); ARB2000082 (April 9 Meeting Agenda); *see also* ARB2000814-000946 (April 9 Meeting Transcript).
[35] *See generally* ARB2001094-001226.

Community groups, including local community councils, and the Anchorage Assembly weighed in to support a preferred alternative. Each of the identified groups favored Option 3B, although Mayor Bronson vetoed the Anchorage Assembly resolution.[36] Assembly Member Christopher Constant, who had chaired the MOA reapportionment process, submitted a letter to the Board explaining the process.[37] 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.[38]

Other public testimony and comments emphasized the connection between Eagle River and JBER, or raised concerns of diminishing the military/JBER vote if JBER was paired with downtown. Still other testimony emphasized similarities between Eagle River and the Girdwood area as "rural" communities.

On April 13, the Board met and discussed the competing proposals for Anchorage senate pairings.[39] Each member stated their rationale for their vote on the record.[40] The deliberations were sometimes 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.[41]

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[36] The Mayor's veto was overridden by the Assembly the next day. See Exhibit 5.
[37] ARB2001391-1481.
[38] According to Assembly Member Constant, "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." ARB2001392. Assembly Member Constant included with his letter extensive documentation of comments the Assembly had received on the Eagle River issue. ARB2001391-1481.
[39] ARB2000083 (April 13 Meeting Agenda); *see also* ARB2000947-001083 (April 13 Meeting Transcript).
[40] *See* ARB2000954-000960 (Member Bahnke); ARB2000962-000974 (Member Simpson); ARB2000975-000980 (Member Borromeo); ARB2000980-000981 (Member Marcum); ARB2000981-000991 (Member Binkley).
[41] ARB2000959-60, ARB2000975-80.

On the other hand, members Marcum and Simpson emphasized the need to keep the military on JBER with Chugiak/Eagle River. Member Simpson described JBER as its own community of interest.[42] He also noted there was "nothing wrong with pairing 9 [South Anchorage/Turnagain Arm] and 22 [Eagle River Valley] . . . they are contiguous."[43] Member Marcum noted she was very uncomfortable with Option 2 because it would uncouple JBER from Eagle River and link it with downtown.[44]

The Board voted to adopt proposed plan "Option 3B" as its new Anchorage senate pairings.[45] Members Binkley, Marcum and Simpson voted in favor of Option 3B, and Members Bahnke and Borromeo voted against it.[46] The Board issued its Amended Proclamation of Redistricting the same day it voted, April 13 ("April 2022 Amended Redistricting Plan"). Unlike the November 2021 cycle, during its meetings to adopt the April 2022 Amended Redistricting Plan—between April 2 and April 13, 2022—the Board did not engage in executive sessions.[47]

III. THE GIRDWOOD CHALLENGE

On April 25, 2022, Plaintiffs Louis Theiss, Ken Waugh, and Jennifer Wingard (collectively the "Girdwood Plaintiffs") filed a complaint challenging Senate District E, which is comprised of House Districts 9 and 10. The three Girdwood plaintiffs live in Girdwood, Alaska, in House District 9.

The Girdwood Plaintiffs assert that Senate District E in the April 2022 Amended Redistricting Plan violates their equal protection rights under the Alaska Constitution by denying them "an equally powerful and geographically effective vote and ignor[ing]

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[42] ARB2000971-972.
[43] ARB2000971-972.
[44] ARB2000980-981 ("Downtown has almost nothing in common with the military base. It absolutely makes the least sense of any possible pairing for District 23, JBER.").
[45] ARB2001015-001016 (April 13 Meeting Transcript).
[46] ARB2001015-001016 (April 13 Meeting Transcript).
[47] *See* Affidavit of Peter Torkelson, ¶ 15 (May 4, 2022); *see also* ARB2000084-000177 (April 2 Meeting Transcript); ARB20000178-000284 (April 4 Meeting Transcript); ARB20000285-000445 (April 5 Meeting Transcript); ARB20000446-000599 (April 6 Meeting Transcript); ARB2000600-000696 (April 7 Meeting Transcript); ARB2000697-000813 (April 8 Meeting Transcript); ARB2000814-000946 (April 9 Meeting Transcript); and ARB2000947-001083 (April 13 Meeting Transcript).

the demographic, economic, political and geographic differences between the Eagle River and Girdwood communities."[48] The Girdwood Plaintiffs also allege that "[t]he Board's creation of two separate Eagle River Senate districts constitutes unlawful political gerrymandering."[49] Lastly, they claim that Senate District E violates the substantive criteria for senate districts in Alaska because it is non-compact, is "falsely contiguous," and ignores geographic features.[50] The Girdwood Plaintiffs ask this Court to compel the Board to adopt Option 2, which pairs House District 9 with House District 13 (Oceanview), and JBER (House District 23) with Downtown (House District 17).[51]

IV. JURISDICTION AND VENUE

Under Article VI, § 11 of the Alaska Constitution, the superior court has original jurisdiction over lawsuits to compel correction of any error in redistricting. "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."[52] Venue is appropriate under Civil Rules 3 and 90.8(f).

V. PROCEDURAL BACKGROUND

The Girdwood Plaintiffs' challenge is timely under Article VI, §11 of the Alaska Constitution.[53] 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. The Board provided the record from its remand proceedings on April 28, additional supplementation of e-mail and text messages on May 2. Opening briefs were submitted on May 6, Opposition briefs were due May 10, with proposed findings due May 11. The Court held oral

[48] Compl. at 9, ¶ 30.
[49] Compl. at 10, ¶ 31.
[50] Compl. at 9.
[51] Girdwood Opening Br. at 30.
[52] Alaska Const. art. VI, § 11.
[53] Because of the extraordinarily short time frame to resolve any challenges prior to the June 1, 2022 filing deadline for legislative candidates, this Court issued an Order on April 27, 2022 accelerating the deadline for any further challenges to the Amended Plan to May 3, 2022. No further challenges have been filed.

argument on May 12. The parties also submitted supplemental Corrections and Affidavits on May 13, 2022.

VI. THE RECORD BEFORE THE COURT

Pursuant to Civil Rule 90.8, the record before this court included the record from the Redistricting Board. In this case, the record includes the full court record from the first round of this litigation, the record from the Board's remand process as filed on April 28 and supplemented on May 2, and all materials submitted by the parties to the Girdwood Challenge.[54]

The Girdwood Plaintiffs supported their written arguments with affidavit testimony from each Plaintiff, two expert reports from Dr. Chase Hensel,[55] references to the Board record, e-mails and text messages from Board members that were provided by the Board, and a limited number of additional exhibits. Similarly, the Board supported its written arguments with citations to the record, and affidavits from Peter Torkelson, the Board's Executive Director.

VII. STANDARD OF REVIEW

A. The General Standard

The Board's actions are, generally, reviewed under a deferential arbitrary and capricious standard.[56] The Court may not substitute its judgment for that of the Board or choose among constitutional alternative plans. The wisdom or "sagacity" of a particular plan is not subject to review, so long as it is otherwise constitutional.[57]

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[54] Once again, because of the accelerated timetable for this latest challenge, the parties had no time to conduct discovery. This Court has accepted all materials submitted by the parties, regardless of timing, and has reviewed them under a somewhat relaxed standard of evidence, as it did in the first round of the litigation. The Court has considered the materials for their relevance to the issues presented and given them the weight they were due under the totality of the circumstances.

[55] Chase Hensel previously served as the expert for the East Anchorage Plaintiffs, and his prior testimony is part of the record in this case.

[56] *Kenai Peninsula Borough*, 743 P.2d at 1358. *In re 2011 Redistricting Cases* (*2011 Appeal III*), 294 P.3d 1032, 1037 (Alaska 2012)

[57] FFCL at 27. *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 866-67 (Alaska 1974)).

However, the Court applies its independent judgment to questions of law, and must adopt the rule of law that is most persuasive in light of precedent, reason, and policy.[58]

B. The Burden of Proof on Remand

> Girdwood argues for a less deferential standard of review in light of the Court's previous finding that the Board engaged in partisan gerrymandering. The Board takes the position that the deferential "arbitrary and capricious" standard continues to apply, while the Girdwood Plaintiffs argue that the Board does not deserve such deference in light of its proven history of illegitimate purpose. This appears to be an issue of first impression in Alaska.[59]

In this case, Girdwood Plaintiffs in their Complaint ask this court to impute the Board's prior bad intent to its subsequent acts and shift the burden onto the Board to explain how it "cured" any constitutional infirmities. While such a shift in the burden of proof might, as a matter of policy, be appropriate, it is not one this Court is prepared to adopt at this stage of these very accelerated proceedings. Instead, that is a question for the Alaska Supreme Court to decide.

This court must generally begin with the presumption that the Board's actions were valid.[60] That presumption was certainly afforded to the Board during the initial phase of this litigation. But the Court's previous finding that the Board engaged in partisan gerrymandering changes the equation. The Court does not simply turn a blind eye to the Board's past transgressions. In a less accelerated proceeding, where both parties knew in advance that the burden of proof would shift to the Board upon the Court's finding of partisan gerrymandering, such a shift seems entirely fair. Stated

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[58] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (internal quotation marks omitted) (quoting *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016)).

[59] *Cf. Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018) (balancing the "presumption of legislative good faith" against prior findings of discriminatory intent in federal review of redistricting plans, while directing courts to consider prior intent as one factor).

[60] *Abbott*, 138 S. Ct. at 2324 (recognizing a "presumption of legislative good faith" when reviewing redistricting plans); *cf. Luper v. City of Wasilla*, 215 P.3d 342, 345 (Alaska 2009) (applying "a presumption of validity" to agency decisions); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004) ("A duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional.").

differently, should the Board's actions on remand be subject to strict scrutiny rather than an arbitrary and capricious standard?

In *Treacy v Municipality of Anchorage*, the Alaska Supreme discussed the different level of scrutiny that applies to the equal protection analysis where the constitutionality of a statute or ordinance is challenged.[61] After first noting that a duly enacted law or ordinance is presumed to be constitutional.[62] But when a challenge is made that the ordinance violates the constitutional guarantee of equal protection, it may be subject to strict scrutiny if it impinges on a fundamental right or disadvantages a suspect class.[63]

The constitutional analysis outlined in *Treacy* provides guidance to this Court in evaluating whether the Board's actions should be subject to a different standard or burden of proof upon remand after a finding of gerrymandering. This Court would shift the burden to the Board to demonstrate that its Amended Proclamation including the new senate pairings were made in good faith and without partisan considerations. But that standard and shift in the burden of proof will not be applied retroactively to this matter. Assuming further review of this Court's decision by the Alaska Supreme Court, the undersigned encourages the Supreme Court to provide guidance for the future.

While this Court is not changing the standard of review or the burden of proof for this challenge, the Court is also not ignoring the Board's past actions. Instead, the Court considers the Board's actions in the context of the record as a whole.

VIII. THE GIRDWOOD CHALLENGE UNDER ARTICLE VI, SECTION SIX

Count I of the Girdwood Plaintiffs' Complaint alleges the Board violated the redistricting criteria in Article VI, § 6 of the Alaska Constitution. They argue the pairing

[61] 91 P.3d 252 (Alaska 2004).
[62] *Treacy*, 91 P.3d at 260.
[63] *Treacy*, 91 P.3d at 264.

of Districts 9 and 10 into Senate District E violates the Constitution's contiguity requirement and disregards local government boundaries without explanation.

The Alaska Constitution provides that "[e]ach senate district shall be composed as near as practicable of two contiguous house districts," and that "[c]onsideration may be given to local government boundaries." [64] Contiguous territory "is territory which is bordering or touching."[65] A district is 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).'"[66] As such, contiguity is a visual concept.[67] In practice, a district that includes transportation barriers such as mountains or waterways physically separating portions of the district may still be considered contiguous.[68]

The Girdwood Plaintiffs acknowledge that Senate District E is "technically" contiguous,[69] but they argue for a more "qualitative" approach. The Girdwood Plaintiffs do not dispute that House Districts 9 and 10 are connected by a miles long border and are in fact physically touching. Instead, they argue that contiguity should also be meaningful from the perspective of representation. The Girdwood Plaintiffs argue that a different approach is appropriate here because the pairing of 9 and 10 is so egregious that it is contiguous in only the most technical of terms. Because several hundred miles of uninhabited state park, including the Chugach Mountains, divide the actual population centers contained in Senate District E, the Girdwood Plaintiffs argue the Board created a "false contiguity."

Much of the Girdwood argument for a more qualitative approach to "contiguity" in the senate pairings is similar to arguments raised in the previous challenges by Valdez and Mat-Su to the House pairings, and by East Anchorage to

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[64] Alaska Const. art. VI, § 6.
[65] *Hickel v. Southeast Conference*, 846 P.2d 28, 45 (Alaska 1992).
[66] *Id.*
[67] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 36 (Alaska Super. Ct. Feb. 1, 2002).
[68] FFCL, at 74-75 ("This Court agrees with Judge Rindner's analysis.").
[69] Girdwood Opening Br. at 20.

the senate pairings of District K. This court rejected those arguments previously, and declines to expand the concept of contiguity here.

This Court rejected the "transportation contiguity" argument asserted by the Matanuska-Susitna Borough and Valdez plaintiffs in the first round of redistricting 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."[70] The Alaska Supreme Court found no error when it affirmed this Court's rejection of a transportation contiguity requirement.[71]

Similarly, this Court rejected the Girdwood Plaintiffs' argument that contiguity must be maximized "as near as practicable," when asserted in the East Anchorage Plaintiffs' challenge to Senate District K (from the 2021 Redistricting Plan). There, the East Anchorage Plaintiffs argued that Senate District K was not truly contiguous or contiguous "as nearly as practicable" because "one cannot travel between [the house districts] without leaving the Senate district and [the house districts] are separated by a mountain range."[72] East Anchorage also urged "that South Muldoon and Eagle River Valley are located in separate drainages, and are even separated by a drainage."[73] This Court rejected that argument because the "boundaries [of Senate District K] are in fact physically touching [and] [n]o more is required."[74]

The Girdwood Plaintiffs acknowledge this Court's prior determinations regarding contiguity, but nevertheless argues their theory is new and different. They support their argument with an expert report from Dr. Chase Hensel. In his report, Dr. Hensel offers the opinion that the "as near as practicable" language in the Constitution applied in two directions: first, to the Board, to give it some flexibility in making its pairings; but second, to the districts themselves, because the underlying purpose of

[70] FFCL at 74-75.
[71] Order on Petitions for Review, S-18332, at 3.
[72] FFCL at 39.
[73] FFCL at 41.
[74] FFCL at 42.

the contiguity requirement is to pair neighboring communities with themselves, to achieve compact and effective representation. As Dr. Hensel wrote, "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."[75]

Dr. Hensel's testimony regarding "practical contiguity" in his expert report amounts to a legal conclusion about what Dr. Hensel believes Article VI, § 6 should require for senate districts. But such legal opinions are not the proper subject of expert testimony. Interpretation of the constitution is the "distinct and exclusive province of [this] court."[76]

Moreover, the concept of practical contiguity advocated by Dr. Hensel ignores the language of Section 6 imposing different limitations on house and senate districts. If Dr. Hensel's concept of representational contiguity were adopted, it would add an additional overlay of socio-economic integration to the evaluation of senate districts. Had the framers of the Constitution intended such a result, they surely would not have provided for different standards.[77]

To be sure, when the Board chose to pair Districts 9 and 10, it 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

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[75] Hensel Report at 2.

[76] *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (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.").

[77] This Court previously noted the constitutional framers intended Senate districts to use geographic criterion rather than the socio-economic integration requirements set forth in Article VI, Section 6. FFCL at p40, citing *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1365 (Alaska 1987).

Senate District E. The contiguous borders of the two house districts are almost entirely based in the Chugach Mountains.

Nonetheless, 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. Senate District E does not violate Article VI, § 6.

IX. EQUAL PROTECTION CHALLENGES

Count II of the Girdwood Plaintiffs' Complaint alleges Equal Protection violations of the Alaska Constitution. In particular, they allege that Senate District E in the 2022 Proclamation denies Girdwood voters and others in their House district their constitutional right to an equally powerful and geographically effective vote and ignores relevant differences between the Eagle River and Girdwood communities.[78] The Girdwood Plaintiffs also allege the Board's creation of two separate Eagle River Senate districts, including Senate District L, constitutes unlawful political gerrymandering.[79]

A. Article VI, Section 11 Timeliness of Redistricting Challenge to Senate District L

The Board first argues that Girdwood's challenge to Senate District L is untimely. Article VI, Section 11 provides time limitations on redistricting challenges:

> 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. . . . Application to compel correction of any error in redistricting must be filed within thirty days following the adoption of the final redistricting plan and proclamation by the board.[80]

[78] Compl. at 9, ¶ 30.
[79] Compl. at 9,1.
[80] Alaska Const. art. VI, § 11.

According to the Board, since Senate District L was unchanged from the initial 2021 Proclamation to the 2022 Amended Proclamation, the Girdwood Plaintiffs' claim comes too late.

A similar claim was made in the 2001 Redistricting litigation. After remanding the 2001 redistricting plan back to the Board to fix excessive population deviations under Section 6,[81] challengers appealed again, raising several arguments pertaining to district and statewide population deviations that "could have been raised against the original Proclamation Plan but were not."[82] Applying the 30-day deadline in Section 11, the Alaska Supreme Court rejected as untimely alleged errors "that were largely carried over from the [original] Proclamation Plan."[83] The Court likewise rejected untimely Section 6 challenges to the compactness of two house districts "even though [the challenged] appendage existed in the board's original Proclamation Plan."[84]

Here, the Board notes that new Senate District L contains the same underlying house districts as the former Senate District L, *i.e.*, JBER and North Eagle River.[85] Because Girdwood did not challenge former Senate District L within 30 days of the November 2021 redistricting plan, the Board argues that any challenge to the new Senate District L—consisting of the same underlying house districts—is untimely.[86] The Board thus asserts that Girdwood is foreclosed from arguing that splitting Eagle River constitutes a political gerrymander.[87]

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[81] *See In re 2001 Redistricting Cases*, 44 P.3d 141, 145-46 (Alaska 2002); Alaska Const. art. VI, § 6 (requiring house districts to "contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty").
[82] *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1090 & n.5 (Alaska 2002).
[83] *Id.* at 1090 n.5.
[84] *Id.* 1091-92 & n.16.
[85] Alaska Redistricting Board's Proposed Findings of Fact and Conclusions of Law ("Board FFCL") at 4, 13.
[86] Board FFCL at 12-14. The Board also argues that because the original plan split Eagle River into two senate districts, and "the Alaska Supreme Court has already approved the splitting of Eagle River-Chugiak into multiple election districts," Girdwood's Section 6 arguments are time-barred. Board FFCL at 13-14.
[87] Board FFCL 13.

Girdwood responds by quoting the precise language of this court's prior findings identifying the constitutional error affirmed on appeal.[88] Girdwood thus argues that the new Senate District E—which the Board does not argue is time-barred—is an "unconstitutional downstream consequence of *the exact same political gerrymander*" that created former Senate District K.[89] Girdwood also points to the Board's actions after remand as evidence that the Board created a new record and made a new decision to split Eagle River despite this court's finding that the Board had previously acted with illegitimate purpose.[90]

Although the Board is correct that any Section 6 challenges to the JBER-Eagle River pairing could have been brought before and are time-barred under Section 11, the Board misinterprets Girdwood's equal protection challenge. Instead, what Girdwood argues is the Board acted with discriminatory intent when it first split Eagle River into two senate districts, that this court and the Supreme Court found such purpose to be illegitimate, and that on remand the Board was charged with fixing the constitutional errors in Senate District K.[91] The "constitutional errors" established in East Anchorage's equal protection challenge consisted of the Board's "intentional discrimination" and any "down-the-road consequences" of the Board's "illegitimate purpose."[92] In other words, what Girdwood primarily challenges is the lingering effect of the Board's prior discriminatory intent.

In the Court's view, this situation is more akin to what occurred in the 2011 challenges. After the Alaska Supreme Court remanded for the Board to comply with the *Hickel* process,[93] the Board reasoned that it need not revisit districts that were previously unchallenged.[94] The Board thus redrew the district lines only for a portion

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[88] Girdwood Plaintiff's Proposed Findings of Fact and Conclusions of Law ("Girdwood FFCL" at 18.
[89] Girdwood FFCL at 18 (emphasis in original).
[90] Girdwood FFCL at 19.
[91] *See* Order, *In re 2021 Redistricting Cases*, S-18332, at 6 (Alaska Mar. 25, 2022); Order Following Remand at 1 (Mar. 30, 2022).
[92] FFCL and Order at 69-70 (Feb. 15, 2022);
[93] *See In re 2011 Redistricting Cases*, 274 P.3d 466, 467-68 (Alaska 2012). In particular, the Court held that the Board improperly elevated VRA compliance over the "traditional redistricting principles" contained in Section 6. *Id.* at 468.
[94] *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1035 (Alaska 2012).

of the map, assuming that the unchallenged districts were not affected by the Board's prior constitutional error.[95] But on appeal, the Court remanded again, explaining that the Board's initial error, *i.e.*, creating VRA districts first and placing VRA considerations above Section 6 criteria, "necessarily affected the contours of the entire map."[96] That certain districts were unchallenged "does not change the fact that they were drawn with VRA considerations as the first priority," and therefore the only way to fix the constitutional error was to start the process over from the beginning.[97]

Here, the constitutional errors occurred much later in the process, and the scope on remand is accordingly narrower. But the error remains that the Board, for inappropriate purposes, sought to give Eagle River more representation. Girdwood thus argues that the error has not been fixed as the Board continues to split Eagle River *for improper purposes*. Girdwood could not have brought this challenge against Senate District L in November 2021, because at that point Girdwood was not paired with South Eagle River, and no court had yet found that the Board acted with discriminatory intent. That intent has since been established, and the Alaska Supreme Court affirmed this court's ruling. Girdwood's challenge is thus that the prior unconstitutional intent persists, and that the Board failed to actually "fix" anything. Regardless of the theory, the Board cannot escape a challenge to new Senate District L based on the Board's motivations for adopting Option 3B and rejecting Option 2. Unlike the various Section 6 challenges that were untimely in the 2001 challenges,[98] Girdwood's equal protection challenge depends on the Board's previously established discriminatory intent. Because Girdwood could not have raised its equal protection

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[95] *Id.* at 1035-36. The Court rejected the Board's arguments, noting "that at least three of [the Board's] template districts were drawn with or approved with VRA requirements in mind," *i.e.*, the same constitutional error as before. *Id.* at 1035 n.13.
[96] *Id.* at 1037-38.
[97] *Id.* at 1038.
[98] *See In re 2001 Redistricting Cases*, 47 P.3d 1089, 1090-92 & nn.5, 16 (Alaska 2002). In contrast, if Girdwood raised any Section 6 challenges to Senate District L or challenges to any of the underlying house districts, those *could* have been brought back in December 2020 and this court would consider such challenges time-barred. Because the Board's discriminatory intent was established in March 2022 when the Alaska Supreme Court affirmed this court's finding as to Senate District K, any reverberations of that intent are effectively new challenges.

claim in December 2021, it may challenge whatever decisions the Board made in April 2022 that may be tainted by this court's prior finding of discriminatory intent.

B. Article I, Section 1 Equal Protection Clause

1. *Kenai* Neutral Factors Test

Girdwood's primary argument is that the Board acted with illegitimate purpose when it adopted Option 3B. Under Alaska's Equal Protection Clause,[99] challengers of otherwise neutral state action must show that the government acted with "a discriminatory purpose."[100] Alaska's equal protection analysis employs a sliding scale approach that varies depending on the nature of the right affected, the government's purposes, and the means-ends fit.[101] In the redistricting context, the Alaska Supreme Court has described "a voter's right to an equally geographically effective or powerful vote" as "a significant constitutional interest," while not necessarily "a fundamental right."[102] The Board therefore "cannot intentionally discriminate against a borough or any other 'politically salient class' of voters by invidiously minimizing that class's right to an equally effective vote."[103] Where the Board acts in a discriminatory manner, the Board must adduce "proof of a legitimate purpose" and "a substantial relationship between the Board's means and ends."[104] But even under this lower standard, courts will apply "a more exacting scrutiny" and "facts will no longer be hypothesized" as might otherwise occur under the federal equal protection standard.[105]

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[99] Alaska Const. art. I, § 1 ("[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law . . . .").
[100] *State v. Schmidt*, 323 P.3d 647, 659 (Alaska 2014).
[101] *See Planned Parenthood of The Great Nw. v. State*, 375 P.3d 1122, 1137 (Alaska 2016); *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978).
[102] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987).
[103] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002). The Court cited the concurring opinion in *Karcher v. Daggett* for the notion that a "group of voters must establish that it belongs to [a] 'politically salient class' as [the] first element of [a] claim of invidious discrimination." 462 U.S. 725, 754 (1983) (Stevens, J., concurring).
[104] *Kenai Peninsula Borough*, 743 P.2d at 1373 n.40.
[105] *Id.* at 1371 & n.35; *see also Com. Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1264 (Alaska 1980) (noting that any legitimate purpose must have "a substantial basis in reality").

While the easiest way to establish discriminatory intent may be by direct evidence, intent can also be shown through the "totality of the circumstances."[106] In *Kenai Peninsula Borough v. State*, the Court adopted the "neutral factors test" for determining "whether the Board intentionally discriminated against a particular geographic area."[107] The *Kenai* Court specifically identified several factors as indicative of "an illegitimate purpose," such as (1) "[w]holesale exclusion of any geographic area from the redistricting process," (2) "secretive procedures," (3) boundaries that "selectively ignore political subdivisions and communities of interest," and (4) other "evidence of regional partisanship."[108] The Court has also recognized that one way to "raise an inference of intentional discrimination" is by showing that "a redistricting plan unnecessarily divides" any "politically salient class," such as boroughs and municipalities, "in a way that dilutes the effective strength of [that class of] voters."[109] Claims of regional gerrymandering can be rebutted by showing that the "intentional discrimination resulted in increased proportionality of geographic representation in the state legislature."[110] Although the Court has previously confronted "regional partisanship," *i.e.*, favoring certain geographic communities over others, in the equal protection context, "political partisanship" has not yet been squarely addressed.[111] Nevertheless, the Court has observed that "[i]n the context of discrimination against a political group, the intent requirement is probably minimal."[112]

It is worth observing at this point the unique nature of the Girdwood challenge. The parties cite no Alaska case law addressing the issue of how this court should treat subsequent decisions on remand after a confirmed judicial finding of discriminatory

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[106] *Kenai Peninsula Borough*, 743 P.2d at 1372 ("A totality of the circumstances assessment of the Board's reapportionment process is unnecessary here because the Board's intent was discriminatory on its face.").
[107] *Id.* (citing *Davis v. Bandemer*, 478 U.S. 109, 174 (1986) (Powell, J., concurring in part and dissenting in part), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)).
[108] *Id.*
[109] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002); *accord Kenai Peninsula Borough*, 743 P.2d at 1370-73.
[110] *Kenai Peninsula Borough*, 743 P.2d at 1372.
[111] *Cf. Rucho*, 139 S. Ct. at 2498-502 (holding that partisan gerrymandering claims are nonjusticiable under the federal Equal Protection Clause).
[112] *Hickel v. Se. Conf.*, 846 P.2d 38, 49 n.18 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993); *see also Bandemer*, 478 U.S. at 129 ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.").

intent by the Board. Ostensibly, if this court were deciding Girdwood's equal protection challenge on a blank slate, *i.e.*, nothing more than the record on remand, this might be a less complicated decision.

But the Court did not make lightly its previous finding that secretive procedures were evident in the Board's process. And Girdwood presents evidence that some secretive procedures were continually used following remand, suggesting the Board created the April 2022 Senate parings with illegitimate purpose.

On the other hand, the Court acknowledges that the Board, on the record, did a much better job adhering to a transparent, open process. The Board adopted two proposed plans on April 6, 2022 which provided the public with a meaningful opportunity to provide testimony on either map.[113] The Board took public testimony on April 2, 4, 6, 7, 8, and 9,[114] and voted to adopt the final plan on April 13, 2022.[115] In this time, the Board held no executive sessions.[116] This stands in stark contrast to the last-minute, opaque procedures leading up to the Senate pairings which led to remand.

However, Girdwood plaintiffs offer evidence that suggests that the Board continued to act in "coalition" to further a common, pre-arranged goal. The Girdwood plaintiffs point out that correspondence between Members Binkley, Marcum, and Simpson generally occurred over the phone, and correspondence was notably

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[113] ARB2000559-ARB2000560 (April 6 Meeting Transcript) (Chairman Binkley: "If there's no objection to the motion, the motion is adopted, and we now have before us two plans, option 2 and option 3 bravo.").
[114] ARB2000076 (April 2 Meeting Agenda); *see also* ARB2000084-000177 (April 2 Meeting Transcript); ARB2000077 (April 4 Meeting Agenda); *see also* ARB2000178-000284 (April 4 Meeting Transcript); ARB2000079 (April 6 Meeting Agenda); *see also* ARB2000446-000599 (April 6 Meeting Transcript); ARB2000080 (April 7 Meeting Agenda); *see also* ARB2000600-000696 (April 7 Meeting Transcript); ARB2000081 (April 8 Meeting Agenda); *see also* ARB2000697-000813 (April 8 Meeting Transcript); ARB2000082 (April 9 Meeting Agenda); *see also* ARB2000814-000946 (April 9 Meeting Transcript).
[115] ARB2001015-001016 (April 13 Meeting Transcript).
[116] *See* Affidavit of Peter Torkelson, ¶ 15 (May 4, 2022); *see also* ARB2000084-000177 (April 2 Meeting Transcript); ARB20000178-000284 (April 4 Meeting Transcript); ARB20000285-000445 (April 5 Meeting Transcript); ARB20000446-000599 (April 6 Meeting Transcript); ARB2000600-000696 (April 7 Meeting Transcript); ARB2000697-000813 (April 8 Meeting Transcript); ARB2000814-000946 (April 9 Meeting Transcript); and ARB2000947-001083 (April 13 Meeting Transcript).

between these three Members, leaving out Members Borromeo and Bahnke. Initially, plaintiffs deem it significant that Members Binkley, Marcum, and Simpson were steadfastly against beginning the hearing processes earlier, given the exceptionally condensed timeline and the Supreme Court's week early decision. To be sure, this Court has gone to great lengths to compress the timeline for litigation such that a decision can be issued, and potentially appealed, in time for the June 1, 2022 deadline. Still, it is not entirely clear why the Board would intentionally delay the process and force uncertainty on the public relative to the democratic process.

Girdwood plaintiffs also accuse Members Marcum and Simpson of undertaking considerations from a partisan political perspective. Initially, Girdwood presents evidence that Member Simpson has acknowledged that he was appointed specifically because he was "a Republican from the Southeast."[117] Following the Supreme Court's order, Member Simpson wrote an email to an unknown number of contacts stating in part that the Court's Order "implies that what the court perceived as a political gerrymander must be replaced with a different political gerrymander more to their liking."[118] Additionally, plaintiffs argue that rather nasty emails sent and received regarding articles written about the redistricting process[119] demonstrate that Member Simpson was "preoccupied by his partisan politics" such that his vote was improperly influenced. Girdwood plaintiffs argue that this is evidence that Member Simpson, on remand, continued to consider Senate pairings in "partisan political terms."[120]

Plaintiffs then turn to Member Marcum, who was subscribed to the mailing list of the National Republican Redistricting Trust, whose concerns were "the preservation of ... shared conservative values for future generations."[121] Girdwood also points out the despite the Courts finding, based on clear evidence and established by Member Marcum's own testimony that she had seen incumbent data, she stated on remand

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[117] Trial Tr. 1725:15-1727:16 (Feb. 3, 2022); Simpson Depo. 210:9-12.
[118] ARB2-507161-62.
[119] ARB2-507137; ARB2-507140.
[120] Girdwood Plaintiffs' Opposition to ARB Brief at 17.
[121] Girdwood Plaintiffs' Opposition to ARB Brief at 19; ARB 502232-35; National Republican Redistricting Trust website, *available at*: thenrrt.org/about-us/.

that she did not read any incumbent data, and that she was not concerned with incumbents.

The Court also expresses concern over Member Binkley's choice to vote against a motion because he did not agree with the Supreme Court's ruling relative to the so-called "Cantwell Appendage."[122] The Court understands that each Board Member is an Alaskan in their own right and, like every individual, has the right to agree or disagree with the Court's decisions. Yet, it is not the Board's place to *act* in its capacity as the Redistricting Board based on whether the individual Board Members agree or disagree with the law. The Rule of Law should be abided in all respects. To the extent that any Board Member felt it was appropriate to act contrary to the clear direction of the highest Court of this State, that is unacceptable.

Girdwood takes the position that on its own, this correspondence may not tip the scales. However, in the face of this Court's previous finding of illegitimate intent, such political correspondence supports the notion that the Board's intent continues unabated. The Court is inclined to agree. While the Board reduces plaintiffs' arguments to unproductive "mudslinging," the evidence is quite clear that a pattern of markedly partisan correspondence between specific Board Members occurred, and aligns with the intent found during the first round of litigation. Further, in the previous order, the Court found that the majority of the Board acted in what appeared to be a sort of coalition. Given the exclusive correspondence between the same majority of the Board, that coalition seems to have continued. The previous illegitimate intent finding renders such partisan and behind-the-scenes correspondence all the more suspect. Alone, this correspondence carries some weight. When viewed in light of the previous finding of illegitimate purpose, that weight becomes heavier.

While the Board Members are Alaskans in their own rights entitled to their own "opinions," actions taken while acting in one's capacity as a Board Member, particularly actions that appear to be influenced by such correspondence, are facially

[122] April 6, 2022, Meeting Tr. at 9-14.

suspicious, especially in light of the Court's previous findings. Indeed, Girdwood's arguments are largely premised on the observation that the Board simply found a new way to accomplish what it improperly sought to do before.[124] Needless to say, the Board avoids this issue entirely and selectively ignores this court's prior findings on discriminatory intent.[125] In response, Girdwood asserts that the Board's lack of "contrition and respect" for this court's findings "negates any presumption that those members were making [*sic*] good-faith effort to comply with both the spirit and the letter of the remand orders."[126] Regardless of intent, the public's trust of the Board's integrity is vital, and is jeopardized by correspondence of this nature. Given this court's findings, and given the possibility that a future Board may operate with similar or even more grave intent, the Court is wary of an order that effectively lights a path both legally and procedurally to creating a gerrymandered map.

Turning to communities of interest, this Court has previously established that Eagle River is a community of interest.[127] Girdwood plaintiffs through their expert witness, Dr. Chase Hensel, offer compelling evidence that Girdwood is a community of interest with South Anchorage.[128] Plaintiffs also cite to extensive testimony during the public hearing process after remand that House District 9 is a community of interest with South Anchorage as a whole, and is markedly distinct and removed from Eagle River. Member Marcum stated that Senate District E is a "natural pairing" as the "Chugach Mountain district."[129] She also noted that both districts "have their own road services."[130] Chair Binkley similarly stated that the districts both have road service districts, both included the Chugach Mountains, and that citizens of those districts "deal with wildlife closer to their homes," have "higher snow loads," and face "wildfire dangers."[131] Chair Binkley also reasoned that both districts were "large, more

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[124] *See* Girdwood FFCL at 26-27.
[125] *See* Board FFCL at 19-22.
[126] Girdwood FFCL at 16-17.
[127] FFCL at 68.
[128] Expert Report of Chase Hensel, May 5, 2022 at 6-7.
[129] ARB2001004, 2001005.
[130] ARB2001005.
[131] ARB2000984.

rural, and share a really long, physical border," which makes them constitutionally contiguous.[132]

As previously discussed, to comply with article VI, section 6, senate districts need only be contiguous, meaning the borders must be touching. Insofar as the Board was considering the similarities between districts its decision, it is not necessarily problematic that the Board used additional considerations when determining which contiguous pairing would be most appropriate. However, upon considering whether communities of interest were ignored for Equal Protection purposes, there is no authority, and no argument offered, that the Court should consider communities of similar interests to be communities of interest. It is clear to the Court that the Senate District E's boundaries ignore the Eagle River and South Anchorage communities of interest. That these communities may have similar interest does not inform the analysis for Equal Protection purposes.

The Board does not appear to contest this point. Rather, the Board interprets the Court's February 15, 2022 ruling and supporting caselaw to mean that if the Board ignores communities of interest, it must justify that choice. Here, the Board argues that the justification was twofold. First, a majority of the Board insisted continuously that Senate District L remain intact, which meant that it was necessary to pair Eagle River's other House District with another contiguous part of Anchorage. Second, Board Members believe that a single senator would be able to represent Senate District E aptly, as the districts have similar interest given their more rural nature and common needs. Ultimately, this pairing strikes the Court not as a conscious decision to pair Eagle River and South Anchorage, but rather another "down-the-road consequence of a majority of Board members insisting that the JBER and Eagle River Districts remain paired in a single senate district.

The Court notes, however, that ignoring the Eagle River and South Anchorage communities of interest was not necessary, but a product of the majority of the Board's

[132] ARB2000985.

preference. The Court observes that Option 2 keeps both the Eagle River and South Anchorage communities in unified Senate Districts. Ultimately, communities of interest were ignored here. The Court acknowledges that justification was provided, and was not unreasonable. However, the fact that other pairings that did not split communities of interest were available serves to undercut the strength of the Board's argument and tips the scales in the Girdwood plaintiffs' favor.

Further, Girdwood largely argues that the Board ignored public comment and that its decision is not supported by the evidence.[133] But aside from some factual discrepancies, there is minimal evidence of regional partisanship.[134] However, the Court still finds that, particularly given the preexisting finding of illegitimate intent and the way that the Board's behavior on remand seems to echo its behavior leading up to the first Proclamation, the Court is compelled to find illegitimate intent under the neutral factors test. As such, the burden then shifts to the Board.

The Court in *Kenai* established a burden shifting standard in the context of the *Kenai* litigation. The Court stated that "intentional geographic discrimination in reapportionment is justifiable only if greater proportionality in geographic representation in the legislature will result therefrom."[135] Additionally, in *In re 2001*, the Court considered an argument that the Matanuska Susitna Borough's equal

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[133] Many of Girdwood's arguments focus on the Board's stated justifications, *i.e.*, protecting the military vote, and how that was a pretext not supported by the record, and thus arbitrary and capricious. Indeed, Girdwood concludes "that the Board acted arbitrarily and capriciously, in a manner that violated the Equal Protection Clause of the Alaska Constitution." Girdwood FFCL at 67. But Girdwood does not raise any due process or Section 10 challenges, nor does Girdwood's complaint allege that the Board acted in an arbitrary and capricious manner. *See* Girdwood Complaint at 8-10. Instead, Girdwood appears to be seeking to apply this court's prior "hard look" analysis under a different constitutional provision. *See* Girdwood FFCL at 15-17. But on appeal the Alaska Supreme Court reversed this court's prior findings on "hard look" review as it related to the Skagway challenge and House Districts 3 and 4. Without further guidance from the Court to clarify the proper standard, this court declines to apply the same analysis under a different name. Nevertheless, Girdwood's arguments that the Board ignored substantive factors it should have considered do serve an important purpose under the federal framework discussed below.

[134] The Board's purported justification that it "sought to preserve the military community's voting strength," Board FFCL at 21, at least as it relates to Senate District E, appears to lack "a substantial basis in reality" and thus would not qualify as a "legitimate purpose." *Com. Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1264 (Alaska 1980). But this court does not reach the issue of weighing the Board's purpose unless and until Girdwood first establishes that the Board acted with discriminatory intent.

[135] *Kenai*, 743 P.2d 1352, 1373 n. 40.

protection rights were violated as it was not given strictly proportional representation.[136] However, the Court determined that the Board had presented a "valid non-discriminatory justification," that the challenged pairing was a necessary result of other pairings that were required to avoid violating the Voting Rights Act.[137]

Looking to strictly numerical proportionality, Eagle River Valley and North Eagle River/Chugiak are underrepresented by -1.65% and -0.71% respectively. South Anchorage is underrepresented by -0.28%. Pairing Eagle River Valley and South Anchorage results in an average deviation of roughly -0.97%, whereas pairing the Eagle River districts together results in an average deviation of -1.18%, and pairing South Anchorage with Oceanview/Klatt, as in Option 2, results in an average deviation of roughly -0.48%. The districts in question vary by as much as 250 persons per district, and thus different pairing create a multitude of different variations among Senate Districts. When looking to the deviations present in the challenged districts in Option 3B, average deviation among both Senate Districts is roughly -0.73%. Average deviations when looking to Option 2 are roughly -0.83%. This is a difference of eighteen individuals. Therefore, Option 3B leads to slightly more proportional representation.

[136] *In re 2001 Redistricting Cases*, 44 P.3d 141, 146-47 (Alaska 2002).
[137] *Id.*

District	All persons	Target	Deviation	Difference	Averages	
Senate District Pairings in Option 3B						
South Anchorage -E- 9	18,023	18,335	-0.28%	-51	-177 -0.965%	-133.5 -0.73%
Eagle River Valley -E- 10	18,032	18,335	-1.65%	-303		
JBER -L- 23	18,285	18,335	-0.27%	-50	-90 -.49%	
North Eagle River/ Chugiak -L- 24	18,205	18,335	-0.71%	-130		
Senate District Pairings in Option 2, Advocated by Plaintiffs						
South Anchorage -E- 9	18,023	18,335	-0.28%	-51	-86.5 -0.475%	-151.5 -0.83%
Oceanview/Klatt -G- 13	18,213	18,335	-0.67%	-122		
Eagle River Valley -E- 10	18,032	18,335	-1.65%	-303	-216.5 -1.18%	
North Eagle River/ Chugiak -L- 24	18,205	18,335	-0.71%	-130		

The Court considers the burden shifting standard in the context of the current challenges regarding Senate districts. In this case, there is no evidence that greater proportionality was a factor the Board considered when crafting Senate pairings. In fact, the Board seemed particularly focused on article VI section 6 requirements relevant to House districts, like socio-economic integration, and whether the districts shared common interests. Where strict proportionality is not a clear consideration by

the Board, the Court hesitates to conclude that the discrimination and illegitimate purpose is overcome by the unintended *de minimis* increase in proportionality that Option 3B presents. Realistically, the Board would not generally be expected to consider numerical proportionality upon determining Senate pairings, as at that point the House districts would have already been created. To be sure, all deviations in the affected Senate districts are below 2%, and most are below 1%. Thus, any argument that Senate Districts are more proportional are ultimately after-the-fact rationalizations rather than legitimate justifications.

Here, the intent carries forward. The Court found that the Board crafted Senate Districts with illegitimate purpose. The Court acknowledges that the Board offered non-discriminatory reasons for pairing House Districts 9 and 10; however, those reasons stemmed from a preference for keeping House Districts 23 and 24 together. While the Court has not determined that Senate District L is unconstitutional, the Board's preference for keeping it intact does not mirror the Voting Rights Act requirements considered in *In re 2001*. It may prefer keeping those districts together, but it is not required to, and mere preference, no matter how strong, cannot justify a finding that districts were created with illegitimate purpose.

Yet, the court is operating without clear guidance from the Alaska Supreme Court establishing the legal framework to apply. Therefore, this court is left to its own judgment as to whether prior findings of discriminatory intent must be taken into consideration and how much weight should they be afforded. Fortunately, Alaska is not the only state that conducts redistricting every 10 years, and federal court decisions provide some guidance under a more expansive standard.

2. The *Arlington Heights* Framework and Subsequent Federal Equal Protection Clause Decisions Addressing Prior Discriminatory Intent

Much like Alaska's Equal Protection Clause, the federal version protects individuals from intentional discrimination by state actors.[138] Under the federal Constitutional standard, challengers need not prove that discriminatory intent was the government's "dominant" or "primary" purpose, but it must be a "motivating factor."[139]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the U.S. Supreme Court detailed several types of circumstantial evidence that it had previously used when determining the existence of discriminatory intent.[140] These factors include: (1) discriminatory effect;[141] (2) the historical background, *i.e.*, whether the action is the latest in "a series of official actions taken for invidious purposes"; (3) the preceding sequence of events, *i.e.*, the timing of the action relevant to other events; (4) departures from normal procedures and substantive norms, *i.e.*, whether the factors normally relevant would counsel a different conclusion; and (5) legislative history, *e.g.*, "contemporary statements by members of the decisionmaking body."[142] And because this is a non-exhaustive list, federal appellate courts have recognized additional factors: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives."[143] Federal courts routinely apply these *Arlington Heights* factors to uncover discriminatory intent in a variety of equal protection challenges, including redistricting cases.[144]

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[138] *See* U.S. Const. amend. XIV; *Washington v. Davis*, 426 U.S. 229, 239 (1976).
[139] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).
[140] *Arlington Heights,* 429 U.S. at 266-68.
[141] There are also rare cases where "a clear pattern" emerges in the application of an otherwise facially neutral law that is "unexplainable on grounds other than [intentional discrimination]," and thus proof of discriminatory effect alone is sufficient. *Id.* at 266 & nn.13-14; *see also Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (laundromat licensing); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (redistricting).
[142] *Arlington Heights*, 429 U.S. at 266-68; *see also Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 960-62 (Alaska 2005) (applying *Arlington Heights* framework).
[143] *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1322 (11th Cir. 2021).
[144] *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 913-14 (1995) (applying *Arlington Heights* factors to Georgia redistricting plan); *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220-33 (4th Cir. 2016) (invalidating redistricting plan based on North Carolina's history of discrimination and other factors).

In *Hunter v. Underwood*, the U.S. Supreme Court confronted a provision of the Alabama Constitution of 1901 that disenfranchised those with convictions for crimes of "moral turpitude."[145] Although the Court reasoned that the language was facially neutral, the challengers provided ample evidence under the *Arlington Heights* factors that the voting restriction "was enacted with the intent of disenfranchising blacks."[146] Indeed, the original language of the provision included the crime of "miscegenation," although later courts had apparently already struck down that and other crimes.[147] Alabama thus argued that despite the obvious discriminatory intent in 1901, "events occurring in the succeeding 80 years had legitimated the provision."[148] But the Court was not convinced:

> Without deciding whether [the constitutional provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.[149]

Hunter thus established that subsequent events cannot always remove the taint of prior discriminatory intent.[150] And more recently, district courts applying *Arlington Heights* and *Hunter* have struck down longstanding immigration laws, initially passed in the 1920s and 1950s amid widespread, open animus toward immigrants.[151]

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[145] 471 U.S. 222, 224 (1985).
[146] *Id.* at 229.
[147] *Id.* at 226, 233.
[148] *Id.* at 233.
[149] *Id.*
[150] *See, e.g., N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016). *But cf. Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1223-25 (11th Cir. 2005) (finding subsequent legislative reenactment eliminated taint from discriminatory law); *Cotton v. Fordice*, 157 F.3d 388, 391 n.8 (5th Cir. 1998) (distinguishing *Hunter* by noting that the Court only discounted "involuntary" pruning of the language by courts as opposed to legislative or voter-approved amendments and reenactments).
[151] *See, e.g., United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1019 (D. Nev. 2021) (finding that Congressional reenactment of immigration laws in 1952 "not only failed to reconcile with the racial animus of the Act of 1929, but was further embroiled by contemporary racial animus"). *But see United States v. Hernandez-Lopez*, No. CR H-21-440, 2022 WL 313774, at *5-6 (S.D. Tex. Feb. 2, 2022) (refusing to consider the intent of the 1929 Congress and finding no discriminatory intent in the same statute).

On the other hand, the U.S. Supreme Court also cautioned against imputing the motivations of prior legislatures to subsequent redistricting efforts in *Abbott v. Perez*.[152] There, several groups challenged Texas's 2011 redistricting plans, which eventually led to a three-judge federal court creating interim plans by making minor adjustments to the 2011 plans.[153] The Texas legislature then adopted those as its permanent plans in 2013, with minor changes, to "'confirm the legislature's intent' to adopt 'a redistricting plan that fully comports with the law.'"[154] After multiple trials, the federal court concluded that the original 2011 plans "were the result of intentional vote dilution."[155] Upon turning to the 2013 plans, the district court "attributed this same intent to the 2013 Legislature because it had failed to 'engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.'"[156] On appeal, the Court clarified:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." The "ultimate question remains whether a discriminatory intent has been proved in a given case." The "historical background" of a legislative enactment is "one evidentiary source" relevant to the question of intent. But we have never suggested that past discrimination flips the evidentiary burden on its head.[157]

The Court distinguished *Hunter* by observing that the Alabama constitutional provision at issue there "was never repealed, but over the years, the list of disqualifying offenses had been pruned"—in other words, subsequent deletions "did not alter the intent with which the article, including the parts that remained, had been adopted."[158] Over vigorous dissents, the Court reversed the district court's conclusion, but it reiterated that prior discriminatory intent should not be ignored either:

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[152] *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018).
[153] *Id.* at 2315-16.
[154] *Id.* at 2317.
[155] *Id.*
[156] *Id.* at 2318 (quoting *Perez v. Abbott*, 274 F. Supp. 3d 624, 649 (W.D. Tex. 2017)).
[157] *Id.* at 2324-25 (citations omitted).
[158] *Id.* at 2325 (distinguishing *Hunter v. Underwood*, 471 U.S. 222 (1985)).

> In holding that the District Court disregarded the presumption of legislative good faith and improperly reversed the burden of proof, we do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature. They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent.[159]

In other words, any prior discriminatory intent remains a "factor" to be considered alongside all other *Arlington Heights* factors, but the prior intent is not dispositive, and the challengers still ultimately bear the burden of proving that discriminatory intent was a "motivating factor" for the subsequent action.

3. Applying the *Arlington Heights* Factors and *Abbott*

In this Court's view, the *Arlington Heights/Abbott* framework provides useful guidance in addressing the board's prior bad intent. Both the *Kenai* "neutral factors test" and the *Arlington Heights* framework are versions of the same "totality of the circumstances" test.[160] Further, the *Kenai* Court specifically observed that "the equal protection clause of the Alaska Constitution imposes a stricter standard than its federal counterpart,"[161] thereby providing greater protection to potentially disaffected voters. If the Board's intent is considered discriminatory under the federal test, then it must be discriminatory under Alaska's Equal Protection Clause as well. Accordingly, given this Court's prior finding of discriminatory intent, this Court will look to the

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[159] *Id.* at 2326-27.

[160] *Compare Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987) (noting that the "neutral factors" evidence should be "considered with the totality of the circumstances" to determine intent), *with Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ."), *and N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) (admonishing the district court for considering "each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*").

[161] *Kenai Peninsula Borough*, 743 P.2d at 1371.

Arlington Heights framework to address the Board's prior discriminatory intent as part of the "totality of the circumstances" in addressing the Girdwood challenge.

a. Discriminatory Effect

Girdwood argues that the South Anchorage district in which Girdwood resides "is majority-leaning but not always majority-electing," and thus essentially a "swing" district.[162] This contention is supported by an expert report from Dr. Chase Hensel,[163] whose testimony this court previously relied on to determine that Muldoon and Eagle River are "communities of interest."[164] In contrast, as Dr. Hensel explained before, Eagle River "votes solidly and predictably Republican."[165] Girdwood thus argues that pairing South Eagle River with South Anchorage has the effect of overpowering District 9's moderate views, thus precluding Girdwood from "a meaningful opportunity to influence state senate elections at the margin."[166] In other words, Girdwood frames the relevant "politically salient class" as not just the community of Girdwood but "District 9 as a whole."[167]

The Board responds that Girdwood's voting-age population ("VAP") comprises only 12.34% of its current house district, and only 6.33% of new Senate District E.[168] Analyzing historical voting data, the Board asserts that Girdwood lacks the population to control any senate district, and that Girdwood's current house district with Hillside is already heavily Republican-leaning.[169] The Board thus concludes "that there is no likelihood that Eagle River voters would drown out Hillside voters, or vice versa."[170] The Board produces two affidavits from its executive director, Peter Torkelson, examining the voting age populations and voting patterns of the communities of

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[162] Girdwood FFCL at 62.
[163] *See* Hensel Report at 7-8 (May 5, 2022).
[164] *See* FFCL and Order at 55-56, 68-70 (Feb. 15, 2022).
[165] Hensel Affidavit at 17 (Jan. 15, 2022).
[166] Girdwood FFCL at 64.
[167] Girdwood FFCL at 63.
[168] Board FFCL at 10.
[169] Board FFCL at 22-23; Board Opposition at 21-23.
[170] Board FFCL at 22.

Girdwood and Hillside.[171] The Board supplies no expert testimony to support its contentions.

On the balance, this court is not entirely convinced that the Board's pairings will necessarily result in any significant discriminatory effect. Much of the arguments regarding future elections is conjecture—no court can actually predict how future elections will unfold. Still, based on the numbers and evidence presented, any pairing of Eagle River with another more moderate community would likely yield a safe Republican seat for the foreseeable future. But there is an equal likelihood that even under Option 2, Girdwood may be represented by a Republican senator. Regardless, that is not the end of the inquiry. And rather than focus on actual discriminatory impact in partisan gerrymandering claims, perhaps the more important question to ask is whether the Board *intended* the pairings to have a substantial effect, *i.e.*, that splitting Eagle River and pairing it with South Anchorage would create two safe Republican senate seats.

b. Historical Background

Under *Abbott*, prior findings of discriminatory intent must be considered as a factor alongside other past evidence of discrimination. In particular, this court previously held that "the Board intentionally discriminated against residents of East Anchorage in favor of Eagle River, and this intentional discrimination had an illegitimate purpose."[172] This court explained that the Board's purpose in creating Senate District K was to "give[] Eagle River more representation,"[173] whereas any dilution of Muldoon's voting strength was "a down-the-road consequence."[174] The Alaska Supreme Court then affirmed this "court's determination that the Board's Senate K pairing of house districts constituted an unconstitutional political gerrymander violating equal protection under the Alaska Constitution."[175] Girdwood

[171] *See* Torkelson Affidavit at 1-6 (May 4, 2022); Torkelson Supp. Affidavit at 1-2 (May 9, 2022).
[172] FFCL and Order at 70.
[173] FFCL and Order at 69.
[174] FFCL and Order at 68.
[175] Order, *ITMO 2021 Redistricting Cases*, S-18332, at 6 (Alaska March 25, 2022).

highlights this court's prior findings of discriminatory intent, arguing that the Board's proceedings after remand were merely pretext "to launder gerrymandered maps through the courts."[176] While the Board disagrees with this court's prior findings, the Board cannot avoid the import of this court's findings, which the Alaska Supreme Court upheld on appeal.

The key question, therefore, is how much weight should this court afford to prior findings of discriminatory intent after remand? Much like the constitutional issue in *Hunter*, the Board did not voluntarily repeal and reenact its prior discriminatory decision—the unconstitutional portions of the 2021 redistricting plan were reversed by the courts, including the highest appellate Court in this State.[177] Nothing about the Board's action here can plausibly be considered "voluntary." And unlike the subsequent legislature adopting the tainted redistricting plans in *Abbott*,[178] there was no intervening election—the Board's membership remains unchanged, and the same three members who voted in favor of splitting Eagle River before have split Eagle River again. Indeed, the Board's discriminatory intent formed roughly six months ago. In light of the contemporaneity of the Board's prior intent, this factor weighs heavily in Girdwood's favor. But this does not end the inquiry. As the *Abbott* Court cautioned, prior intent alone cannot forever preclude the Board from adopting pairings that may otherwise be upheld absent discriminatory intent.

c. Procedural and Substantive Departures

Without question, this court's prior finding of discriminatory intent was heavily dependent on procedural irregularities, *i.e.*, "secretive procedures," such as the Board's abuse of executive sessions and the appearance of off-the-record decision-making.[179] After remand, the Board therefore sought to eliminate any appearance of

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[176] Girdwood Opposition Brief at 40.
[177] *See Cotton v. Fordice*, 157 F.3d 388, 391 n.8 (5th Cir. 1998) (differentiating between "involuntary" pruning by courts and legislative or voter-approved amendments and reenactments).
[178] *Abbott v. Perez*, 138 S. Ct. 2305, 2316, 201 L. Ed. 2d 714 (2018) (noting that Texas conducted elections using the interim plans in 2012).
[179] *See* FFCL and Order at 65-68 (Feb. 15, 2022).

impropriety by stating each member's rationale on the record and never once entering executive session.[180] As noted above, during this expedited challenge, this court has not been presented with *direct evidence* of "secretive procedures" or other departures from procedural norms. Instead, the Girdwood Plaintiffs rely primarily upon inference and circumstantial evidence.

Nevertheless, departures from *substantive* norms also come in under this factor. The *Arlington Heights* Court explained that the relevant question here is whether "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."[181] Arguably, the factors the Board should have considered important are the limited constitutional criteria for senate districts, *i.e.*, contiguity, local government boundaries, and geography.[182] Article VI, Section 10 also requires the Board to "hold public hearings on the proposed plan."[183] Indeed, the Board itself stated that public comment was an important consideration, and it sought to extend public comment after remand to "give the public their due."[184] Thus, where the Board substantively departed from such considerations, this may constitute circumstantial evidence of invidious intent.

Girdwood's challenge is replete with instances where the Board either ignored public testimony, geography, and even the boundaries of Eagle River to justify adopting Option 3B, or simply downplayed it.[185] This court need not recount every substantive deviation—it should be enough to observe that the Board fails to actually dispute any of Girdwood's observations.[186] Instead, the Board now argues that senate districts need not even be strictly contiguous.[187] The Board also now asserts that it

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[180] Board FFCL at 6-9.
[181] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).
[182] Alaska Const. art. VI, § 6.
[183] Alaska Const. art. VI, § 10.
[184] ARB2000238; *see also* ARB000226-42. The record shows that it was actually the Board members that voted in favor of Option 3B who initially sought to elicit greater public testimony "to meaningfully implement the findings of the Supreme Court." ARB2000241.
[185] Girdwood FFCL at 39-61.
[186] Indeed, the Board's rejoinder on public comment is merely that "[n]either option garnered *total* support of all the public." Board FFCL at 4 (emphasis added).
[187] In particular, the Board interprets the qualifier "as near as practicable" in Section 6 to mean that it can

has no obligation to listen to or follow the weight of public testimony.[188] This Court acknowledges it previously criticized the Board for failing to take an appropriate "hard look" at the public testimony in mapping the house districts for Skagway and Juneau, but the Alaska Supreme Court reversed this Court's remand order.[189] Nonetheless, this Court does not believe the Board's discretion is unfettered. For purposes of this decision, the Court simply notes the weight of the substantive public testimony appeared to favor Option 2 rather than Option 3B. And as for respecting the boundaries of Eagle River, the Board offers no arguments as to why North Eagle River could not be paired with South Eagle River.[190]

Rather than relying on any of the aforementioned considerations, the Board's stated rationale for adopting Option 3B was "to preserve the military community's voting strength" as a "community of interest."[191] But this court never found that JBER was a "community of interest." The Board has never presented *any* expert testimony on that issue. And the record does not appear to contain specific public comment from *any* JBER resident.[192] On the other hand, this court did find that Eagle River was a "community of interest," and yet the Board made no effort to preserve its boundaries.[193] Not only is the Board's stated purpose not supported by the weight of the record,[194] it is also contrary to precedent.[195]

"pair non-contiguous house districts together if it is not practicable to adopt contiguous pairings." Board FFCL at 16. This court rejects that narrow reading. Instead, the more reasonable interpretation of this phrase is that it allows contiguity across bodies of water or inaccessible mountain ranges. *See Hickel v. Se. Conf.*, 846 P.2d 38, 45 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993). Moreover, the Supreme Court has already interpreted the phrase "as near as practicable" in Section 6 as it applies to population deviations to require "a good faith effort" to reduce deviations below the federal threshold. *In re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002).

[188] Board Opposition Brief at 3-7. This court observes that, once again, the clear weight of public testimony was opposed to splitting Eagle River. *Compare* Girdwood FFCL at 48-56, *with* FFCL and Order at 68 (Feb. 15, 2022). Moreover, the Municipality of Anchorage and every community council that weighed in on the pairings preferred Option 2. Girdwood FFCL at 53-54.

[189] Order, *ITMO 2021 Redistricting Cases*, S-18332, at 3 (Alaska March 25, 2022).

[190] The Board even concedes that Option 2 had bipartisan support, as "two Republican senators and a member from Governor Dunleavy's administration spoke out against Option 3B." ARB2000973.

[191] Board FFCL at 21.

[192] Girdwood FFCL at 56.

[193] *See* FFCL and Order at 68 (Feb. 15, 2022).

[194] This is addressed more below as it pertains to whether the Board's purpose was "legitimate."

[195] *See In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) ("Neither military personnel nor

As previously noted, the record does support the conclusion that some military officers and ex-military members live in Eagle River. On the other hand, the record contains negligible support for the pairing of Girdwood/Turnagain Arm with South Eagle River.[196] While the Board members supporting that pairing talked of rural road service, wildlife issues, and even the geographic connections (the Chugach Mountains and the Ship Creek drainage), there was little discussion of the obvious pairing of the two Eagle River house districts. If the Board had instead relied on "the factors usually considered important" for senate district pairings, pairing Eagle River with Eagle River would have received more attention. The Board's stated motivations about protecting the JBER connection and supporting military voters appears pretextual. This court therefore views these substantive departures as weighing heavily in Girdwood's favor.

d. Contemporary Statements of Board Members

Legislative history, or contemporaneous statements of the decision-makers, is another factor relevant here. This factor primarily concerns public statements, such as those normally found in meeting minutes or reports.[197] In the context of large legislative bodies, "statements from only a few legislators, or those made by legislators after the fact, are of limited value."[198] Courts may also rely on trial testimony, deposition statements, and other available evidence.[199] But "statements

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members of any other group have any constitutional right to be divided among two or more districts to maximize their opportunity to influence multiple districts rather than control one.").

[196] The Board cites only superficial similarities between South Eagle River and Girdwood, such as being "close to the mountains" and "generally more rural." Board FFCL at 7-8. Instead, the Board admits that new Senate District E is essentially another downstream consequence of pairing North Eagle River with JBER. ARB2000970.

[197] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

[198] *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 229 (4th Cir. 2016).

[199] *See, e.g.*, *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 13 F.3d 920, 928 (6th Cir. 1993) (relying on testimony from city officials); *cf. Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064-65 (4th Cir. 1982) ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this. The trial court, in making findings of fact, was faced with the same problems confronting trial courts everywhere

made by private individuals," such as those offered during public comment, are irrelevant without additional "evidence that the private motives . . . are fairly attributable to the State."[200]

Girdwood offers very few public statements in support of its arguments. Instead, Girdwood focuses on private communications between the members as evidence of discriminatory intent. For example, Member Simpson's email correspondence evinced knowledge that the South Eagle River district was "reliably republican," and that the Board previously paired it with South Muldoon because it was also "majority non-minority" and voted "republican 2/3 of the time."[201] Member Simpson then complained that the Alaska Supreme Court upheld this court's finding that the Board "politically gerrymandered" Senate District K, which now "must be replaced with a different political gerrymander more to their liking," and that "the Ds will push to dilute both of them to make it easier to elect their candidates."[202] In context, Member Simpson was most likely venting his frustrations. But that does not change the fact that Member Simpson knew that Eagle River was "reliably republican," and that splitting Eagle River again would be viewed as another "political gerrymander."[203] Aside from that, Girdwood provides no reasons why this court should attribute statements from private individuals to Board members, and this court declines to do so.[204]

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sitting as finders of fact in cases involving racial discrimination.").

[200] *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 189 (2003).

[201] Girdwood FFCL at 35; ARB2-507161-62.

[202] ARB 2-507161-62. Member Simpson also expressed relief that the Court upheld his Skagway-Mendenhall Valley pairing, and mused that Skagway "will be stuck with that arrangement for the next 10 years, at least." ARB2-507161.

[203] If anything, this statement goes more to some of the additional *Arlington Heights* factors that other federal courts have recognized, such as the foreseeability and knowledge of discriminatory impact. *See Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1322 (11th Cir. 2021). And as for "the availability of less discriminatory alternatives," as this court observed above, Option 2 had widespread, bipartisan support. These additional factors, while potentially less important, also weigh in Girdwood's favor.

[204] One email cited by the Girdwood Plaintiffs and apparently received by Member Simpson on April 13, 2022, is particularly unkind. The email subject line noted the heading "Alaska Redistricting Board adopts GOP-friendly plan, pairing Eagle River with South Anchorage" but the sender appears to attack Members Bahnke and Borromeo for their vote against the plan. ARB2-507140.

There is also the question of whether Board members' statements from earlier in this redistricting cycle continue to come in under this factor. To the extent that this court already found that the Board acted with discriminatory intent, and that the Board's prior intent continues to be a consideration, this court will not "double-count" Board members' prior statements. Nevertheless, because those statements continue to be pertinent to this court's analysis, it is worth reiterating what members previously stated on the record about their motivations for splitting Eagle River, as the Board now repeats this result.

As this court previously noted, the one who proposed and then fervently advocated for the Eagle River-JBER pairing was Member Marcum.[205] For context, Bethany Marcum is the CEO of the Alaska Policy Forum.[206] She served as a member of the Air National Guard stationed at JBER, and has lived in both Eagle River and on the Lower Hillside.[207] She was appointed to the Board by Governor Mike Dunleavy.[208] On November 8, 2021, as the Board was debating senate pairings, Member Marcum observed that "the connection between Eagle River and the military was not given any consideration during the House district drawing process."[209] She stated that splitting Eagle River into two senate districts "actually gives Eagle River the opportunity to have more representation, so they're certainly not going to be disfranchised by this process."[210] In support of pairing North Eagle River with JBER, Member Marcum also read into the record one particular public comment that described Eagle River as "a somewhat friendlier, safer part of Anchorage."[211] But the actual public testimony in the

[205] FFCL and Order at 58-62 (Feb. 15, 2022).
[206] Marcum Affidavit at 2 (Jan. 12, 2022).
[207] Marcum Affidavit at 1 (Jan. 12, 2022).
[208] ARB000005.
[209] ARB006671-72.
[210] ARB006672. Member Borromeo later reiterated this statement in opposition to the Board's final pairings: "Member Marcum said that splitting Eagle River into two Senate seats would extend the electoral influence of the community resulting in more representation." ARB007190.
[211] ARB006695. The record shows that this statement came from the written testimony of Eagle River resident Dan Saddler on October 12, 2021. ARB003610-11. Mr. Saddler also submitted written testimony at least two more times, urging the Board to connect JBER and Eagle River in a senate district. ARB003612-13 (Nov. 10, 2021); ARB2001332 (April 4, 2022).

record described Eagle River as "a somewhat friendlier, safer, *and more conservative* part of Anchorage."[212]

Member Marcum's prior statements, viewed in context, thus paint the picture that partisan politics was indeed a "motivating factor" behind her desire to pair North Eagle River with JBER. However, because this court has already taken the Board's prior discriminatory intent into consideration, Member Marcum's past statements are not afforded any additional weight here. It certainly appears to this court that Board members took extra precautions so as not to inadvertently include any blatantly partisan statements on the record after remand.[213] But as a whole, this factor weighs only slightly in favor of Girdwood if at all.

In the end, Girdwood has identified ample evidence in the record to support its argument that the Board substantially deviated from substantive norms in order to achieve a preordained result. Whereas other relevant factors, such as discriminatory effect and "legislative history", are less conclusive. On the record after remand alone, this court does not find that there is sufficient circumstantial evidence of discriminatory intent. Ultimately, the factor that tips the balance in Girdwood's favor is this court's prior finding on intent.

The Board knew that this court found that Senate District K was the result of intentional discrimination. And the Board knew that the Alaska Supreme Court affirmed this court's findings in the East Anchorage challenge on equal protection grounds. Yet the Board has proceeded through the remand as though this court reversed Senate District K on a procedural technicality. The majority of the Board appears to have assumed it could reach the same result – two reliably conservative senate seats for Eagle River - if only it submitted the senate pairings to additional public comment, regardless of what the public actually preferred. Once again, this

[212] ARB003610 (emphasis added). This omission of Mr. Saddler's actual testimony speaks volumes as to Member Marcum's true rationale behind pairing Eagle River and JBER.
[213] *See* Girdwood FFCL at 27-34. This is apparent by the number of private phone conversations between the three-member majority. Members Bahnke and Borromeo appear to have been excluded from any of those discussions.

court does not make this finding lightly. But when viewed under the totality of the circumstances, this court finds that the Board once again intentionally discriminated against the communities of Girdwood and South Anchorage in order to maximize senate representation for Eagle River and the Republican party. The Board was keenly aware that its actions would be perceived by the public as a political gerrymander—this court simply agrees with that observation.

e. Evaluating the Board's Purpose and Means-End Fit

Because this court finds that the Board acted with discriminatory intent, the burden shifts to the Board to show a "legitimate" purpose for its actions. This court then must evaluate whether there is "a substantial relationship between means and ends."[214] The Board argues that pairing Girdwood with South Eagle River "provides greater proportionality of representation to Girdwood voters," because every other contiguous pairing reduces Girdwood's overall percentage of voting-age population.[215] But the record unambiguously shows that advancing Girdwood's interests was never the Board's "purpose." This court rejects such obvious post-hoc rationalizations.[216] Instead, the Board's primary "purpose"—and its only stated goal on the record—was to protect military voters.[217] But, as explained below, the Board effectively admits that partisan politics is exactly what drove its decision.

Members repeatedly brought up the military connections between Eagle River and JBER.[218] When explaining his vote, Member Simpson referred to House District 23 as "the military district."[219] Member Marcum claimed to "speak for thousands of full-

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[214] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987) (quoting *Alaska Pac. Assur. Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984)).
[215] Board FFCL at 10-11, 22.
[216] *See Com. Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1264 n.39 (Alaska 1980) (requiring "a substantial basis in reality" and rejecting "hypothesize[d] or invent[ed] purposes"); *cf. Raad v. Alaska State Comm'n for Hum. Rts.*, 86 P.3d 899, 905 (Alaska 2004) (rejecting "fictitious, post-hoc justifications" for intentional discrimination in the employment context (quoting *Thomas v. Anchorage Tel. Util.*, 741 P.2d 618, 624 (Alaska 1987))).
[217] Board FFCL at 6-8.
[218] *See, e.g.*, ARB2000968 ("We heard a lot of testimony about interactions between Eagle River, Chugiak, and JBER, that that area has essentially developed as a bedroom community . . . for the military families.").
[219] ARB2000967-68.

time Alaska residents who serve this state and country in the military" in her support of Option 3B.[220] And when his turn came, Chair Binkley noted "concerns that putting the more *conservative* or swing district of the military base with downtown would drown out the *military voters*."[221] In light of those justifications on the record, the Board argues that it "was concerned that pairing JBER with downtown Anchorage would result in JBER's *preference for candidates* being usurped by downtown Anchorage's *preference for opposing candidates*."[222]

Although Board members repeatedly couched their reasoning in terms of "military voters," as the Board's argument confirms, Board members either knew or assumed that JBER residents preferred the same political candidates as Eagle River, *i.e.*, Republicans. The Board thus candidly admits that its decision to pair JBER with North Eagle River was to amplify conservative voices by creating a safe Republican senate seat.

The Board responds that Option 2 would have resulted in even more of a political gerrymander. The three members voting for Option 3B each stated their belief that JBER was a "community of interest."[223] Based on that view, Member Marcum opined that she was "very uncomfortable with [Option] 2," because "Downtown has almost nothing in common with the military base," and pairing it with JBER "could be viewed as, like, an intentional action to break up the military community."[224] And after noting that several Republican officials had testified against Option 3B, Member Simpson argued that "the most partisan [option] is the proposed pairing of JBER and Downtown," which "would diminish the voice of our valued Alaska military

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[220] ARB2001003.
[221] ARB2000989 (emphasis added).
[222] Board FFCL at 21 (emphasis added); ARB2000973-74. Of course, Girdwood's whole argument is that pairing South Eagle River with Girdwood does the same thing.
[223] *See* ARB2000968 ("I think pairing the military bases with downtown overlooks JBER as a significant community of interest . . . ."); ARB2000980 ("The military, JBER, is absolutely a community of interest, I think."); ARB2000988 ("I understand that the Court has found . . . Eagle River to be a community of interest, but I think the testimony has also established very clearly that the military community is also a community of interest, and I don't believe that we should be trading one community of interest for the other.").
[224] ARB2000980.

personnel."[225] The Board now argues that JBER is itself a "community of interest" and that pairing JBER with Downtown would cause "undue dilution of the military vote."[226] But evidence of bipartisan support for Option 2 is not evidence that Option 3B is not "partisan." And merely because the Board learned to parrot the language from this court's prior order does not automatically turn JBER into a "community of interest." As noted above, this court has made no such finding and the Board has not offered evidence on that issue.

Moreover, as Girdwood points out, House District 23 includes a large portion of Downtown in addition to JBER.[227] All of the community councils within House District 23 who passed resolutions on the pairing opposed Option 3B.[229] Dr. Hensel explains that District 23 as a whole is also much more ethnically diverse than Eagle River, and actually has more in common geographically and demographically with Downtown.[230] And Girdwood points out that all of this information was brought before the board in the form of public testimony.[231]

It thus appears that the majority of the Board adopted Option 3B for political reasons—to protect *conservative* voters. Even accepting *arguendo* the Board's stated purpose of maximizing the voting strength of military voters, the Court previously rejected this rationale as illegitimate.[232] And acting to amplify the strength of conservative voters at the expense of moderate or liberal voters is even less

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[225] ARB2000973-74. Chair Binkley repeated these arguments. ARB2000982-83. Member Borromeo later retorted that the "military" arguments were "just dog-whistle politics to get people riled up that we're somehow disenfranchising the Armed Services," noting that the Board "shouldn't even be considering socioeconomic integration" at that point. ARB2000995.

[226] Board FFCL at 21.

[227] Girdwood FFCL at 40-42. Indeed, House District 23 also includes the neighborhoods of Government Hill, North Muldoon, and Downtown north of Fourth Avenue.

[229] Girdwood FFCL at 11-12, 41.

[230] Hensel Supp. Report at 3-4 (noting that the Board's data shows that 57% of House District 23 residents identify as "White," compared to 75% of House District 24). This difference is almost as striking as the Eagle River-Muldoon pairing this court previously invalidated.

[231] Girdwood FFCL 39-48.

[232] *See In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) ("Neither military personnel nor members of any other group have any constitutional right to be divided among two or more districts to maximize their opportunity to influence multiple districts rather than control one."). This is precisely what the Board sought to do for Eagle River.

legitimate.[233] Because the Board once again acted with discriminatory intent, and because the Board has not put forth any legitimate, nondiscriminatory purpose for its actions, this court concludes that the Board violated the equal protection rights of the residents of Girdwood and House District 9.[234]

C. The Totality of the Circumstances

As outlined and discussed above, this Court has weighed the totality of the circumstances in reaching its conclusions. The Court's discussion of the *Arlington Heights* factors informs this Court's application of the *Kenai* "totality of the circumstances" analysis in a fuller context. In light of the substantial evidence of secretive procedures, regional partisanship, and selective ignorance of political subdivisions and communities of interest on the *whole* record, developed both in this 2022 amended redistricting process, and the earlier 2021 redistricting process, the Court finds above that the Board intentionally discriminated against residents of District 10, including Girdwood in order to favor of Eagle River, and this intentional discrimination had an illegitimate purpose. This Court also takes the opportunity to highlight some of the other evidence that factored into this analysis. Some of these observations fall under the Arlington Heights factors and are separately listed above. Although this Court does not base its decision on the following observations, it is worthwhile to highlight some of the small inconsistencies and peculiarities in the Board's process, in the aggregate, also support this Court's conclusion that the Board acted with discriminatory intent and improper purpose.

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[233] Indeed, the whole reason why the framers of the Alaska Constitution included requirements for contiguity, compactness, and socio-economic integration was to prevent partisan gerrymandering for political gain. *See Hickel v. Se. Conf.*, 846 P.2d 38, 45 & n.11 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993); *cf.* Order, *ITMO 2021 Redistricting Cases*, S-18332, at 6 (Alaska Mar. 25, 2022) (affirming invalidation of former Senate District K as an "unconstitutional political gerrymander"). The Board does not explain how political gerrymandering becomes "legitimate" or constitutional when the limited Section 6 criteria are met. Because the Board fails to put forth any legitimate purpose, this court need not determine whether there is a substantial relationship between the Board's goal and its decision.

[234] This does not mean that JBER and Eagle River, or Girdwood and Eagle River, can never be paired together in a senate district. It is, however, highly unlikely that *this* Board, given its past actions, can legitimately split Eagle River into two senate districts. The existence of discriminatory intent is key.

For example, the Board's stated justification, as before was to preserve the military ties between North Eagle River/Chugiak and JBER. This Court previously noted the plausibility of this justification, and noted there was at least some public testimony in support of this pairing. But there was also considerable public testimony to the contrary, both this time, and in the 2021 hearings. To be sure, there is little question in the supplemental record that both factions, supporters of Option 2 and supporters of Option 3B, marshalled the troops to write and call in support of their competing positions. Indeed, many of the written comments submitted to the Board appear to be simple "cut and paste" campaign type scripts. While this is true of both supporters and opponents alike, it appears to be much more true of the Option 3B camp. Many of the written comments used the same language. For example, numerous individuals called or wrote in merely to state that they opposed Option 2, with no explanation given;[235] or that they opposed it because it was "partisan" or "political," without further explanation.[236]

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.[237]

In the context of voting rights in redistricting litigation, equal protection under the Alaska Constitution guarantees each person one vote and the right of fair and effective representation – the right to group effectiveness or an equally powerful vote.[238] As discussed earlier, Girdwood's expert, Dr. Hensel noted:

> if a pairing presents particularly unnecessary obstacles to 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

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[235] *E.g.,* ARB2001685; ARB2001687; ARB2001689; ARB2001692; ARB2001695; ARB2001696; ARB2001697; ARB2001699 (small sampling of comments).
[236] *E.g.,* ARB2000260; ARB2000294; ARB2001690; ARB2001693
[237] ARB2000356; ARB2000363; ARB2000483-84; ARB2001617.
[238] *Kenai Peninsula Borough*, 743 P.2d at 1370-71 (quoting *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984)).

> also have previously engaged in partisan gerrymandering, it raises the question of "why this pairing, and not that?[239]

Dr. Hensel's point is well-taken. In analyzing the circumstances which led the board to adopt 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 a significant mountain range including vast, unpopulated areas (or empty census blocks). While such expanses may be unavoidable in rural areas of the state, this Court looks 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 Board generally disregarded local government boundaries in establishing District E. While all districts in both proposals are technically within the Municipality of Anchorage, there are other local boundaries, including school zones, community councils and even the Downtown Improvement District which the Board could have considered. Both the Anchorage Assembly and the Girdwood Board of Supervisors issued Resolutions opposing the Board's senate pairing, but these resolutions were ignored.[240] In addition, the Downtown Community Council ("DCC"), Government Hill Community Council ("GHCC"), and Anchorage Downtown Partnership ("ADP") all formally supported a pairing of downtown with North Anchorage.[241]

By contrast, no formal resolutions or messages were received from community councils or other community government bodies in any Eagle River communities—nor were any resolutions or messages received from any community government body or entity representing the JBER population. While a few individual commenters

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[239] Hensel Report at 3.
[240] Girdwood Exhibits 4 and 5.
[241] ARB2001782-83 (ADP Resolution); ARB2001381 (testimony from Government Hill Community Council President); Exhibit 1 (Downtown Community Council Resolution).

supported a District 23/24 pairing or a District 9/10 pairing, the majority of the testimony was against it.

Further, this Court's observation from the first round of this litigation appears once again to be true. "The public portion of the record leads to only one reasonable inference: some sort of coalition or at least a tacit understanding between Members Marcum, Simpson, and Binkley."[242] The text messages certainly suggest there were private phone calls occurring between the three majority members.[243] In addition, the email evidence indicates Member Marcum was subscribed to the mailing list of the National Republican Redistricting Trust ("NRRT").[244] Since the stated goal of the NRRT is to preserve "our shared conservative values for future generations" through the redistricting process, the only reasonable inference that can be drawn is that Member Marcum's stated partisan goal from the first round of redistricting remained paramount in her work on the Board.[245]

The communications also demonstrate these members were keen to avoid the process problems identified by the Court the last time. While Members Bahnke and Borromeo questioned the need for an extensive process given that the Board had already heard testimony to move quickly and to use the constitutionally acceptable pairings proposed in November 2021,[246] the other three Board members insisted on a longer public process "to meaningfully implement the findings of the Supreme Court, "[247] "to give the public their due,"[248] and "allow the public to engage and look at that plan."[249] Member Simpson went so far as to state: "I refuse to be badgered into a decision made on partial information before I'm ready to do it."[250] These statements

[242] FFCL at pp 65-66.
[243] ARB2-507072-74, ARB 2-507136.
[244] ARB2-502232–35.
[245] Girdwood Exhibit 5; See also FFCL at p58 (referencing Board Transcripts).
[246] ARB2000235-37.
[247] ARB2000240-41.
[248] ARB2000238.
[249] ARB2000232.
[250] ARB2000240.

are admirable and certainly suggest the Board understood this Court's criticism of their senate pairing process in November 2021.

But despite the more open public process the Board engaged for this round, the justification provided for the Senate District pairings was virtually unchanged from stated justification in November – the military connection. The communications and statements suggest the majority board members approached the process with a pre-determined outcome in mind. The record indicates a disregard for the weight of public testimony, and lack of geographic awareness of what was in the districts at issue. Instead, totality of the circumstances indicates a goal-oriented approach; they paid attention to the details only as much as they needed to say the right words on the public record when explaining their choice.

In summary, the totality of the circumstances leads this Court to conclude that the majority of the Board acted in concert with at least a tacit understanding that Eagle River would again be paired in such a way as to provide it with two solidly Republican senate seats – an unconstitutional partisan gerrymander. The result deprives the voters of District 10 of fair and effective representation – the right to group effectiveness or an equally powerful vote[251] - in violation of the Equal Protection clause of the Alaska Constitution.

X. THE REMEDY

Having concluded the Board once again engaged in a partisan gerrymander in violation of the equal protection clause of the Alaska Constitution, the Court must determine how best to correct the constitutional error. Because of the extraordinarily short time remaining for legislators to file for political office, further uncertainty must be avoided. Article VI of the Alaska Constitution provides the starting point for the Court's analysis. Section 11 (Enforcement) provides in relevant part:

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[251] *Kenai Peninsula Borough*, 743 P.2d at 1370-71 (quoting *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984)).

> 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 . . .. Upon a final judicial decision that a plan is invalid, the matter *shall* be returned to the board for correction and development of a new plan. If that new plan is declared invalid, the matter *may* be referred again to the board.[252]

Here, there has already been a final judicial determination that the Board's initial plan was invalid. Upon that determination, the matter was returned to the Board to correct the error. This Court has now declared the Amended plan invalid, so the court may return the matter to the Board again, but is not required to do so.

The Court is also mindful that it is not the court's role to draw the map, or to decide which map it prefers.[253] The Court may not substitute its judgment for that of the Board or choose among constitutional alternative plans. But having determined the Board acted in an arbitrary and unconstitutional manner, the Court must chart a path which balances the constitutional rights of Alaska voters to fair and effective representation at the ballot box with the rights of legislators and potential legislators to seek political office.

The statutory deadline for candidates to file a declaration of candidacy is a short two weeks away - June 1, 2022.[254] Under the circumstances, there must, at a minimum, be an interim map in place in sufficient time for potential candidates to make an informed decision and declare their candidacy. During this phase of the redistricting process, the Board considered two proposals for senate pairings: Option 2 and Option 3B, which has now been declared unconstitutional. Given what has transpired to date, there is simply no practical way for the Board to develop, debate and approve yet another map which would correct the constitutional error.

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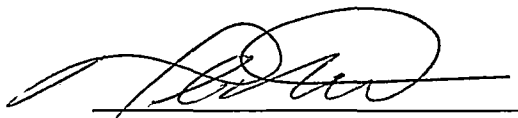
[252] Alaska Const. art. VI, § 11 (emphasis added).
[253] FFCL at 27. *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 866-67 (Alaska 1974)).
[254] AS 15.25.040(a)(1).

The Court has the power, by mandamus,[255] to order the Board to correct any error in redistricting.[256] The only practical solution is for this Court to order the Board to adopt a map of senate pairings. Having determined that Option 3B was an unconstitutional political gerrymander, the Court orders the Board to adopt Option 2 on an *interim* basis for the 2022 general election. With the time pressure of the impending deadline removed, the matter should then be remanded once again to the Board to correct its constitutional error and adopt a new plan of redistricting for the balance of the decade.

This Court anticipates and encourages immediate appellate review of this decision by the Alaska Supreme Court. Accordingly, unless this Order is stayed by the Alaska Supreme Court, the Board shall prepare a Second Amended Proclamation incorporating the proposed senate pairings in Option 2 not later than May 23, 2022.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16th day of May, 2022.



Thomas A. Matthews
Superior Court Judge

[255] "Traditionally, a suit asking the court to order a government official to act in a certain way is an action for mandamus." *Anderson v Dept. of Administration, Div. of Motor Vehicles*, 440 P.3d 217, 220 (Alaska 2019). See also *Wade v Dworkin*, 407 P.2d 587, 587 (Alaska 1965) (action to compel the Secretary of State to order a recount of votes.) The Writ of Mandamus has been abolished in Alaska, but the relief itself is still available. The court retains the power under Civil Rule 65 to issue a mandatory or reparative injunction. Alaska R. Civ. P. 91(b). *Anderson*, 440 P.2d at 220.

[256] Alaska Const. art. VI, § 11.

I certify that 5/16/22 a copy of this Order
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