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
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Superior Court Judge Thomas Matthews

2.15.2022

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FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

I. INTRODUCTION

Once a decade, Alaska goes through the constitutional process of redistricting legislative seats in order to ensure that all citizens of the state have a fair and equal right 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 foundation of our democracy. Reapportionment is the process taken up by the States following the decennial census. In Alaska, this task is delegated to the Alaska Reapportionment Board. The Board produced its proclamation plan on November 10, 2021, and five challenges to that plan have been consolidated before this Court.

In the process of redistricting, the Board is required to produce a plan and draw a map which fairly divides Alaska into forty (40) house seats, and twenty (20) senate seats using criteria set forth in the Alaska Constitution. The Board must also follow a process that complies with Due Process and Equal Protection under both the U.S. and Alaska Constitutions. And it must follow the process, to the extent it is applicable, set forth in the Alaska statutes governing Open Meetings and Public Records.

Here, four of the five challengers argue the Board failed to properly draw the house district map. The fifth challenger alleges the Senate district map does not comply with the law. For the various different reasons discussed below, this Court concludes the Board did not follow the constitutional process when it drew the Senate map, and one of the

[1] This decision is intended as the findings of fact and conclusions of law required by Civil Rule 52 and is further intended to be the Court's final decision required by Civil Rule 90.8(c).

challenged house districts. The plan of reapportionment should be remanded to the Board to prepare a new plan which complies with this Order.

II. HISTORY OF LEGISLATIVE REAPPORTIONMENT

In accordance with Article VI of the Alaska Constitution, the Alaska Redistricting Board (the "Board") is required to reapportion Alaska's House of Representatives and the Senate immediately following the official reporting of each decennial census of the United States. Under the current framework of the Alaska Constitution[2], the Board consists of five members, two of whom are appointed by the Governor, one of whom is appointed by the Speaker of the House of Representatives, one of whom is appointed by the Senate President, and one of whom is appointed by the Chief Justice of the Alaska Supreme Court. At least one Board member must be a resident of each of the four judicial districts.

As originally written in Alaska's constitution, the task of redistricting the legislature was delegated to the Governor of Alaska.[3] In 1964, the U.S. Supreme Court issued its seminal decision in *Reynolds v. Sims*,[4] holding that the Equal Protection Clause of the U.S. Constitution requires that the seats in both houses of a bicameral legislature be apportioned on a population basis.[5] The *Reynolds* decision rendered Alaska's original designation of geographic senate districts invalid and set legislative redistricting in Alaska on its way.[6]

From 1966 through the 1990s, the Governor of Alaska conducted redistricting.[7] Litigation ensued each redistricting cycle.[8] In 1998, Alaska voters ratified a constitutional

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[2] Alaska Const. art. VI, § 8.
[3] *See Wade v. Nolan*, 414 P.2d 689, 690 n. 2 (Alaska 1966) (quoting Article XIV, § 2 of the Alaska Constitution as ratified by Alaska voters in 1956 and approved by the U.S. Congress in the Alaska Statehood Act of 1958). President Eisenhower signed the official proclamation admitting Alaska as the 49th state on January 3, 1959.
[4] *Reynolds v. Sims*, 377 U.S. 533 (1964).
[5] *Wade v. Nolan*, 414 P.2d at 690.
[6] *Wade v. Nolan*, 414 P.2d at 690.
[7] *See Hickel v. Southeast Conference*, 846 P.2d 38, 42 (Alaska 1992) ("Under the Alaska Constitution, the governor has the power and duty to reapportion the state legislature every ten years.").
[8] *See Wade v. Nolan*, 414 P.2d 689 (Alaska 1966); *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972); *Groh v. Egan*, 526 P.2d 863 (Alaska 1974); *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska 1983); *Kenai Peninsula Borough v. State*, 743 P.2d 1352 (Alaska 1987); *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992); *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002); *In re 2001 Redistricting Cases*,

amendment to Article VI of the Alaska Constitution that overhauled the redistricting process.[9] The amendment placed the duty of reapportioning the Alaska Legislature after each U.S. Census with the independent Alaska Redistricting Board.[10] Section 8(a) of Article VI states that the Board is comprised of "five members, all of whom shall be residents of the state for at least one year and none whom may be public employees or officials at the time of or during the tenure of appointment. Appointments shall be made without regard to political affiliation."[11]

The Governor appoints two members of the board. The presiding officers of the House and Senate each appoint one member. The fifth member is appointed by the Chief Justice of the Supreme Court. The appointments are made in the order just listed, and one board member must be a resident of each of the four judicial districts in the State.[12]

III. HISTORY OF THE BOARD'S WORK

A. Makeup of the Board

Governor Dunleavy appointed Budd Simpson of Douglas and Bethany Marcum of Anchorage to the Alaska Redistricting Board.[13] Senate President Cathy Giessel appointed John Binkley of Fairbanks to the Board.[14] House Speaker Bryce Edgmon appointed Nicole Borromeo of Anchorage to the Board.[15] Chief Justice Joel Bolger appointed Melanie Bahnke of Nome to the Board.[16]

In August 2020, the Board elected John Binkley as the chair of the Board.[17] Binkley

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47 P.3d 1089 (Alaska 2002); *In re 2011 Redistricting Cases*, 274 P.3d 466 (Alaska 2012); *In re 2011 Redistricting Cases*, 294 P.3d 1032 (Alaska 2012).

[9] *See In re 2001 Redistricting Cases*, 2002 WL 34119573, *1 n. 1 (Alaska Sup. Ct. Feb. 1, 2002) ("An Amendment to Article VI of the Alaska Constitution, effective January 3, 1999 (the "1998 Amendment"), changed the composition and responsibilities of the Board."); *see also* Gordon S. Harrison, *The Aftermath of In re 2001 Redistricting Cases: The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 Alaska L. Rev. 51, 60-63 (2006).

[10] *In re 2011 Redistricting Cases*, 274 P.2d 466 n.2 (Alaska 2012).

[11] Alaska Const. art. VI, § 8(a).

[12] Alaska Const. art. VI, § 8(b).

[13] ARB000005; Aff. of Budd Simpson ¶ 7, dated Jan. 12, 2022.

[14] ARB000005.

[15] ARB000005.

[16] ARB000005.

[17] Binkley Aff. ¶ 12.

was born and raised in Fairbanks, but ran a tug and barge business on the Lower Yukon in St. Mary's, Alaska for a time.[18] Binkley lived in Bethel from 1978 through 1990, and was elected to represent a Bethel-centered house district and then a senate district.[19] In 1990, Binkley moved back to Fairbanks.

Member Melanie Bahnke was born in Nome and raised in Savoonga on St. Lawrence Island.[20] She has lived in Nome since 1995, and among other things, is President of Kawerak, Inc., a nonprofit corporation that the Bering Straits Native Association organized after passage of the Alaska Native Claims Settlement Act ("ANCSA").[21] St. Lawrence Island Yupik is Ms. Bahnke's first language; she is also fluent in English.[22]

Member Nicole Borromeo was born and raised in McGrath.[23] She is currently Executive Vice President and General Counsel of the Alaska Federation of Natives.[24] She also serves as the chairman of the board of directors of MTNT, Limited, the ANCSA Village Corporation for McGrath, Takotna, Nikolai, and Telida.[25]

Member Bethany Marcum has been an Anchorage resident for 26 years.[26] She has served in the military for 20 years, has lived in various neighborhoods throughout the Municipality of Anchorage, and has traveled regularly in Alaska for work and military exercises.[27] Marcum has served in the Air National Guard since 2008, originally stationed at Kulis Air National Guard Base and now at Joint Base Elmendorf Richardson ("JBER").[28]

Member Budd Simpson has lived in the City and Borough of Juneau and practiced law in Alaska since 1977.[29] Through his law practice, Simpson has traveled regularly

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[18] Binkley Aff. ¶ 4.
[19] Binkley Aff. ¶¶ 4-5.
[20] Bahnke Aff. ¶ 2.
[21] Bahnke Aff. ¶ 4.
[22] Bahnke Aff. ¶ 5.
[23] Borromeo Aff. ¶ 2.
[24] Borromeo Aff. ¶¶ 3-4.
[25] Borromeo Aff. ¶ 5.
[26] Marcum Aff. ¶ 2.
[27] Marcum Aff. ¶ 3.
[28] Marcum Aff. ¶ 4.
[29] Simpson Aff. ¶¶ 2-3.

throughout Southeast Alaska.[30] Since the late 1970s, Simpson and his wife have owned property in Haines, Alaska. Simpson served as the City Attorney for the City and Borough of Haines for 15 years.[31] He has also regularly represented Sealaska, the Regional Corporation for Southeast Alaska.[32]

In December 2020, the Board hired Peter Torkelson as the Board's Executive Director and TJ Presley as the Deputy Director of the Board.[33] Torkelson had been working as a professional assistant to the Senate President's office since 2013.[34] Torkelson had a background and an interest in website design, and a college degree in criminal justice.[35] This was his first foray into redistricting.[36]

B. Board Meetings

The Board held numerous meetings throughout its tenure. It began in September of 2020 with various organizational and training meetings. In general, the time from September, 2020 through July, 2021 was devoted to organizational work, procurement, training and planning for the hard work of the Board. Once the census data was received on August 12, 2021, the "clock" started for the 90-day sprint through the redistricting process.

September 10, 2020

On September 10, 2020, the Board held a meeting with all members present.[37] During this meeting, the Board discussed obtaining information technology and cellphone service for Board members.[38] Tim Banaszak, who was the Information Technology

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[30] Simpson Aff. ¶ 3.
[31] Simpson Aff. ¶ 3.
[32] Feb. 3 Trial Tr. 1737:22-25; 1738:1-3; 1738:20-22.
[33] ARB000005.
[34] Aff. of Peter Torkelson ¶ 7, dated Jan. 12, 2022.
[35] Deposition of Peter Torkelson, January 15, 2022 at 27.
[36] Torkelson Depo. At 15, L10-12.
[37] ARB000118-ARB000120 (Board Meeting Minutes).
[38] ARB000118-ARB000119.

Manager for the Legislative Affairs Agency, attended the meeting to assist.[39] The Board selected vendors for information technology service and internet service.[40] The Board also voted to provide cellphone service for each member.[41] The Board discussed the general staff and legal counsel it would require.[42]

December 3, 2020

On December 3, 2020, the Board held a meeting with all members present.[43] JC Kestel, a procurement officer with the Legislative Affairs Agency, and Tim Banaszak, the Information Technology Manager for the Legislative Affairs Agency, also attended the meeting.[44] Mr. Banaszak reported that the Board member laptops were configured with Microsoft Office and redistricting software, and that individual email accounts had been created for each member.[45] Chair Binkley advised all members they were registered for a National Conference of State Legislatures ("NCSL") that was being held virtually in January 2021, and encouraged all members to attend.[46] The Board entered executive session to discuss the applicants for the Executive Director position.[47] It exited executive session and adjourned the meeting.[48]

December 10, 2020

On December 10, 2020, the Board held a meeting with all members present.[49] The Board entered executive session and interviewed applicants for the Executive Director position.[50] The Board exited executive session and adjourned the meeting.[51]

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[39] ARB000119.
[40] ARB000119.
[41] ARB000119.
[42] ARB000119.
[43] ARB000121-ARB000123 (Board Meeting Minutes).
[44] ARB000121.
[45] ARB000121.
[46] ARB000122.
[47] ARB000122.
[48] ARB000122-ARB000123.
[49] ARB000124-ARB000125 (Board Meeting Minutes).
[50] ARB000124-ARB000125.
[51] ARB000124-ARB000125.

December 12, 2020

On December 12, 2020, the Board held a meeting with all members present.[52] The Board summarized that it spent a full day on December 10 interviewing candidates for the Executive Director position, and unanimously approved the selection of Peter Torkelson for the position.[53]

December 19, 2020

On December 19, 2020, the Board held a meeting with all members and Executive Director Torkelson present.[54] The Board discussed a draft organizational chart, budget, hiring timelines and personnel related matters.[55]

December 29, 2020

On December 29, 2020, the Board held a meeting with all members, Executive Director Torkelson, and Deputy Director TJ Presley present.[56] The Board discussed its status as an independent entity from the legislative and executive branches of the state government and its ability to adopt either the legislative or administrative procurement codes.[57] Ultimately, the Board unanimously voted to adopt the legislative procurement code, but with changes to the terms that reflected that the Board, not an agency, was using the code and to restrict bid protests to only bidders.[58] The Board then discussed the process to solicit proposals from firms to serve as the Board's legal counsel, and voted to begin drafting the language for the Board's request for information ("RFI") for legal counsel.[59]

January 8, 2021

On January 8, 2021, the Board held a meeting with all members, the executive

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[52] ARB000126-ARB000127 (Board Meeting Minutes).
[53] ARB000126.
[54] ARB000128-ARB000130 (Board Meeting Minutes).
[55] ARB000128-ARB000130 (Board Meeting Minutes).
[56] ARB000131-ARB000133 (Board Meeting Minutes).
[57] ARB000131-ARB000132.
[58] ARB000132.
[59] ARB000132.

director, and deputy director present.[60] The Board set a January 29 deadline for firms to respond to its RFI for legal counsel and finalized the wording of the RFI.[61] The Board also adopted its procurement code that had been derived from the legislative procurement code with some changes.[62]

January 26, 2021

On January 26, 2021, the Board held a meeting with all members, the executive director, and deputy director present.[63] The Board considered and adopted the following policies: (1) Public Meeting and Notice Requirement Policy; (2) Public Records Policy; (3) Board Member Compensation Policy; and (4) Board Member and Staff Per Diem Policy.[64] Torkelson also reported that the Board's webpage was scheduled to go live in the next two weeks, and would serve as a single point of access for redistricting maps.[65]

February 26, 2021

On February 26, 2021, the Board held a meeting with all members, the executive director and deputy director present.[66] Torkelson updated the Board on his communications with the U.S. Census Bureau that the 2020 Census results would be provided by September 30, 2021, at the latest.[67] The Board explored options to proactively solicit redistricting input from interest groups that historically participate in redistricting in Alaska, and decided that, to the extent practicable, meeting requests from interest groups would be routed through staff.[68] Torkelson further advised Board members of online software training available to them.[69] The Board entered executive

[60] ARB000134-ARB000135 (Board Meeting Minutes).
[61] ARB000134-ARB000135.
[62] ARB000135.
[63] ARB000136-ARB000138 (Board Meeting Minutes).
[64] ARB000137, ARB000420-ARB000426.
[65] ARB000138.
[66] ARB000139-ARB000142 (Board Meeting Minutes).
[67] ARB000139.
[68] ARB000141.
[69] ARB000141.

session to interview a respondent of the legal services RFI.[70] After completing the interview, the Board exited executive session and adjourned the meeting.[71]

March 2, 2021

On March 2, 2021, the Board held a meeting with all members, the executive director, and deputy director present.[72] Torkelson shared informal advice from the legislative attorney that executive session was an appropriate forum to interview potential legal counsel.[73] The Board entered executive session and interviewed additional legal counsel applicants.[74] After the interviews, the Board exited executive session and adjourned the meeting.[75]

March 6, 2021

On March 6, 2021, the Board held a meeting with all members, the executive director, and deputy director present.[76] Torkelson summarized the Board's RFI, interview, and selection process for legal counsel.[77] Torkelson advised that the Board had selected two respondents to interview and had completed both interviews.[78] The Board entered executive session to discuss the selection of one of the firms, and upon exiting executive session unanimously voted to select Schwabe, Williamson & Wyatt.[79]

April 16, 2021

On April 16, 2021, the Board held a meeting with all members except member Bahnke present.[80] The executive director, deputy director, and Matt Singer of Schwabe, Williamson & Wyatt were also present.[81] Torkelson reported that counsel had advised

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[70] ARB000141.
[71] ARB000142.
[72] ARB000143-ARB000144 (Board Meeting Minutes).
[73] ARB000143.
[74] ARB000144.
[75] ARB000144.
[76] ARB000145-ARB000147 (Board Meeting Minutes).
[77] ARB000145-ARB000146.
[78] ARB000146.
[79] ARB000146.
[80] ARB000148-ARB000149 (Board Meeting Minutes).
[81] ARB000148.

the Board to secure a Voting Rights Act ("VRA") consultant as soon as possible, and a draft RFI was presented and approved by the Board with some modifications.[82]

May 26, 2021

On May 26, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[83] The Board took public testimony from former state senator Cathy Giessel, who thanked the Board for proactively seeking a VRA consultant.[84] The Board entered executive session to discuss the responses to its RFI for a VRA consultant.[85] After exiting the executive session, the Board unanimously moved to enter into a contract with Bruce Adelson as the Board's VRA consultant.[86]

June 28 – June 30, 2021

On June 28-30, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[87] The Board immediately entered a three-day work session to receive in-person training on the Autobound Edge redistricting software with Fred Hejazi, the CEO of Autobound.[88]

July 2021

In July, the Board attended the National Conference of State Legislatures "Ready to Redistrict" conference in Salt Lake City and received training on legal and procedural topics related to redistricting.[89]

August 12, 2021 – Census Data

On August 12, 2021, the United States Bureau of the Census reported the results of the census to the State of Alaska.[90] The Census reported Alaska's population to be

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[82] ARB000149.
[83] ARB000150-ARB000151 (Board Meeting Minutes).
[84] ARB000151.
[85] ARB000151.
[86] ARB000151.
[87] ARB000152.
[88] ARB000152.
[89] ARB000121-ARB000152 (Board Meeting Minutes).
[90] ARB000002.

733,391.[91] The release of the U.S. Census Bureau's results obligated the Board to adopt a proposed plan(s) within 30 days of the August 12, 2021 release date.[92]

August 23 – August 24, 2021

On August 23-24, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[93] The Board revised its travel and per diem policy. It also adopted a public testimony policy to allow two (2) minutes per speaker. It then took public testimony on the redistricting process.[94] Among other testimony, Yarrow Silvers of Anchorage testified against the existing senate districts in East Anchorage that she felt improperly bisected East Anchorage, William Naneng of Hooper Bay advocated for Hooper Bay to be part of the Bethel house district, Doyon Limited President Aaron Schutt advocated for a unified interior district, and Senate Minority Leader Tom Begich urged the Board not to use Valdez to fill the under-population of the Matanuska-Susitna Borough.[95] The Board entered executive session to discuss legal issues, and upon re-entering public session, Torkelson noted that the Board was required to create at least one forty-district "draft" plan within 30 days of the release of the 2020 U.S. Census results on August 12, which would be no later than September 11, 2021.[96] The Board announced that third parties could submit their proposed redistricting plans by September 17, for the purpose of receiving public comment during the upcoming state-wide "road show," and the Board would provide them 30 minutes to present their proposals.[97] The Board then discussed how best to complete a draft plan[98] by September 11, and the Board recessed until the next morning.[99] The next day, the Board went over

[91] ARB004350-ARB004351.
[92] Board 2021 Proclamation of Redistricting, p. 1, ARB000002.
[93] ARB000153-ARB000158 (Board Meeting Minutes).
[94] ARB000154.
[95] ARB000154-ARB000155.
[96] ARB000155-ARB000156.
[97] ARB000156.
[98] The Board noted in its "workflow" discussion that legal issues arose during the last redistricting process when the board assigned different areas of the state to one individual member to draw a map and bring it back to the board for collective discussion. *See* ARB000156.
[99] ARB000157.

general principles of law regarding redistricting in public session and then began mapping Southeast Alaska together.[100]

September 7–9, 2021

On September 7-9, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[101] The Board received public testimony at the outset of the meeting.[102] The Board and staff then discussed the challenges they encountered when mapping after the last Board meeting, and entered executive session to receive legal advice from counsel.[103] Upon exiting executive session, legal counsel provided a summary of general redistricting law, including that the Alaska Supreme Court had indicated that areas within incorporated boroughs were, by definition, socio-economically integrated.[104] The Board members presented the draft maps they had been working on, and, upon request, took additional public testimony in the afternoon, including from Yarrow Silvers, who voiced concern that the Board had drawn a district that included a portion of East Anchorage with Eagle River.[105] The Board entered a work session for all of September 8 to draw maps.

On September 9, adopted Board Composite v.1 and Board Composite v.2. Both v.1 and v.2 were forty-district redistricting plans for the house districts.[106] Neither v.1 or v.2 contained proposed senate pairings.[107] The Board received written testimony submissions regarding v.1 and v.2 from September 9 forward.[108]

September 11, 2021

September 11, 2021, marked the end of the 30-day period within which the Board was required to adopt its proposed plans. The Board did not meet on September 10 or

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[100] ARB000158.
[101] ARB000159-ARB000165 (Board Meeting Minutes).
[102] ARB000160.
[103] ARB000160-ARB000161.
[104] ARB000161.
[105] ARB000161.
[106] ARB000164.
[107] ARB10708-ARB10765 (Board Composite v.1); ARB 10766-ARB10821 (Board Composite v.2).
[108] Torkelson Aff. ¶ 20; ARB001714-ARB004347 (public testimony, including September 9 submissions).

September 11. Thus, the only two plans developed and adopted within the 30-day period were Versions 1 and 2 (v.1 and v.2). Neither v.1 nor v.2 included proposed senate pairings. The Board did not meet again until September 17

September 17, 2021

On September 17, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[109] The Board met for a total of six hours and 12 minutes to review the draft maps.[110] The Board received two hours public testimony on v.1 and v.2 redistricting plans formally adopted at its prior meeting.[111] The following third-party groups then presented their maps: (1) Doyon Coalition,[112] (2) Alaska Democratic Party, (3) Alaskan for Fair and Equitable Redistricting ("AFFER"), (4) Alaskans for Fair Redistricting ("AFFR"), and (5) the Senate Minority Caucus.[113] The Board took additional public testimony and advised the public that its next meeting would be on September 20, and after that meeting the public outreach phase of its work would begin.[114]

September 20, 2021

On September 20, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[115] The Board opened the meeting by taking public testimony.[116] The Board then discussed the five (5) third-party plans, with the proponents of those plans providing information and answering questions.[117] Torkelson then presented improvements the Board had made to v.1 and v.2 of its maps, and proposed that versions 3 and 4 be adopted in lieu of v.1 and v.2, respectively.[118] The Board then voted to replace v.1 and v.2 with versions 3 and 4, respectively, and to

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[109] ARB000166-ARB000174 (Board Meeting Minutes).
[110] ARB000166 - ARB000174.
[111] ARB000167-ARB000170; Board 2021 Process Report, p. 3 (Nov. 20, 2021), ARB000007.
[112] The Doyon Coalition was a partnership of Doyon, Ltd.; Tanana Chiefs Conference; Sealaska Corporation; Ahtna, Incorporated; and Fairbanks Native Association. *See* ARB000170.
[113] ARB000170-ARB000173.
[114] ARB000173-ARB000174.
[115] ARB000175-ARB000192.
[116] ARB000176.
[117] ARB000176-ARB000186.
[118] ARB000186-ARB000190.

adopt[119] the plans submitted by the Senate Minority Caucus, the Doyon Coalition, AFFER, and AFFR as proposed plans to take on its outreach tour.[120] Each of the third-party plans included proposed senate pairings.[121]

It was at this meeting that the Board contends it adopted proposed senate pairings through the AFFER proposed plan.[122] However, this was never announced to the public and members of the public were not permitted to testify about senate pairings. In its announcement regarding the adopted plans, the Board referenced only the map components of each plan — the announcement included a quotation from Member Nicole Borromeo, which stated "[w]e look forward to hearing feedback from Alaskans on our new draft maps, as well as the four adopted third-party maps, as we present them in public meetings in communities across the state."[123] The announcement was devoid of any mention of senate pairings, televising to the public that no proposed senate pairings had been adopted.

The Board voted against adopting the Alaska Democratic Party's plan.[124] The Board took additional public testimony[125] and then advised it would be on its public outreach tour until the end of October. An email address was provided for anyone desiring the Board to come to their community to submit such a request.[126]

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[119] It is customary for the Alaska Redistricting Board to adopt third-party plans as proposed maps for the purposes of the public outreach tour. Jan. 31, 2022 Trial Tr. 1416:13-20 (Ruedrich Cross).
[120] ARB000190-ARB000192, ARB010360 at 217:19-24 (September 20, 2021 board meeting, adopting four third-party plans to take on the road for public comment).
[121] ARB001233-ARB001293 (AFFER); ARB001295-ARB001340 (AFFR); ARB001436-ARB001481 (Doyon Coalition); ARB001483-ARB001528 (Senate Minority); ARB001189-ARB001191 (minutes of September 20, 2021 ARB meeting).
[122] The AFFER proposed plan adopted by the Board on September 20, 2021 included a senate pairing of Muldoon with Eagle River in proposed senate district J. However, that Senate pairing carved out the majority of the population of Eagle River and included a significant portion of North Muldoon. And the AFFER proposed plan does not resemble any proposal discussed by the Board during its senate pairing proceedings on November 8-10, 2021. ARB001236-ARB001237, ARB001250. Third Party Proposed Plans, ARB001388-ARB001424.
[123] *See* ARB00063071 ("Alaska Redistricting Board Approves Proposed Redistricting Plans" press release).
[124] ARB000191. On that same day, the Board unanimously approved the purchase of items in the managed services proposal and permitted each Board member to work directly with JC Kestel, Procurement Officer of Legislative Affairs Agency, to obtain cell phone service. September 10, 2021 Board Meeting Minutes; ARB000119-ARB000120.
[125] ARB010361-ARB010369 at 218:15-225:17 (public testimony at September 20, 2021 board meeting after adoption of third-party plans).
[126] ARB000192.

September 27 – November 1, 2021 ("The Road Show")

After adoption of all six proposed plans, and between September 27 and November 1, 2021, the Board held public hearings throughout Alaska.[127] On September 30, the Board held a hearing in Valdez, one of its earliest stops,[128] during which large printouts of all the adopted proposed maps were hung on the walls and citizens were permitted to share their thoughts with the Board.[129] Numerous residents of Valdez, including Nathan Duval and Sheri Pierce, attended the meeting, reviewed the maps, and shared their views with the Board.[130] The Board also held hearings in Palmer, Wasilla, Anchorage, and Bethel, among many other locations, and it held a Skagway public hearing using the Zoom internet platform.[131] In addition to the in-person hearings in communities across the state, the Board also held two additional telephonic public hearings for statewide participants on October 20 and October 30.[132] The Board held

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[127] ARB004415-ARB004417 (Board website showing list of all public hearings); ARB001699-ARB001704 (Torkelson presentation summarizing public hearing itinerary and showing representative photographs of various meetings); Jan. 25, 2022 Trial Tr. 475:12-16 (Duval cross, Q: "And there were six different plans that were presented in Valdez at that meeting on September 30th; is that right?" A: "I don't recall the exact number but six sounds correct, yes."); 475:23-476:11 (Duval cross, admitting Board proposed v.4 map that paired Valdez with Mat-Su was on the wall at the September 30 Valdez hearing, along with the other proposed maps); Jan. 25, 2022 Trial Tr. 485:17-21 (Duval redirect: Q: "You've been asked several questions about the maps on the wall. Is it your understanding that the maps on the wall that were posted on Valdez were 3 and 4 and four third-party maps?" A: "Yes.".); Jan. 27, 2022 Trial Tr. 1055:15-25 (Torkelson cross: Q: "In proposed version v4, Valdez is in – placed with the same communities that it was in the final map and with the eastern Mat-Su; is that right?" A: "Yes. From recollection, board-adopted v4 contains a Valdez/Mat-Su district that's very similar to the final adopted plan." Q: "And the board adopted v4 for public comment on September 20th; is that correct?" A: "Yes, sir, that's correct." Q: "V4 was on the wall at the Valdez tour stop?" A: "Yes. It was on the wall at every stop.").

[128] Jan. 26, 2022 Trial Tr. 796:8-14 (Borromeo cross); Jan. 27, 2022 Trial Tr. 1047:2-4 (Torkelson cross: "For example, I think it's been noted that Member Borromeo really wanted to get to Valdez early and hear from them.").

[129] Jan. 25, 2022 Trial Tr. 476:12-478:15 (Duval cross describing September 30 meetings, viewable maps, and his participation); 518:6-10, 519:7-19 (Pierce confirming Board proposed v.4 was on display at September 30 hearing in Valdez and on her conversations with each member of the Board one-on-one).

[130] Jan. 25, 2022 Trial Tr. 476:12-478:15 (Duval cross); 518:6-10, 519:7-19 (Pierce cross).

[131] ARB004377, ARB004416-ARB004417.

[132] ARB004415-ARB004417.

public hearings with all six proposed plans available for comment.[133] Public testimony during these hearings included testimony regarding senate district pairings.[134]

November 2, 2021

After the road show was concluded, the Board reconvened in Anchorage to finalize its house district map. On November 2, 2021, the Board held a meeting with all members, the executive director, deputy director and legal counsel present.[135] The Board met for a total of six hours and 55 minutes.[136] Of that total time, the Board spent two hours and 23 minutes in executive session.[137] In addition, the Board spent two hours and 48 minutes in a mapping work session.[138]

The Board took public comment wherein residents generally voiced support for a particular proposed map.[139] Torkelson provided a summary of the public hearing tour and reported that public hearings had been held in the following communities: Juneau, Haines, Sitka, Valdez, Anchorage (2 hearings), Kotzebue, Ketchikan, Petersburg, Wrangell, Nome, Seward, Homer, Kenai, Kodiak, Delta Junction, Fairbanks, Bethel,

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[133] Jan. 25, 2022 Trial Tr. 485:17-21 (Duval redirect: Q: "You've been asked several questions about the maps on the wall. Is it your understanding that the maps on the wall that were posted on Valdez were 3 and 4 and four third-party maps?" A: "Yes.".); Jan. 27, 2022 Trial Tr. 977:14-17 (Bahnke cross Q: "And at that meeting in Nome, the board's version 3 and 4 and the other third-party proposed maps, those were on the wall, right?" A: "Yes."); Jan. 27, 2022 Trial Tr. 979:20-25 (Bahnke cross: A: "I believe the format that we were following was we'd give kind of a presentation, explain the process of redistricting, what it is, share information about what was on the walls, and then we would go into a process where we kind of mingled with people."); Jan. 27, 2022 Trial Tr. 1032-12-1033:11 (Simpson cross, Q: "[I]f I'm understanding you correctly, that's board version 3 and 4 and various third-party maps, is it correct that the board adopted them for the purposes of getting public comment on those maps?" A: "Yes, that's exactly why we adopted several versions, yes." Q: "So does it matter whether the board received public comment on those maps before it adopted them for the purposes of public comment?" A: "No. The purpose of adopting them was to encourage a variety of public comment and to provide a number of options that people could look at and sort of pick and choose their way through what they liked or didn't like about any of them." Q: Did the board get public comment on those maps?" A: "Absolutely. At the public meetings around the state, the typical process was that either – either board members or staff working together would physically pin the maps up to the walls of the various meeting venues, and people could come into the room and walk around the perimeter looking at different maps. And the maps were labeled as to their source, so there was a board version 3 and 4, there was AFFR, AFFER, Doyon, and so forth.").
[134] ARB006500-ARB006600.
[135] ARB000193-ARB000200 (Board Meeting Minutes).
[136] ARB000193; ARB000199.
[137] ARB000196.
[138] ARB000199.
[139] ARB00194-00195 (Board Meeting Minutes).

Dillingham, Palmer, Wasilla, Cordova, and Utqiagvik.[140] The Board took additional public testimony and then entered a work session beginning on the afternoon of November 2 to continue its work on a final redistricting plan.[141]

November 3, 2021

On November 3, 2021, the Board held a meeting with all members, the executive director, deputy director and legal counsel present.[142] The Board met for a total of seven hours, most of which took the form of a mapping work session.[143]

November 4, 2021

On November 4, 2021, the Board held a meeting with all members, the executive director, deputy director and legal counsel present.[144] Once again, The Board met for a total of seven hours, most of which took the form of a mapping work session.[145]

November 5, 2021 – House Map Finalized

On November 5, 2021, the Board held a meeting with all members, the executive director, deputy director and legal counsel present.[146] The Board started with a work session, and then entered into the first executive session for one hour and 35 minutes.[147] This was followed by a mapping work session that lasted one hour and 46 minutes.[148] During this mapping session, Member Marcum discussed her extensive attempts to avoid putting Valdez in a house district with the Mat-Su.[149]

The Board then took extensive public testimony from individuals, including Yarrow Silvers and Felisa Wilson.[150] Following public testimony, the Board entered into a second

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[140] ARB000198.
[141] ARB000199.
[142] ARB000193-ARB000200 (Board Meeting Minutes).
[143] ARB000200.
[144] ARB000193-ARB000200 (Board Meeting Minutes).
[145] ARB000200.
[146] ARB000201-ARB000209 (Board Meeting Minutes).
[147] ARB000201-ARB000202 (Board Meeting Minutes).
[148] ARB000202.
[149] ARB007755-ARB007745 (Board Meeting Transcript).
[150] ARB000202-ARB000208.

executive session which lasted 55 minutes.[151] The Board thus met in executive session for a total of two and one-half hours.

Member Simpson moved the Board to adopt the redistricting map labeled "Board Consensus v.7" as the Board's Final Map of the forty (40) house districts, with the allowance for staff to make minor changes accompanied by a report for the Board to review.[152] The Board voted 4-1, with Member Marcum voting no, to adopt Board Consensus v.7 as the Final House Redistricting Plan.[153]

November 8, 2021 – Senate Pairings Begin

On November 8, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[154] Two days remained for the Board to finish its work pursuant to the constitutional deadline. Having finalized its house district map, the Board began its work regarding senate districts. [155] The Board began the meeting by taking two hours of public testimony regarding senate pairings.[156] The Board took public testimony from individuals and groups,[157] including Yarrow Silvers and Felisa Wilson, who advocated against pairing any house districts in the Municipality of Anchorage with Eagle River house districts.[158] During this meeting, the public voiced significant support for pairing then-numbered House districts 18 and 23, which represent North and South Muldoon, as well as House districts 22 and 24, which represent both Eagle River House districts.[159] This was the only public testimony that was ever taken regarding senate pairings.

After taking this testimony, the Board entered executive session "for legal and other purposes related to receiving legal counsel for the Board."[160] The Board remained

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[151] ARB000208.
[152] ARB000208.
[153] ARB000208-ARB000209.
[154] ARB000210-ARB000222 (Board Meeting Minutes).
[155] ARB000210.
[156] ARB000210-ARB000213 (Board Meeting Minutes).
[157] ARB006504-ARB006600.
[158] ARB000210-ARB000213.
[159] ARB000211-ARB000213 (Board Meeting Minutes).
[160] ARB000208.

in executive session for one hour, and then took a lunch break. After lunch, the Board entered a senate pairings work session at 1:21 p.m., which lasted until 5:00 p.m.[161] Member Bahnke began the discussion of Anchorage pairings. She urged the board to pair the two Eagle River House districts together and the two Muldoon districts together because each of those pairs were socioeconomically integrated.[162] After Ms. Bahnke finished, Ms. Marcum began a discussion of her suggested pairings. She had four different versions, and indicated she wanted to discuss all of them. However, she noted that all four of her proposals would split the two Eagle River districts to give Eagle River the opportunity for more representation.[163] The Board engaged in some public discussion regarding the pairing of the senate districts presented by Marcum, but did not take any public testimony after the work session started.[164]

In review of a video recording of the work session, Marcum and Simpson can be seen and heard consulting and discussing an unredacted chart received from Randy Ruedrich ("Ruedrich") providing incumbent information for house districts statewide.[165]

After the work session, Marcum moved for the Board to enter executive session "for legal advice with regard to the proposed Senate pairings". That executive session lasted until the Board recessed at 6:25 p.m.[166]

November 9, 2021

On November 9, 2021, the Board held a meeting with all members, the executive director, deputy director, and legal counsel present.[167] The Board reconvened at 9:00 a.m. and continued its executive session.[168] The Board exited executive session at 10:30

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[161] ARB000208.
[162] ARB006661-ARB006669 (November 8 board meeting transcript 164:20 – 173:1).
[163] ARB006671-ARB006675 (November 8 board meeting transcript 173:10-179:3)
[164] Marcum Aff. ¶ 17.
[165] Marcum Depo. at 206:21-218:25 (identifying Ex. 6005 as a chart received from Randy Ruedrich containing incumbent information and stating that she pulled up on her computer "the version that [she] had, which was the unredacted version" to show Simpson); video recording of November 8, 2021 Board Meeting at 2:52:00-2:55:30.
[166] ARB000208.
[167] ARB000210-ARB000222 (Board Meeting Minutes).
[168] ARB000215 (Board Meeting Minutes).

a.m.[169] The Board took no public testimony on November 9. Member Marcum immediately moved to accept Senate district K pairings for Anchorage which paired Eagle River and South Muldoon..[170] Simpson seconded the motion. Bahnke opposed the motion and requested a roll call vote. The motion passed 3-to-2, with Binkley, Marcum, and Simpson in favor, and Bahnke and Borromeo against.[171] The Board voted to pair House Districts 21 and 22 to create Senate District K, and voted to pair House Districts 23 and 24 to create Senate District L.[172] Both of these senate districts were consistent with proposals Member Marcum had made the prior day on the record,[173] but were quite different then the pairings proposed by Ms. Borromeo the day before.

Borromeo moved to reconsider the vote, with Bahnke seconding the motion. Borromeo expressed strong opposition against pairing East Anchorage district with the Eagle River districts, noting that "it opens the Board up to an unfortunate and very easily winnable argument [of] partisan gerrymandering."[174] Borromeo noted that Marcum stated the previous day that this pairing "gives Eagle River the opportunity to ... have more representation, so they're certainly not going to be disenfranchised by the process,"[175] and stated that the pairing "defies logic" and is contrary to "the sound, sound legal advice [the Board] got from counsel in executive session."[176]

However, before Borromeo had finished speaking, Chair Binkley and Marcum called the question.[177] The motion to reconsider the vote on adoption of the Anchorage senate pairings failed, with only Bahnke and Borromeo in favor of reconsideration.[178]

Board staff then presented a report showing the percentage change of constituents for senate districts, so that the Board could decide which senate terms required truncation because the districts had substantially changed and thus must stand for election in 2022,

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[169] ARB000215.
[170] ARB000215.
[171] ARB000215.
[172] ARB0007035-ARB007036.
[173] ARB006687 at 191:9-17; ARB006660-ARB006702 (discussing Anchorage Senate pairing options).
[174] ARB007040.
[175] ARB007041.
[176] ARB007041.
[177] ARB007043; Binkley Depo. 198:25-199:9.
[178] ARB000215.

regardless of when the seat had previously stood for election.[179] Bahnke suggested that, to avoid the appearance of partisanship or knowledge as to which seats would be truncated, the Board should flip a coin to make the decision. In contrast, Binkley suggested that there should be some rationale for the decision, and proposed alternating between the 2024 and 2022 cycles beginning with Senate District T. Simpson and Marcum supported Binkley's proposal, with Marcum specifically noting that the Board had not been presented with any incumbent information.[180] A vote was held, and Binkley's method passed. Borromeo then moved to determine the sequencing for truncations beginning with Senate District A going in the 2024 cycle, but the majority board members voted against this motion.[181] Marcum then moved to alternate by numerical order with District A going in the 2022 cycle, and the motion passed. It appears that the majority board members had a preference for this configuration, despite their purported neutrality and ignorance of incumbents.[182] After this decision, the Board entered a recess at 4:30 p.m.

November 10, 2021

On November 10, 2022, the Board issued its Final Plan and Proclamation of Redistricting.[183]

Borromeo and Bahnke initially refused to sign the Proclamation as a direct result of the East Anchorage/Eagle River pairings and the dilution that these pairings may cause, specifically, in House District 21-South Muldoon.[184] Ultimately, they signed the Proclamation, noting their dissent.[185] Both Members' closing statements are contained in the Board's minutes in their entirety.[186]

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[179] ARB000216.
[180] ARB000217.
[181] ARB000217.
[182] ARB000217.
[183] ARB000219-ARB000222.
[184] November 10, 2021 Board Meeting Minutes, ARB000219.
[185] Board 2021 Proclamation of Redistricting, ARB000003.
[186] ARB000219-ARB000221.

IV. LEGAL PROCEEDINGS

The Alaska Constitution allows challenges to the Final Plan. Article VI, section 11 states, "[a]ny 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..."[187] In accordance with Article VI, section 11, five lawsuits were filed in superior courts throughout the State, and were consolidated under the caption, In Re 2021 Redistricting Cases, Consolidated Case No. 3AN-21-08869CI. All of these lawsuits challenge the 2021 Redistricting Plan and name the Alaska Redistricting Board as Defendant., and seek an order to the board to make corrections to the Plan.

A. Parties to the Case

The five cases are:

Municipality of Skagway v. Alaska Redistricting Board, 1JU-21-00944CI;
The City of Valdez v. Alaska Redistricting Board, 3VA-21-00080CI;
Matanuska-Susitna Borough v. Alaska Redistricting Board, 3PA-21-02397CI;
Calista Corporation v. Alaska Redistricting Board, 4BE-21-00372 CI; and
Felisa Wilson v. Alaska Redistricting Board, 3AN-21-08869CI.

Pursuant to Civil Rule 90.8(f) the Presiding Judges consolidated the five cases and moved them to Anchorage.

In addition, the Court granted a motion to intervene submitted by a coalition of several Alaska Native Corporations and individuals. They include Doyon, Limited; Tanana Chiefs Conference; Fairbanks Native Association; Ahtna, Inc., Sealaska; Donald Charlie, Jr.; Rhonda Pitka; Cherise Beatus; and Gordon Carlson. The State has also been participating in the litigation, but did not formally move to intervene.

In addition, several interested parties were granted permission to appear as *amicus curiae*. They include the Alaska Black Caucus, National Association for the Advancement of Colored People Anchorage, Alaska Branch #1000, Enlaces, the Korean

[187] The Alaska Supreme Court has broadly interpreted the concept of standing, favoring the increased accessibility to judicial forums. Accordingly, "any qualified voter" is authorized to institute and maintain a reapportionment suit seeking to correct any errors in redistricting. *Carpenter*, 667 P.2d at 1209-10.

American Community of Anchorage, Inc., the Native Movement, and First Alaskans Institute.

B. Pre-Trial Proceedings

All of the five cases were filed on or shortly the statutory deadline of December 10, 2021. The Presiding Judge issued an initial Pretrial Order on December 15 setting a scheduling hearing for December 20, 2021, and a Second Pre-trial Order on December 20, 2021. The undersigned judge was assigned as the trial judge on December 20, and held an initial discovery hearing on December 22, 2021. The Court issued its Third Pretrial Order on December 22, 2021. The Court held weekly Discovery and Status hearings thereafter until trial began. A Fourth Pre-Trial Order was issued setting forth the general trial plan was entered on January 4, 2022.

On December 23, 2021, the Parties filed an original Petition with the Supreme Court seeking an extension of the deadline for the final order in this case to be issued.[188] The Supreme Court granted a two-week extension to February 15, 2022.[189]

On January 21, 2021, the Court began a 12-day bench trial. The trial was conducted entirely by Zoom and followed a hybrid format due to the highly condensed schedule. All direct testimony was pre-filed by Affidavit in advance of trial. In addition, the parties took depositions of each of the Board members, the executive director, expert witnesses and a third-party witness. At trial, the parties were permitted to conduct cross-examination of witnesses, and present redirect testimony. The Court also heard rebuttal evidence from each of the Plaintiffs, with the exception of East Anchorage.

In addition to the Deposition and trial testimony, the Court also received numerous exhibits from the Parties.

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[188] Pursuant to Civil Rule 90.8(c), this Court's final decision was then due on February 1, 2022.
[189] Order on Original Application, S-18275 (December 23, 2021).

During the course of the pre-trial proceedings, the Court ruled on a number of pre-trial motions. The Orders addressing the various Motions and procedural issues are identified in Appendix A.

C. The Record Before the Court

Pursuant to Civil Rule 90.8, the record before this court included the record from the Redistricting Board. On December 22, 2021, the board submitted the initial record, consisting of 7,232 pages. The Board supplemented the record on January 14, 2022 with an additional 3,588 pages. A third supplement was submitted to the court on February 4, 2022 containing additional transcripts of Board meetings. The record is all labeled and identified as ARB 1 to ARB 11,662. The Board has also filed a complete copy of the trial transcript.[190]

Attached as Appendix B is a list of all of the Deposition testimony included in the record. Attached as Appendix C is a copy of the Exhibit lists (as amended through trial) submitted by each party identifying the admitted exhibits. Attached as Appendix D is a summary of the Claims raised by each Plaintiff.

D. Trial Proceedings

During the trial in this case, the parties each presented testimony by Affidavit. The opposing parties then had the choice to cross-examine the witnesses. If a witness was crossed, then the offering party was afforded the opportunity to question the witness on re-direct.

At trial, the Plaintiffs presented a total of 19 lay witnesses, plus four expert witnesses. The Board presented 6 witnesses and the Intervenors also presented three witnesses. The Court has considered the affidavit testimony as well as the live testimony offered during trial (in addition to the depositions identified earlier.)

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[190] As of this writing, only the closing arguments conducted on Friday, February 11, 2022 were not included in the transcript.

The following witnesses were heard from:

East Anchorage

Felisa Wilson, a Plaintiff and resident of District 23

Sean Murphy, a Plaintiff and resident of District 22

Yarrow Silvers, a Plaintiff and resident of District 21

David Dunsmore

Kevin McGee, President of the Anchorage area NAACP

Dr. Chase Hensel, PhD an expert in Anthropology

Mat-Su

Edna DeVries, a resident and Mayor of the Mat-Su Borough

Michael Brown, a resident and Manager of the Mat-Su Borough

Stephen Colligan, an expert in Redistricting and GIS

Valdez

Sharon Scheidt, Mayor of Valdez

Sheri Pierce, City Clerk of Valdez

Nathan Duval, Director of Capital Facilities, City of Valdez

Kimball Brace, an expert in Redistricting

Calista

Andrew Guy, President of Calista

William Naneng, resident of Hooper Bay

Harley Sundown, resident of Scammon Bay

Myron Naneng, COO of Sea Lion Corp.

Leonard Thom Aparuk, Director of Communications for Calista

Randy Ruedrich, expert witness in redistricting

Skagway

Andrew Cremata, Mayor of Skagway

Brad Ryan, Skagway Borough Manager

Jan Wrentmore, resident and business owner in Skagway

John Walsh, lobbyist for the City of Skagway

Kimball Brace, expert witness in redistricting

Intervenors

Michelle Anderson, President of Ahtna

Miranda Wright, Treasurer of Doyon

Vicki Otte, resident of McGrath and Doyon Shareholder

The Board

Melanie Bahnke, Board Member

Nichole Borromeo, Board Member

John Binkley, Board Member

Bethany Marcum, Board Member

Budd Simpson, Board Member

Peter Torkelson, Executive Director

V. JURISDICTION AND STANDARD OF REVIEW

Article VI, Section 11 of the Alaska Constitution provides that the superior court has "[o]riginal jurisdiction" over applications from qualified voters "to compel the Redistricting Board . . . to correct any error in redistricting." The provision continues that:

> all dispositions by the superior court . . . under this section shall be expedited and shall have priority over all other matters . . . . 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.[191]

Plaintiffs all have standing to bring these lawsuits and this court has original jurisdiction under the Alaska Constitution.

Alaska Civil Rule 90.8 provides additional guidance for redistricting challenges, including a strict deadline for issuing a decision.[192]

Redistricting plans are reviewed in a similar manner as regulations adopted by an administrative agency, or in other words, "to ensure that the Board did not exceed its delegated authority and to determine if the plan is 'reasonable and not arbitrary.'"[193] But

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[191] Alaska Const. art. VI, § 11.

[192] Alaska R. Civ. P. 90.8(c) ("The date for the court's decision shall be no later than 120 days prior to the statutory filing deadline for the first statewide election in which the challenged redistricting plan is scheduled to take effect.").

[193] *In re 2011 Redistricting Cases* (*2011 Appeal III*), 294 P.3d 1032, 1037 (Alaska 2012) (quoting *Kenai*

"a court may not substitute its judgment" for that of the Board or "choose among alternative plans," nor is a plan's "sagacity" or "wisdom" subject to review.[194]

Courts apply their "independent judgment" to questions of law, including issues of first impression involving "constitutional and statutory interpretation," and must "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[195]

VI. APPLICABLE LAW

A. District Boundaries (Alaska Const. art. VI, § 6)

Article VI, Section 6 of the Alaska Constitution provides several substantive criteria for the Board to apply when drawing geographic boundaries for house districts and when pairing senate districts:

> Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.[196]

The Court has clarified the terms "contiguous," "compact," and "integrated socio-economic area" over subsequent redistricting challenges as well as the equal population requirement.

1. Contiguous territory

The Court has defined the contiguity criterion to require "territory which is bordering or touching," or more specifically, that "every part of the district is reachable from every other part without crossing the district boundary."[197] But in light of Alaska's size and

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Peninsula Borough v. State, 743 P.2d 1352, 1357 (Alaska 1987)).

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

[195] *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)).

[196] Alaska Const. art. VI, § 6.

[197] *Hickel v. Se. Conf.*, 846 P.2d 38, 45 (Alaska 1992) (quoting Bernard Grofman, *Criteria for Districting: A*

"numerous archipelagos," the Court noted that "a contiguous district may contain some amount of open sea" within reason and subject to the other Section 6 criteria.[198] The Alaska Supreme Court has defined a "contiguous territory" as one which is bordering or touching.[199] The Court determined that "[a] district may be defined as contiguous if every part of the district is reachable form every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)."[200] The Court acknowledges that Alaska is a unique state with many islands and massive coastline. This reality means that without limitations on the definition of "contiguous," a coastal district could be considered contiguous with any other coastal district by reason of sharing the open sea. For example, District 37 covering the Aleutian Islands could permissibly be paired in a Senate district with District 2 in Southeast Alaska despite being separated by the Gulf of Alaska. In *Kenai*, the Supreme Court noted this anomalous result, and determined that *contiguity* could not be separated from the concept of *compactness* when crafting senate districts.[201]

2. *Compact territory*

Compactness is defined as "having a small perimeter in relation to the area encompassed," such that "bizarre designs" do not result.[202] The Court has provided some examples that may violate this criterion, such as "'corridors' of land that extend to include a populated area" or "appendages attached to otherwise compact areas."[203]

3. *Relatively integrated socio-economic area*

The purpose of the relative socio-economic integration criterion is "to prevent[] gerrymandering" and "ensure that a voter is not denied his or her right to an equally

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Social Science Perspective, 33 UCLA L. REV. 77, 84 (1985)), *as modified on reh'g* (Mar. 12, 1993).
[198] *Id.*
[199] *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992).
[200] *Id.* (quoting Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L.Rev. 77, 84 (1985)).
[201] *Kenai Peninsula*, 743 P2d at 1365 n.21.
[202] *Hickel*, 846 P.2d at 45 (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska 1983) (Matthews, J., concurring)).
[203] *Id.* at 45-46.

powerful vote."[204] Delegates to the Alaska Constitutional Convention defined this principle to mean "a group of people living within a geographic unit" following "similar economic pursuits."[205] The Court has thus considered significant factors such as "ferry and daily air service, geographical similarities and historical economic links," as well as other factors such as "patterns of housing, income levels and minority residences."[206] Municipalities and boroughs are "by definition socio-economically integrated."[207] The Court has also construed the modifier "relatively" to require a comparison of "proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient."[208]

4. Equal population

Although earlier Alaska redistricting cases accepted maximum population deviations as high as ten percent,[209] after the 1998 amendment adding the language "as nearly as practicable," the Alaska Supreme Court reasoned that this provision is usually "stricter than the federal threshold," and that "technological advances will often make it practicable to achieve deviations substantially below the ten percent federal threshold, particularly in urban areas."[210] Thus, the Board must "make a good faith effort" in reducing population deviations or otherwise "demonstrate that further minimizing the deviations would have been impracticable in light of competing requirements imposed under either federal or state law."[211]

5. Local government boundaries

As for the significance of local government boundaries, although this criterion arguably applies to both house and senate districts, focusing on the text's permissive

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[204] *Id.* at 46.
[205] *Id.* (quoting 3 PACC 1873 (January 12, 1956)).
[206] *Id.* at 47 (quoting *Groh v. Egan*, 526 P.2d 863, 879 (Alaska 1974)).
[207] *2001 Appeal I*, 44 P.3d 141, 146 (Alaska 2002); *see also Hickel*, 846 P.2d at 51 ("[A] borough must have a population which 'is interrelated and integrated as to its social, cultural, and economic activities.'" (quoting AS 29.05.031(a)(1)).
[208] *Hickel* 846 P.2d at 47.
[209] *See Groh*, 526 P.2d at 877.
[210] *In re 2001 Redistricting Cases* (*2001 Appeal I*), 44 P.3d 141, 145-46 (Alaska 2002).
[211] *Id.* at 146.

language, the Court has said "that respecting local government boundaries is discretionary."[212] But the Court has also noted that "the division of a borough which otherwise has enough population to support an election district will be an indication of gerrymandering," in which case "some legitimate justification" is required.[213]

B. Public Hearings Requirement (Alaska Const. art. VI, § 10)

The Alaska Constitution also outlines the process for the Board to receive public feedback prior to adoption of the final plan:

> Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.[214]

The Alaska Supreme Court has not yet provided concrete guidance on how to interpret this section since its amendment in 1998, and superior courts overseeing subsequent redistricting disputes have reached different results. In 2002, the superior court reasoned "that Article VI, Section 10 requires that public hearings be held only on the plan or plans adopted by the Board within thirty days of the reporting of the census."[215] But in 2013, after the Alaska Supreme Court remanded the 2011 final plan to the Board for a second time,[216] the superior court ordered that Section 10's broad mandate meant that "[p]ublic hearings must he held for a new plan or plans promulgated by the Board,"[217] even though the initial 30-day window had long since passed.

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[212] *2001 Appeal II*, 47 P.3d 1089, 1091 (Alaska 2002).
[213] *Hickel*, 846 P.2d at 51 n.20.
[214] Alaska Const. art. VI, § 10(a).
[215] *In re 2001 Redistricting Cases* (*2001 Cases I*), No. 3AN-01-08914CI, at 33 (Alaska Super., Feb. 01, 2002).
[216] *See 2011 Appeal III*, 294 P.3d 1032, 1039 (Alaska 2012).
[217] *In re 2011 Redistricting Cases* (*2011 Cases II*), No. 4FA-11-02209CI, at 3 (Alaska Super., May 30,

C. Equal Protection (Alaska Const. art. I, § 1; U.S. Const. amend. 14)

Article I, Section 1 of the Alaska Constitution provides "that all persons are equal and entitled to equal rights, opportunities, and protection under the law."[218] There is also a robust body of case law involving the federal Equal Protection Clause,[219] particularly as it pertains to redistricting.[220] The Alaska Supreme Court has consistently noted that "the equal protection clause of the Alaska Constitution imposes a stricter standard than its federal counterpart."[221]

"In the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection, namely that of 'one person, one vote'—the right to an equally weighted vote—and of 'fair and effective representation'—the right to group effectiveness or an equally powerful vote."[222] The first principle has been described as "quantitative, or purely numerical, in nature," and the second as "qualitative."[223] The Alaska Supreme Court has noted that, under Alaska equal protection jurisprudence, the first principle "has mirrored the federal requirement," whereas the second "has been interpreted more strictly than the analogous federal provision."[224] The Alaska equal protection clause also presents its own redistricting analysis.[225]

1. One person, one vote

The U.S. Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to generally provide for "one person, one vote,"[226] while in

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2013). The superior court reasoned "that the Board has access to, and has used, different forms of technology throughout this process and could hold public hearings through a variety of . . . technologies designed to promote the widest public input in the shortest amount of time." *Id.* at 3 n.6.

[218] Alaska Const. art. I, § 1.

[219] *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[220] *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

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

[222] *Id.* at 1366.

[223] *Hickel v. Se. Conf.*, 846 P.2d 38, 47 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).

[224] *Id.*

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

[226] *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

general permitting "minor deviations from mathematical equality" without justification.[227] Whereas "a maximum population deviation under 10%" is considered "minor," justification must be provided for any deviation above that threshold.[228] The Court has also identified a number of "traditional districting principles such as compactness, contiguity, and respect for political subdivisions," that may justify greater deviations to some degree.[229] These concepts are also explicitly codified in Article VI, Section 6 of the Alaska Constitution.

2. *Fair and effective representation*

Recognizing that numerical equality alone can still produce "the most grossly gerrymandered results," the U.S. Supreme Court has also recognized substantive restraints that come into play "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized."[230] In *Davis v. Bandemer*, a plurality of the Court held that invidious discrimination on the basis of political groups in redistricting presented a justiciable claim.[231] The plurality reasoned that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[232] The Alaska Supreme Court quoted *Bandemer* approvingly in subsequent redistricting challenges,[233] reading that case to "require[] a showing of a pattern of discrimination" against an identifiable group, in addition to proving discriminatory intent and effect to succeed on a vote dilution claim.[234] But in 2019 the U.S. Supreme Court ultimately concluded that partisan gerrymandering claims under the Fourteenth Amendment are nonjusticiable.[235] The Alaska Supreme Court has not yet addressed the

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[227] *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973).
[228] *Kenai Peninsula Borough*, 743 P.2d at 1366 (citing *Brown v. Thomson*, 462 U.S. 835, 842 (1983)).
[229] *Shaw v. Reno*, 509 U.S. 630, 647 (1993); *see also Reynolds v. Sims*, 377 U.S. 533, 578-80 (1964) (listing impermissible factors such as "history alone" and "economic or other sorts of group interests").
[230] *Gaffney v. Cummings*, 412 U.S. 735, 753-54 (1973).
[231] 478 U.S. 109, 124-25 (1986), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).
[232] *Id.* at 132.
[233] *See Kenai Peninsula Borough*, 743 P.2d at 1368-69; *accord Hickel v. Se. Conf.*, 846 P.2d 38, 49 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).
[234] *Hickel*, 846 P.2d at 49.
[235] *Rucho*, 139 S. Ct. at 2506-07.

import of this decision vis-à-vis the potential for partisan gerrymandering claims under the Alaska Constitution.

3. Alaska equal protection analysis

Equal protection analysis under Article I, Section I of the Alaska Constitution applies "an adjustable 'uniform-balancing' test . . . depending on the importance of the individual right involved" to determine the applicable level of scrutiny, which is then balanced against the government's purpose and "the state's interest in the particular means employed."[236] In *Kenai Peninsula Borough v. State*, the Court concluded that "a voter's right to an equally geographically effective or powerful vote . . . represent[s] a significant constitutional interest."[237] The Court therefore applied a "stricter equal protection standard when assessing the constitutionality of a reapportionment plan."[238] In that context, "upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation."[239] In light of the stricter constitutional standard, no "pattern of discrimination" is required, and the de minimis nature of any imbalance is not considered "when determining the legitimacy of the Board's purpose."[240]

D. Due Process (Alaska Const. art. I, § 7)

Article I, Section 7 of the Alaska Constitution states that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[241] The Alaska Supreme Court has identified both procedural and substantive applications of due process:

This clause requires that adequate and fair procedures be employed when state action threatens protected life, liberty, or property interests. This is procedural due process. It also may bar state action that infringes such interests in the absence of a

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[236] *Kenai Peninsula Borough*, 743 P.2d at 1370-71 (quoting *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984)).
[237] *Id.* at 1372.
[238] *Id.* at 1371.
[239] *Hickel*, 846 P.2d at 49 (citing *Kenai Peninsula Borough*, 743 P.2d at 1372).
[240] *Id.*
[241] Alaska Const. art. I, § 7.

sufficient government reason making procedures irrelevant. This is substantive due process. Substantive due process is a doctrine that is meant to guard against unfair, irrational, or arbitrary state conduct that "shock[s] the universal sense of justice."[242]

As for procedural due process, the constitution "does not require a full-scale hearing in every situation to which due process applies."[243] "At a minimum, due process requires that the parties receive notice and an opportunity to be heard."[244]

Under both the Federal and Alaska Constitutions, due process analysis involves consideration of three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[245]

However, the Alaska Supreme Court has provided little in the way of guidance as to how the Due Process Clause applies to redistricting challenges.[246] In other jurisdictions, courts have found violations of due process in electoral procedures only in rare instances where state action "seriously undermine[s] the fundamental fairness of the electoral process."[247] Such examples include filling vacancies through appointment rather than holding elections as required under state law.[248]

E. The Hickel process

In *Hickel v. Southeast Conference*, the Alaska Supreme Court formulated the following process for designing an interim redistricting plan on remand:

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[242] *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 124-25 (Alaska 2019) (footnotes omitted) (quoting *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999)).
[243] *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1026 (Alaska 2005) (quoting *Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 661 (Alaska 1974)).
[244] *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008).
[245] *Id.* (citing *Laidlaw Transit*, 118 P.3d at 1026); *accord Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
[246] *See, e.g.*, *2001 Appeal I*, 44 P.3d 141, 147 (Alaska 2002) (holding only that the plaintiffs' due process claims "have no merit").
[247] *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981).
[248] *Id.* at 704; *see also Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 898-99 (8th Cir. 2008) (collecting cases).

> Priority must be given first to the Federal Constitution, second to the federal voting rights act, and third to the requirements of article VI, section 6 of the Alaska Constitution. The requirements of article VI, section 6 shall receive priority *inter se* in the following order: (1) contiguousness and compactness, (2) relative socioeconomic integration, (3) consideration of local government boundaries, (4) use of drainage and other geographic features in describing boundaries.[249]

On rehearing, the Court clarified this process further:

> The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.[250]

The Court explained that, although "expediency mandated" prioritizing "compliance with the Voting Rights Act" at the time, when "drafting a permanent plan" outside of such added time constraints, "[t]he Board shall ensure that the requirements of article VI, section 6 of the Alaska Constitution are not unnecessarily compromised by the Voting Rights Act."[251] This became known as the *Hickel* process, and the Court has adhered to this list of priorities in subsequent redistricting challenges.[252] The Court even rejected the 2011 final redistricting plan due solely to the Board's failure to "follow the *Hickel* process."[253] The Court concluded that subsequent U.S. Supreme Court decisions "have made adherence to the *Hickel* process even more critical," as jurisdictions must "ensur[e] that traditional redistricting principles are not 'subordinated to race.'"[254] And in light of *Shelby County v. Holder* striking down Section 4 of the Voting Rights Act,[255] some considerations such as preclearance are no longer obstacles.[256]

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[249] *Id.* at 62.
[250] *Id.* at 51 n.22.
[251] *Id.*
[252] *2001 Appeal I*, 44 P.3d 141, 143 n.2 (Alaska 2002).
[253] *In re 2011 Redistricting Cases* (*2011 Appeal I*), 274 P.3d 466, 468 (Alaska 2012).
[254] *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996)).
[255] 570 U.S. 529, 557 (2013).
[256] *See Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 369 (9th Cir. 2016).

F. Voting Rights Act

In addition to the state requirements, the Federal Voting Rights Act governs redistricting of state election districts.[257] This Act protects the voting power of racial minorities.[258] "Under section 5 of the Act, a reapportionment plan is invalid if it 'would lead to a retrogression in the position of racial of racial minorities with respect to their effective exercise of the electoral franchise.' "[259]

Furthermore, in order to comply with section 5 of the Act,[260] the Alaska Supreme Court has ruled that a "state may constitutionally reapportion districts to enhance the voting strength of minorities in order to facilitate compliance with the Voting Rights Act."[261] Under Section 2 of the Federal Voting Rights Act, Plaintiffs may have a redistricting plan invalidated if: (1) under the totality of the circumstances, the redistricting results in unequal access to the electoral process; and (2) racially polarized bloc voting exists. [262]

G. Open Meetings Act (AS 44.62.310-19)

Finally, Alaska Statute 44.62.310, otherwise known as the Open Meetings Act[263] ("Act"), provides that "[a]ll meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law."[264] The Act contemplates teleconferencing and it requires "[r]easonable public notice" prior to any public meeting.[265] The Act also allows certain subjects to be considered in executive session.[266] Although the Act declares that "[a]ction taken contrary

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[257] 42 U.S.C. § 1973 (1988) (quoting *Egan,* 502 P.2d at 865-66 (footnotes omitted) (quoted in *Groh*, 526 P.2d at 875; *Kenai Peninsula Borough*, 743 P.2d at 1359; and *Hickel*, 846 P.2d at 50)).
[258] *See Hickel*, 846 P.2d at 49.
[259] *Hickel,* 846 P.2d at 49 (*quoting Kenai Peninsula Borough,* 743 P.2d at 1361, *quoting Beer v. United States,* 425 U.S. 130, 141 (1976)).
[260] In 2013, the United States Supreme Court struck down a portion of Section 4 addressing pre-clearance of Redistricting plans. *Shelby County, Alabama v Holder*, 570 U.S. 529, 557 (2013). As a result, Alaska is no longer required to seek preclearance of its redistricting plan from the Justice Department.
[261] *Kenai Peninsula Borough,* 743 P.2d at 1361; *quoted in Hickel,* 846 P.2d at 49-50.
[262] *Hickel,* 846 P.2d at 50 (citing *Thornburg v. Gingles,* 478 U.S. 30, 47 (1986)).
[263] AS 44.62.319.
[264] AS 44.62.310(a).
[265] AS 44.62.310(a), (e).
[266] AS 44.62.310(c) (including finances, reputational matters, confidential matters, and non-disclosable government records).

to this section is voidable," the superior court must first weigh a number of factors to determine whether "the public interest in compliance . . . outweighs the harm that would be caused to the public interest and to the public entity by voiding the action."[267] The legislature additionally stated its intent that any exceptions to the Act "be construed narrowly."[268]

The Alaska Supreme Court addressed the question of whether the attorney-client privilege is a valid excuse for calling executive sessions under the Act in *Cool Homes, Inc. v. Fairbanks North Star Borough*.[269] In light of the Act's broad policy goals, the Court reasoned that "[t]he privilege should not be applied blindly" and the existence of pending litigation "is not enough"; instead, the privilege only permits executive sessions to further "candid discussion of the facts and litigation strategies."[270] The Court thus recognized a narrow exception for when members of a board faced "personal liability" in "ongoing litigation," and therefore called an executive session to obtain "legal advice as to how it and its members could avoid legal liability," as opposed to just "general legal advice."[271]

In *Hickel*, the Court affirmed "that the Open Meetings Act and Public Records Act apply generally to the activities of the Reapportionment Board."[272] But in 1998, Article VI was amended so that the Board is no longer appointed solely by the Governor.[273] And in the 2001 redistricting challenge, the Court assumed that the Act continues to apply to the Board without actually reaching that question.[274] In a separate order, this court addressed these questions and determined that the Act does continue to apply to the Board,[275] which is now the law of the case.

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[267] AS 44.62.310(f).
[268] AS 44.62.312(b).
[269] 860 P.2d 1248, 1260-62 (Alaska 1993).
[270] *Id.* at 1262.
[271] *Id.*
[272] *Hickel v. Se. Conf.*, 846 P.2d 38, 57 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).
[273] *See* former Alaska Const. art. IV, § 8.
[274] *2001 Appeal I*, 44 P.3d 141, 147 (Alaska 2002).
[275] *See* Order re Motion for Rule of Law – Attorney Client Privilege (Jan. 18, 2022).

VII. PRACTICAL LIMITATIONS

In his opinion relating to the 2001 redistricting challenges, Judge Rindner aptly described the practical limitations inherent in redistricting in Alaska:

> In addition to the legal principles discussed, the court notes the practical problems connected with redistricting in Alaska. The Alaska Supreme Court, in virtually every redistricting case, has recognized the following general principles:
>
> At the outset we recognize the difficulty of creating districts of equal population while also conforming to the Alaska constitutional mandate that the districts 'be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area.'
>
> When Alaska's geographical, climatical, ethnic, cultural and socio-economic differences are contemplated the task assumes Herculean proportions commensurate with Alaska's enormous land area. The problems are multiplied by Alaska's sparse and widely scattered population and the relative inaccessibility of portions of the state...
>
> ...
>
> Despite the possibility of belaboring this opinion we feel obliged to set forth a few of the facts which make it difficult to fit Alaska's reapportionment plan into standards established for the 48 contiguous states which preceded it into the Union. Alaska has a total land area of 586,400 square miles-as large as the entire Louisiana Purchase, and one-fifth the total area of the continental United States. Its boundaries embrace four time zones. The state contains the highest mountain on the North American continent, glaciers that exceed the size of the State of Rhode Island, and a coastline longer than the total coastline along the remainder of the continental United States. Mountain ranges which equal or exceed the length and height of the Rockies divide Alaska into five relatively isolated regions which in turn are subdivided by river systems and other geographic factors such as broad expanses of frozen tundra challenging the most advanced roadway engineering.
>
> ...
>
> When confronted with conditions so different from those of any other single state in the continental United States, it is readily apparent that it becomes

well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states.[276]

The Board is also constrained by the limited time requirements set forth in the 1998 constitutional amendments. After receipt of the decennial census data reports, the Board is only given 90 days to complete its work.[277] Given this extraordinary time frame, there is a substantial burden placed on the individual board members and staff to complete the work. The Court's review of the challenges to the Board's processes must be considered in this context.

Finally, the Court also recognizes the work of this Board was complicated by the COVID-19 pandemic. In addition, the census data was received by the State much later than normal. In most years, the census data is received in the March or April. This cycle, the data was not received until August, placing the Board's 90-day time allotment through the fall instead.

Faced with the many obstacles and extraordinary timeframe imposed by Alaska's constitution, this Court wishes to emphasize the Board and its staff performed the usual "herculean task" of redistricting most admirably. Nothing in this order should be taken as a personal attack on any of the participants who all performed a great public service under extraordinary circumstances.

VIII. THE EAST ANCHORAGE CHALLENGES – Senate District K

A. Article VI Section 6

Plaintiffs argue that Senate District K violates the mandate in Article VI section 6 that senate districts be composed "as near as practicable of two contiguous house districts." Plaintiffs allege that in pairing South Muldoon and Eagle River Valley, which are two districts one cannot travel between without leaving the Senate district and are separated by a mountain range, the district is not contiguous "as nearly as practicable."

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[276] *In Re 2001 Redistricting Cases*, 2002 WL 34119573, at *20-21 (February 1, 2002).
[277] Alaska Const. art VI, § 10.

1. Law

Article VI section 6 provides, relative to Senate Districts, that, "[e]ach senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible."[278] The constitutional framers intended Senate districts to use geographic criterion rather than the socio-economic integration requirements set forth in Article VI, Section 6.[279] However, Senate districts must still be compact and contiguous.[280]

The Alaska Supreme Court has defined a "contiguous territory" as one which is bordering or touching.[281] The Court determined that "[a] district may be defined as contiguous if every part of the district is reachable form every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)."[282]

The Superior Court in *In re 2001 Redistricting Cases* considered a request to define contiguity to include the requirement that residents be able to cross the district using the existing transportation systems without leaving the district.[283] The court declined to adopt this definition, explaining that Alaska law does not support such a limited definition of contiguity, and emphasized that contiguity is a visual concept that assures *only* that no district contains discrete or unconnected parts.[284] To be sure, Black's law Dictionary defines "contiguous" as "touching at a point or along a boundary."[285] Likewise, Merriam-Webster defines "contiguous" as "being in actual contact, touching along a boundary or at a point."[286]

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[278] Alaska Const. art. VI § 6.
[279] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1365 (Alaska 1987).
[280] *Kenai* was decided prior to the 1998 Amendments which re-wrote section 6. However, the Supreme Court has not overruled the interpretation of "contiguous" in *Kenai* incorporating a measure of compactness.
[281] *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992).
[282] *Id.* (quoting Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L.Rev. 77, 84 (1985)).
[283] *In Re 2001 Redistricting Cases*, 2002 WL 34119573, at *39 (Alaska Super. Feb. 1, 2002).
[284] *Id.*
[285] *Contiguous*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[286] *Contiguous*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/contiguous (last visited Feb. 11, 2022).

2. *Analysis*

East Anchorage Plaintiffs explain that Senate District K is, practically speaking, "divided into two or more discrete pieces."[287] Plaintiffs lean on the law review article cited by the *Hickel* court in defining contiguity, which states that "there may be a dispute about contiguity if the only route between two places in the district is via roads which do not lie entirely within the district."[288] While this is not an unreasonable definition,[289] the Alaska Superior Court disagreed that such a definition should be applied in *In Re Redistricting Cases 2001*, and the Supreme Court declined to disrupt that determination on review.

Nonetheless, Plaintiffs argue that that Senate District K may be contiguous in the strictest interpretation of the word "contiguous," but is not "as contiguous as practicable," as required by Article VI Section 6. Plaintiffs also argue that Section 6 requires that "geographic features" and "drainage" be "used in describing boundaries wherever possible," but instead were ignored. Dr. Hensel did testify that the districts are separated by the Chugach mountain range, which is the principal impediment to traveling across Senate District K without leaving the district.[290] Further, Plaintiffs assert that South Muldoon and Eagle River Valley are located in separate drainages, and are even separated by a drainage.

However, the Board argues that it is unnecessary to go any further than ensuring that the house districts which are paired have boundaries that touch, particularly where both house districts exist within the Municipality of Anchorage.[291] Thus, the Board argues that two house districts that have boundaries which are physically touching and reside in the same borough are contiguous by law, and there is no need to discern whether pairing

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[287] *Hickel*, 846 P.2d at 45 (Alaska 1992) (quoting Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L.Rev. 77, 84 (1985)).
[288] Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L.Rev. 77, 84 n. 37 (1985).
[289] Elsewhere in this Opinion, the Court addresses a similar argument raised by Mat-Su and Valdez in the context of house districts. *See infra*. There, the Court rejected the argument that House District 29 was not contiguous because a driver leaving Valdez would need to travel through District 36 to get to the Mat-Su Borough.
[290] Affidavit of Chase Hensel, Ph.D. ¶ 24.
[291] Anchorage, which includes both East Anchorage and Eagle River, is socio-economically integrated by law. *In re 2001 Redistricting Cases*, 44 P.3d 141, 145 (Alaska 2002).

those two house districts was done "as nearly as practicably," because the house districts are, in fact, legally contiguous.

While it is apparent that Senate district K contains two house districts that are practically separated, the boundaries are in fact physically touching. No more is required. Moreover, the fact that South Muldoon and Eagle River are located in different drainages does not mean the districts are not contiguous. In context, the reference to "drainage and other geographic features" is not a constitutional limitation on contiguity. Instead, the plain language of section six indicates such geographic features shall be used where possible *in describing boundaries.*[292]

B. Article VI Section 10 – East Anchorage

Plaintiffs allege that the Board did not properly or timely present a proposed plan that included Senate pairings. Further, Plaintiffs contend that the Board never held hearings regarding any adopted senate pairings and underwent deliberations about Senate pairings in Executive Session away from the public view, immediately before voting to adopt new senate pairings that had not been presented to the public. East Anchorage argues that this reflects a "deliberate effort to postpone consideration of Senate pairings until after it decided on the contours of its finalized house districts."[293] As such, Plaintiffs ask this Court to void the Senate pairings that were adopted unconstitutionally and remand to the Board to adopt Senate pairings with a procedure that conforms with the Constitution.

East Anchorage alleges a violation of Article VI Section 10 of the Alaska Constitution. Section 10 provides that:

> Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the board has been appointed and the official

[292] Article VI, § 6 (emphasis added.)
[293] East Anchorage's Pretrial Brief at 12.

> reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.[294]

The *In Re 2001 Redistricting Cases* included a challenge under section 10 wherein Plaintiffs argued that the Board accepted late filed plans, failed to hold public hearings on those plans, and ultimately adopted one such late-filed plan, violating Article VI section 10 of the Alaska constitution.[295] The trial court determined that Article VI, Section 10 only requires that public hearings be held on the plan or plans adopted by the Board within the constitution's thirty day deadline.[296] The Board is under a very expedited constitutional timeline. Thus, the court reasoned that if the Board were required to continually hold public hearings on any significant modification it made in response to public comment, it may discourage the Board from making necessary modifications in response to public comment on the original plans. There may also be unnecessary deliberation over whether a modification was significant such that the Board was required to hold additional public hearings. However, the court also commented that the 2001 redistricting challenge to Article VI Section 10 did not contemplate a situation where the Board adopted a new plan radically different from the proposed plans, which itself was never subjected to public hearings.[297] On review, the Alaska Supreme Court found that such a Due Process challenge held no merit, and did not comment on the issue further.[298]

In this case, the Board did an exceptional job allowing for public comment in general. Throughout the process, the Board very regularly took public testimony, particularly regarding the house districts. The Board members even held off on a vote on proposed plans v.1 and v.2 in order to receive a final round of public comment first.[299]

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[294] Alaska Const. art. VI § 10(a).
[295] *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at *23-24 (Alaska Super. Feb. 1, 2002).
[296] *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at *23 (Alaska Super. Feb. 1, 2002) (Trial Order).
[297] *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at *24 n. 40 (Alaska Super. Feb. 1, 2002) (Trial Order).
[298] *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) ("We hold that plaintiffs' due process challenges to the board's development of the Proclamation plan have no merit.").
[299] Board Meeting Transcript 166:5-25, 167:1-17 (Sept. 9, 2021).

From September 27, 2021, through November 1, 2021, the Board traveled around Alaska on a "Public Hearing Tour" which the Board dubbed "The Roadshow" and visited 23 different locations around Alaska. It also held at least two "Statewide Dial-in" hearings to allow citizens to testify remotely.[300] Further, public testimony was taken at almost every hearing where substantive issues about house maps were considered and deliberated.

It does appear, however, that meaningful public testimony regarding Senate pairings was only taken once, on November 8, 2021.[301] The Court acknowledges that Senate pairings would have been difficult to comment on meaningfully with respect to the proposed maps. While the third-party proposed maps did include Senate districts, it is difficult for the Court to evaluate the ability for the public to truly comment on Senate pairings before the final house map was adopted, and none of the Board's own maps proposed senate pairings.

The conflict here is twofold. Initially, there is a question as to whether the Board's choice not to include Senate pairings in the plans adopted by the constitutional deadline violated Section 10. Second, the Court considers whether the Board's failure to hold hearings on the Senate pairings it proposed on the finalized house districts, namely on Member Marcum's proposed Senate Pairings, violated the constitutional requirement that the Board hold hearings on all proposed plan(s).

1. Strict Statutory Construction Favors Interpreting "proposed redistricting plans" to Include Both House and Senate Pairings

First, the Court considers the strict textual interpretation of Article VI, Section 10. When considering a question of constitutional law, the Court first consults the Alaska Constitution's plaint text "as clarified through its drafting history."[302] However, constitutional provisions are not to be interpreted in a vacuum, and any section of the Constitution must be considered in context.[303] Terms and phrases chosen by the framers

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[300] ARB 4416-4417, Alaska Redistricting Board Public Hearing Tour.
[301] Board Meeting Minutes at 1-4 (Nov. 8, 2021).
[302] *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020), *reh'g denied* (Feb. 5, 2021) (citing *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017); *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994)).
[303] *Forrer*, 471 P.3d at 585–86.

are given their ordinary meaning as they were understood at the time, and usage of those terms is presumed to be consistent throughout.[304] The Court should not add "missing terms" to a constitutional provision or "interpret existing constitutional language more broadly than intended by ... the voters."[305]

Article VI, Section 10 does not specifically describe what is to be included in a proposed redistricting plan. The Board understood this section to be "silent" on the issue and thus decided they had discretion to determine whether to include Senate pairings in the plans proposed by the Constitutional deadline.[306] However, as explained below, the Court disagrees and concludes that Article VI, Section 10 requires the Board to include Senate pairings in its proposed plans.

In addition to the plain text, the Court interprets a proposed redistricting plan in the context of the rest of the provision. While there exists no specific description of what a proposed redistricting plan entails, Section 10 does specify that a final plan is to "set out boundaries of house and senate districts." The Court interprets a "proposed plan" in the context of the description of a final plan. A proposed plan is thus a proposed final plan, and should likewise include both House and Senate districts. Nothing in the language of the texts suggests there should be any difference in the component parts of the plan.

Further, the final plan is to be "effective for the election of members of the legislature." Thus, redistricting has direct implications on both chambers of the legislature. It would be inconsistent with the definition of a final redistricting plan to hold that a proposed plan need only include proposals that implicate one chamber of Congress. The Court does recognize that, practically speaking, drawing house districts is a more time intensive and laborious task than selecting Senate pairings. Further, senate pairings are applied to existing house districts, and thus senate pairings could not realistically precede the creation of house districts. However, despite the practical realities, it is illogical to presume that one chamber would take precedence over the other. While Section 10 does

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[304] *Id.*
[305] *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017).
[306] Board Meeting Transcript 162:4-10 (Sept. 9, 2021). Given the lack of court direction on the matter, the Court does not agree with Plaintiff's allegation that this reflects bad faith or a deliberate effort to delay consideration until the very end of the process.

not specify that senate pairings must be included, it likewise does not specify that house pairings must be. The Court cannot interpret Section 10 to select a single chamber of the legislature to be included in the proposed redistricting plan. Once the final redistricting plan is effective, it implicates both the house and senate equally, and both must therefore be equally included in Section 10.

Also mandated by Section 10 are public hearings on the proposed plan. The Court does recognize that in this case, senate pairings were included in the third-party plans which were brought on the Public Hearings Tour. Yet, in the event that the Board chose not to adopt third-party plans, which it is not required to do, no Senate pairings would have been presented to the public during the public hearings process at all. It would frustrate the clear intent of Section 10's public hearings clause to interpret proposed plans in a way that would allow the Board to avoid holding public hearings on proposals for one of the two chambers of the legislature.

The Court understands that the proposed plan is, practically speaking, a draft. Public hearings in response to the draft are intended to allow for comment from which changes are expected to flow. However, there is a difference between a proposed plan with room for improvement and a partial or incomplete proposed plan. Where a final plan must include districts for both the House and Senate, a proposed plan that omits senate pairings is a partial plan that leaves out half of the legislature. That differs from a proposed plan that contains Senate pairings which are later altered in response to public comment.

Moreover, the Court is troubled by the notion that the proposed plan is simply to be completed in order to comply with the constitutional deadline, with the "real work" to be done after that point. The Court is deeply sympathetic to the highly expedited timeline imposed on the Redistricting Board. However, Constitutional mandates must be observed. Section 10 describes a singular "proposed plan." Multiple proposed plans are not the rule, but the consequence "if no single proposed plan is agreed on." While there is no defined constitutional limit as to how substantially a proposed plan may change once it is adopted as a proposal, it should be the intent of the Board to adopt a proposed plan which all members can agree on as a strong plan for the public to offer comments on.

Thus, any proposed plan should be as complete as is practicable, and accordingly should include proposals as to both chambers of the legislature.

Further, the Court is skeptical of the Board's argument that adoption of third-party plans can satisfy the constitutionally mandated process, particularly where the Board relies on third-party Senate proposals in responding to Plaintiffs' claims. Section 10 also specifies that proposed plans are plans "proposed by the Board." Technically, third-party plans were proposed by third parties and then adopted by the Board on motion. There is no indication that adopting third-party plans is improper, and they may be valuable to both the Board and the public. However, third-party plans should be supplemental, and should not provide the pillar upon which the Board rests its adherence to Constitutional mandates.

2. *Senate Pairings Must be Included as Plans Proposed by the Constitutional Deadline*

The plans adopted by the constitutional deadline, September 11, 2021, did not include any senate pairings.[307] Of the plans adopted as "proposed plans" for the public tour, all third-party plans, including AFFER,[308] AFFR,[309] Doyon, TCC, FNA, Sealaska, Ahtna,[310] and the Senate Minority Caucus[311] included proposed senate pairings along with proposed house districts. V.3[312] and V.4[313] as adopted did not include senate pairings.

Some of the third-party plans, adopted six days after the constitutional deadline, did include senate pairings. Further, the public had an opportunity to comment on all of the proposed plans during the Public Hearing Tour. Whether the Board was required under the Constitution to adopt senate pairings in addition to house pairings in the proposed plans appears to be an issue of first impression.

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[307] ARB 10708-10821.
[308] ARB 1232-1293.
[309] ARB 1294-1340.
[310] ARB 1435-1481.
[311] ARB 1482-1528.
[312] ARB 1341-1387.
[313] ARB 1388-1434.

In the Court's view, the Board's insistence that the third-party plans adopted after the deadline satisfy its obligation to provide for public hearings on the board's proposed plans is essentially an argument that "good enough" should satisfy the Constitution. But, *none* of the plans proposed and adopted by the board before the constitutional deadline contained any proposed senate pairings. And words have meaning. If the framers of the Constitution had intended 36 days to be good enough, then they would have said 36 days rather than 30 days.

This Court recognizes the public had an opportunity to comment on some third-party Senate pairings through the process, although none were proposed by the Board. The Senate pairing process is substantially more straightforward than the House map-drawing process.

On the other hand, the thirty-day deadline is intended to require the Board to receive and consider public comment in creating the full redistricting plan. To allow the Board to wait until the very end of the process to start senate pairings inevitably leads to the situation presented here – where the Board simply does not offer its proposed pairings for public comment. To the extent that the Board argues that Senate pairing proposals existed in the third-party maps, those maps were adopted after the constitutional deadline, did not necessarily have the same house districts, and did not provide the proposed pairings that East Anchorage challenges.[314]

Some Plaintiffs have argued the constitutional language means the public is guaranteed a full 60-day comment period. There is some support for this view in the legislative history. To be sure, the limited legislative history available shows that the primary concern was that proposals be available for public comment on the tour. In developing the Amended section 10 in 1998, Mr. Sourant, Legislative Assistant to

[314] There is some indication that the AFFER proposal contained Senate pairings that paired South Muldoon with Eagle River. On review, the AFFER proposal does contain a House district, District 20, which is similar to the Board's District 20 which represents South Muldoon. However, the district it is paired with, District 19, has two distinct differences, First, it does not contain the vast majority of the most densely populated portion of Eagle River, as the other Eagle River House District carves this section. Second, District 19 contains a large portion of North Muldoon. Practically speaking, the AFFER senate proposal does not sever the South Muldoon and pair it with Eagle River in the same way the Board's proposal does. *See* ARB 38, 39, 1236, 1250.

Representative Brian Porter, one of the sponsors of the bill, "explained that when the census data is released, the board will have 30 days to come up with a proposed plan, if they can all agree on one. If they can't agree on one plan, they can have alternative plans. Then, over the next 60 days after the first 30 days, there are public hearings around the state; and that is when the reapportionment board, by the end of that 60-day period, should agree upon its reapportionment plan and proclamation."[315] There was no significant discussion about the nuances of time for public comment, but rather that the public hearings are key to the process.

While there was a short period of time in this case between the thirty-day deadline (September 9) and the date when the Board adopted the maps that actually went on the tour (September 17), there were no Senate pairings included in any of the Board's versions. If the Board's v.4, which was ultimately adopted (with some revisions), had contained senate pairing proposals, there could be a different conclusion as to whether the opportunity for public comment complied with Article 10. However, the failure to include any Senate pairings in the initial proposed maps led to a complete breakdown in the process for senate pairings when none were proposed for public consideration. This breakdown, coupled with Board's decision to wait until November 8 to consider senate pairings, seems to have aided the ability to effectively spring the adoption of the Anchorage senate pairings not only on the public, but on certain members of the Board.

Because senate pairings must be offered in the "proposed plans" adopted within the constitutional deadline, the Board did not meet the requirements of Article VI, Section 10.

3. Failure to Hold Hearings on Proposed Senate Districts

East Anchorage also complains that the Board failed to hold public hearings on their senate pairings. In response, the Board argues the public did comment on possible senate pairings.

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[315] Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-11 Side A No. 0491 (Feb. 6, 1998) (statement of Jim Sourant, Legislative Assistant to Rep. Brian Porter).

Article VI Section 10 contemplates that the public is to be afforded a meaningful opportunity to comment on proposed plans. It is also clear that the Board is to make a concrete proposal for the public to comment on. Though the Board is certainly not required to continue to hold meetings on every single revision, in this case, there was no revision process evident in the Board's decision-making relative to the Senate. There was also no clarity as to which Senate pairings were actually contemplated. Nothing concrete was ever proposed to the public for its consideration.

The Board took public testimony on November 8 before actually proposing any senate pairings.[316] After receiving testimony, the Member Bahnke proposed Senate pairings,[317] and Member Marcum discussed several maps she drafted of senate pairings.[318] Once Chairman Binkley determined that there was a majority, it was unclear, even to the Board members, which pairings had majority support. Board member Borromeo expressed confusion about the multiple maps that Member Marcum had discussed and uncertainty as to which map had majority support.[319] It seems apparent to the Court that the majority was not on a particular set of Anchorage Senate pairings, but on the one consistency among Board Member Marcum's proposed maps – splitting Eagle River and pairing North Eagle River with JBER.

Thus, there was no opportunity for the public to comment on the Senate pairings that were actually proposed by the members of the Board. There was no evolution or revision of Senate pairings that lacked additional public comment. The public had no meaningful chance to comment on the Senate pairings proposed by any board member, and there is even a lack of clarity as to which Senate pairings were actually proposed before the final pairs were adopted.

The Board's choice not to hold public hearings on Senate pairings it actually proposed on the final house map, and the subsequent choice to effectively rush those proposals to a majority vote, frustrates the basic tenants of Section 10. As discussed

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[316] Board Meeting Minutes at 1 (Nov. 8-10, 2021), ARB 210.
[317] Board Meeting Transcript 164:20-173:9 (Nov. 8, 2021).
[318] Board Meeting Transcript 173:10-202:4 (Nov. 8, 2021).
[319] Board Meeting Transcript 202:10-205:4 (Nov. 8, 2021).

above, it would be absurd to conclude that the Board is not required to propose senate pairings by the deadline, leading to the possibility that it never proposes any, and then forces the pairings through at the last minute, as seems to have happened here. Yet, the Court acknowledges the tension between the need to have a meaningful opportunity to provide public comment, and the Board's need to complete the precursor house map. Without a nearly final house-map, it is understandably difficult for the Board to develop meaningful Senate pairings. But that practical tension does not absolve the board of its responsibility. Other than the Board's own timetable, there is no reason why the House map could not have been finalized two weeks before the deadline in order to allow meaningful time for public hearings on possible Senate pairings. It is not the Court's role to impose different deadlines. The deadlines are set by the Constitution. But, a meaningful process for public comment on the Senate pairings after the House map is finalized is required. Both the timeline and the policy enshrined in Section 10, that the Board have proposals to offer the public for comment, are frustrated where the Board, as it did here, is able to hide behind third-party senate proposals. Instead, it should be clear with the public about what pairings it is actually considering at the most meaningful point in the senate pairings process.

Consistent with this Court's conclusion that Board Members must make good-faith attempts to incorporate public testimony into the Board's final plan, the Board fell short of this requirement with regard to the Senate pairings. Considering the testimony that was submitted by the public that referenced Eagle River or East Anchorage being combined, both in reference to house and senate districts, the vast majority of both East Anchorage and Eagle River residents were strongly against splitting either region and combining one with the other.[320] While each Board member is an Alaskan with knowledge about the State and its regions in their own right, that fact does not give the Board the discretion to make

[320] *See e.g.*, September 7-9, 2021 Board Meeting Minutes, ARB000167-ARB00170; November 5, 2021 Board Meeting Minutes, ARB000202-205, 207; November 8, 2021 Board Meeting Minutes, ARB000211-ARB000212; November 4, 2021 letter from Anchorage Assembly Leadership, East Anchorage Plaintiffs ex. 6002; ARB 003202-ARB003203, ARB 1802-1803, 1808, 1817, 1819-1820, 1826-27, 1830-31, 1836, 1840-41, 1849-50, 1855, 1863, 1870, 1872, 1875-76, 1901, 1908-09, 1919, 1923, 1929, 1934-35, 1938, 1941, 1944, 1948, 1950-51, 1954-56, 1965-66, 1971-76, 1980, 1985, 1994-96, 1998, 2013-14, 2021-22, 2045, 2083, 2095-98, 2101, 2132, 2134, 2149, 2151, 2153-54, 2156, 2162, 2165, 2169-70, 2177, 2181-83, 2187, 2194, 2203, 2220, 2227, 2235-36, 2239.

decisions based on personal preference when that preference is directly contrary to the overwhelming majority of public testimony. The Board offered no reasons as to why it acted against public opinion, beyond personal feelings and preferences. Again, the Board must make a good-faith effort to incorporate the clear weight of public testimony. That was not done when the time finally came to address senate pairings.

The Court acknowledges there are situations, even among other Plaintiffs in these consolidated 2021 cases, where the Board was forced to make a decision contrary to the public testimony, and that decision is upheld. However, the Court also considers whether, in the face of public testimony, the Board has taken a "hard look" and made a good faith effort to incorporate public testimony into its decisions.[321]

Here, it was entirely possible for the Board to incorporate public testimony; however, it chose to ignore that testimony in favor of a strong personal preference by one board member. In fact, Member Bahnke presented a Senate map that adhered to the will expressed by the public, and her map was practically brushed aside for the proposed maps that did not.[322] This process did not comply with the requirement that the Board take a "hard look" at the issue in light of nearly universal public opinion from both Eagle River residents and East Anchorage residents insisting that Eagle River and East Anchorage be kept together in their own respective senate districts. It was clearly possible, and a minimal burden on the Board to do so.

Therefore, the Court concludes that the Board's Anchorage Senate pairings do not comply with the requirements of Article VI, Section 10.

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[321] As discussed elsewhere, this situation is in contrast to Valdez, where the Board made a good faith effort to district Valdez in accordance with public testimony, but the realities of mapping made the public's wishes difficult to honor without sacrificing other areas of Alaska to an arguably greater extent.
[322] Board Meeting Transcript 164:20 – 173:1, 202:5 – 205:21 (Nov. 8, 2021).

C. Equal Protection

1. Alaska's Equal Protection Law

East Anchorage Plaintiffs bring an Equal Protection claim under the Alaska Constitution. "In the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection."[323] These principles are 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."[324] The former is quantitative, or purely numerical, in nature; the latter is qualitative.[325]

Alaska's equal protection analysis is a balancing test,[326] which requires the Court to consider the weight of the interest impaired, which guides the determination of the standard of review,[327] and the purpose served by the act that is alleged to violate the Equal Protection clause.[328] The Supreme Court in *Kenai* has concluded that the right to an equally powerful and geographically effective vote in the state legislature represents a significant constitutional interest, though not a fundamental right.[329]

Alaska employs a sliding scale approach in determining the level of scrutiny to be applied.[330] This scale ranges from a relaxed level of scrutiny to strict scrutiny.[331] "Based on the nature of the right, a greater or lesser burden will be placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective. Where fundamental rights or suspect categories are involved, the results of this test will be essentially the same as requiring a 'compelling state interest'; but, by

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[323] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366 (Alaska 1987).
[324] *Id.* at 1365 (citing *Davis v. Bandemer*, 478 U.S. 109, 166-167, 106 S.Ct. 2797, 2828, 92 L.Ed.2d 85, 127-28 (1986) (Powell, J., dissenting)).
[325] *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska 1992) (citing *Kenai Peninsula Borough*, 743 P.2d at 1366-67).
[326] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1370 (Alaska 1987).
[327] *Id.* 1371.
[328] *Id.*
[329] *Id.* 1371-72.
[330] *State v. Ostrosky*, 667 P.2d 1184, 1192 (Alaska 1983)
[331] *Id.*

avoiding outright categorization of fundamental and nonfundamental rights, a more flexible, less result-oriented analysis may be made."[332]

In evaluating state equal protection claims where the interest in an equally powerful vote is involved, the Alaska Supreme Court in *Kenai* determined that the relevant inquiry is whether "the Board intentionally sought to dilute the voting power of Anchorage voters disproportionately."[333] If the Court determines that the Board created the challenged districts with discriminatory intent, the Board's "purpose in redistricting will be held illegitimate unless that redistricting effects a greater proportionality of representation."[334]

The Court employs a neutral factors test to assess the legitimacy of the Board's purpose in creating a Senate district.[335] The Board's purpose would be illegitimate if it diluted the power of certain voters "systematically by reducing their senate representation below their relative strength in the state's population."[336] In making this assessment, the Court looks to the Board's process in making its decision as well as the substance of the decision.[337] The Court will find suggestive of illegitimate purpose any secretive procedures employed by the Board, evidence of regional partisanship, and the existence of district boundaries which "meander and selectively ignore political subdivisions and communities of interest."[338]

Upon a finding of discriminatory intent, the Board's purpose is to be held illegitimate if the Board cannot show that any intentional discrimination leads to "a greater proportionality of representation."[339] In the event that the Court finds the Board's purpose to be illegitimate, it becomes unnecessary to evaluate whether a substantial relationship exists between the Board's means and ends.[340]

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[332] *Id.* at 1193 (citing *State v. Erickson,* 574 P.2d 1, 11–12 (Alaska 1978)).
[333] *Kenai Peninsula Borough*, 743 P.2d at 1372.
[334] *Id.*
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.*
[340] *Id.* at 1373 n. 40. ("[S]ince intentional geographic discrimination in reapportionment is justifiable only if

The Court does not "consider any effect of disproportionality de minimus when determining the legitimacy of the Board's purpose."[341] However, the Court may consider whether the degree of disproportionality is de minimus in determining relief.[342]

Plaintiffs in *Kenai* challenged the Board's decision to create Senate District E, which was explicitly crafted in order to prevent the creation of another Anchorage Senate seat.[343] The Court did not assess the Board's process as the Board's intent was discriminatory on its face in outright designing Senate seat E in order to prevent an additional Anchorage senate seat in the legislature.[344]

2. Analysis

The East Anchorage Plaintiffs argue the choice to split Eagle River and pair one Eagle River House district with Muldoon dilutes the voting power of the Muldoon voters and violates Alaska's Equal Protection Clause.

The interest impaired, like in *Kenai*, is the interest of voters in South Muldoon to have their votes protected from disproportionate dilution by the votes of Eagle River residents. This is a significant constitutional interest that, under Kenai, requires the Board to determine whether the Board intentionally discriminated with legitimate purpose.[345]

a) The Board's Purpose (Intent)

The Court now looks to the Board's purported purpose in pairing House District 21 (South Muldoon) with House District 22 (Eagle River Valley) to create Senate District K, and House District 23 (JBER) with House District 24 (North Eagle River/Chugiak) to create Senate District L. The East Anchorage Plaintiffs presented credible expert testimony from Dr. Chase Hensel, a respected local anthropologist. According to Dr.

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greater proportionality in geographic representation in the legislature will result therefrom, proof of a legitimate purpose will normally be synonymous with proof of a substantial relationship between the Board's means and ends . . . . [t]he last two parts of the test therefore merge.").

[341] *Id.*

[342] *Id.* at 1373.

[343] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1357, 1372 (Alaska 1987).

[344] *Id.* at 1372.

[345] *Kenai Peninsula Borough*, 743 P.2d at 1371-72.

Hensel the Muldoon community, comprised of House Districts 20 and 21, is a "community of interest".[346] Further, Eagle River, comprised of House Districts 22 and 24, is its own community of interest.[347] In crafting Senate Districts, the Board does not need to consider socio-economic integration, but it must still create Senate districts that are compact and contiguous.[348] Generally, this legal requirement was articulated to the Board by counsel to mean they must be made up of two house districts that are physically touching. To be sure, the boundaries of House District 21[349] and House District 22[350] are touching, but this itself does not mean that the Board did not create these districts with illegitimate purpose.

In determining whether the Board crafted the challenged senate seats with illegitimate purpose, the Court looks to whether there were secret procedures in the contemplation and adoption of these senate districts, whether there is evidence of partisanship, and whether the adopted senate boundaries selectively ignore political subdivisions and communities of interest.[351]

On September 9, 2021, the Board's counsel, Mr. Singer, was asked whether the Board's proposed plan was required to include Senate districts. Mr. Singer responded that the Constitution is "silent" on that issue, and advised the Board that it had discretion as to the timing.[352] Regarding the legal requirement for Senate pairings, Mr. Singer advised that Senate districts are to be made up of House districts that are contiguous,[353] and that Senators should "be able to walk across their districts."[354] Additionally, Singer noted that "Certainly you're going to hear from the public, and that – and that public input may be helpful to the board as it thinks about Senate pairings." Eric Sandberg recalled that in the last cycle, senate pairings were not made in the draft plans, but were made in

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[346] Affidavit of Dr. Chase Hensel, Ph.D. at 18 ¶ 73.
[347] Affidavit of Dr. Chase Hensel, Ph.D. at 18 ¶ 73.
[348] *Kenai Peninsula Borough*, 743 P.2d at 1365.
[349] 2021 Board Proclamation Anchorage (ARB 13).
[350] 2021 Board Proclamation District 23-L (ARB 41).
[351] *Kenai Peninsula Borough*, 743 P.2d at 1365 n. 21.
[352] Board Meeting Transcript 162:4-10 (Sept. 9, 2021).
[353] Board Meeting Transcript 164:2-12 (Sept. 9, 2021).
[354] Board Meeting Transcript 164:11-12 (Sept. 9, 2021)

the final plan. Binkley noted that it would be instructive to review the third-party plans that will be presented on September 17, 2021."[355]

Marcum testified that the Board members "would not have access to political data, that we would not have it on our computers, that we would not access it."[356] However, on November 7, 2021 at 6:47pm, the night before the scheduled Board meeting regarding senate pairings, Mr. Ruedrich emailed the Board at its designated email address as well as directly to Members Marcum and Simpson separately, incumbent information for each of the house districts.[357]

At the November 8, 2021 Board meeting, Board Staff member Juli Lucky informed the Board and Mr. Ruedrich that the incumbent information had been redacted from the email correspondence before its presentation to the Board and public. When asked about her receipt of the email, Marcum responded that she did not recall receiving the document on the night it was purportedly emailed but that it could have been provided to Board members in a compilation or at a later date.[358] Member Marcum testified that while she had access to incumbent information provided to the Board by Ruedrich, she "didn't bother looking at the incumbent information," and explained that such information was "irrelevant to the process that we were tasked with, and it just muddied the waters..."[359]

When the unredacted incumbent information document was presented to Marcum in her deposition, she claimed she did not know what the information on the document proposed and that she could "honestly say this is the first time that I have looked at any of the names that are on [the] document."[360] However, Marcum also admitted that she went to her computer to pull up the unredacted version of the incumbent information when speaking with member Simpson. When asked why she pulled up that version when Simpson was holding the redacted version, as opposed to just looking over Simpson's shoulder at that redacted version, Marcum responded, in part that she looked at it

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[355] September 7-9, 2021 Board Meeting Tr., ARB009985-ARB009988.
[356] Marcum Depo., p. 198, lines 1-21.
[357] Ruedrich Depo., p. 14:19-15:10; November 7, 2021 email correspondence from Ruedrich to Board, Ex. 6005.
[358] Marcum Depo., Ex. 11; Marcum Depo., p. 202, lines 7-25.
[359] Marcum Depo., Ex. 11; Marcum Depo., p. 200, lines 11-14.
[360] Marcum Depo., p. 206, lines 21-25; p. 207-211.

electronically because that is "her preferred way of reading."[361] In depositions, Marcum further confirmed she reviewed the unredacted materials sent by Ruedrich containing the incumbent information on November 8, 2021, during her conversation with Simpson during the senate pairing deliberations.[362]

On November 9, 2021, following public testimony on Senate pairings, Member Marcum presented her proposals for senate pairings after the Board took public testimony.[363] She noted, "And I will say that I started with one premise that I think is one of the most important premises that we have ignored throughout this process. . . . And that is the very natural both physical, as well as socioeconomic connection between JBER and Eagle River. . . . So that is the one thing that's common in all four of these maps."[364] In making this pairing, Board Member Marcum insisted that she began with what she defines as a "natural connection" between Eagle River and JBER.[365] Board Member Marcum, when asked by Board Member Bahnke about why she did not pair the two Eagle River House districts with each other, responded that "Eagle River has its own two separate House districts. *This actually gives Eagle River the opportunity to have more representation*, so they're certainly not going to be disenfranchised by this process."[366] Member Bahnke responded by asking, "So you're saying that by splitting Eagle River, they would have more representation?"[367]

Member Marcum continually insisted that she believed Eagle River has "the most direct socioeconomic ties with the military base of JBER."[368] In response, Member Borromeo stated that while those in Eagle River may frequent areas of East Anchorage, East Anchorage residents do not necessarily frequent Eagle River.[369] Following a

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[361] Marcum Depo., p. 217, lines 1-5.
[362] Marcum Depo. at 215:6-217:5.
[363] *See generally* Board Meeting Transcript 174:1-206:23 (Nov. 8, 2021).
[364] November 8, 2021 Board Meeting Tr., p. 174, ARB006670.
[365] Board Meeting Transcript 174:4-25, 175:1-6 (Nov. 8, 2021).
[366] Board Meeting Transcript 175:16-25, 176:1-10 (Nov. 8, 2021) (emphasis added).
[367] Board Meeting Transcript 176:13-15 (Nov. 8, 2021).
[368] Board Meeting Transcript 176:24-25, 177:1 (Nov. 8, 2021).
[369] Board Meeting Transcript 189:15-22 (Nov. 8, 2021).

suggestion by Board Member Marcum that there may be questions regarding a "race issue," Mr. Singer suggested such questions should be discussed in executive session.[370]

Simpson then responded to criticism from Bahnke and Borromeo against Marcum's pairings and defended Marcum's pairings stating, "Bethany has articulated a number of reasonable, logical connections in support of the pairings she's suggesting. Certainly they're not the only ones, and they are things about which reasonable people could differ . . . in the end we have to pick one or two or whatever and – make a decision. But I don't think it's right to say that there's no reasonable basis for those. There's reasons, and she's articulated them."[371] At his deposition, Simpson confirmed his opinion of what is "reasonable" is defined at least in part as "having a reason".[372]

In the midst of discussion, where several senate pairings that split Eagle River and split the Muldoon area were offered by Member Marcum, Chairman Binkley states, "So I get a sense that there's a majority of, not consensus for the plan that Bethany has brought forward. If that's the case, I think we should move on to the last one that we got, which is Fairbanks."[373] Members Borromeo and Bahnke then expressed confusion as to which specific plan he was referring to that had a consensus, inquiring as to why the Board was moving on without a consensus on Anchorage.[374] Chairman Binkley expressed that he had "heard it articulated from three of the members," including the Chairman, that they thought Member Marcum's map was "most reasonable."[375] The public was not given an opportunity to comment on these proposed pairings.[376]

Following other discussion regarding Fairbanks pairings and district numbering,[377] the Board entered an executive session for legal advice regarding the proposed Senate parings in Anchorage.[378] The Board exited Executive Session and entered recess at 6:25

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[370] Board Meeting Transcript 199:2-25, 200:1-25, 201:1 (Nov. 8, 2021).
[371] November 10 Board Meeting Tr. p. 201:4-18, ARB 6697.
[372] Simpson Depo., pp. 239:8-240:14.
[373] Board Meeting Transcript 202:5-9 (Nov. 8, 2021).
[374] Board Meeting Transcript 202:10-13, 204:7-9 (Nov. 9, 2021).
[375] Board Meeting Transcript 204:10-24 (Nov. 8, 2021).
[376] Board Meeting Minutes 1-6 (Nov. 8-10, 2021); ARB 210-215
[377] Board Meeting Transcript 206:3–214:14 (Nov. 8, 2021).
[378] Board Meeting Transcript 215:18-25, 216:1-13 (Nov. 8, 2021).

p.m., and explained that the Board would reenter Executive Session immediately the following morning at 9:00 a.m.[379]

On November 9, 2021, the Board entered Executive Session at 9:00 a.m. without a motion being made during public session.[380] Upon exiting executive session on November 9, 2021, Chairman Binkley began explaining that the Board was facing many legal issues, and Board Member Marcum appears to cut the Chairman off in requesting to speak. Member Marcum then immediately moves the Board to adopt specific Senate pairings:

> 1· · · · (Audio commenced at Time Stamp 1:33:55)
> 2· · · · CHAIRMAN JOHN BINKLEY: Okay. We are going to come
> 3· ·back into public session. We've been in Executive
> 4· ·Session, kind of an extended one. A lot of legal issues
> 5· ·to go through as we kind of close in on finalization for
> 6· ·the Senate pairings that we've been working on this week
> 7· ·and -- Yeah, Bethany?
> 8· · · · BOARD MEMBER BETHANY MARCUM: Yeah, Mr. Chairman,
> 9· ·I'd like to move that we accept the following Senate
> 10· ·pairings for Anchorage.
> . . .
> 22· · · · BOARD MEMBER BETHANY MARCUM: I move we accept
> 23· ·Senate pairings for Anchorage as follows: 9 -- District
> 24· ·9 with District 10. District 11 with District 12.
> 25· ·District 13 with District 14. District 15 with District
> 1· ·16. District 19 with District 20. Districts 23 with
> 2· ·District 17. Districts 18 with District 24. And
> 3· ·District 21 with District 22.[381]

The motion passed on a 3-2 vote, with Members Borromeo and Bahnke voting no.[382] Board Member Borromeo then moved to reconsider the vote, stating in discussion on the motion that she strongly opposed pairing the South Muldoon house district and the Eagle River Valley district, stating she believed that those Senate pairings:

> Open[] the Board up to an unfortunate and very easily winnable argument to partisan gerrymandering. The record is before many litigants . . . based on Member Marcum's own words yesterday that this gives Eagle River the

[379] Board Meeting Transcript 217:3-25, 218:1-12 (Nov. 8, 2021).
[380] Board Meeting Minutes at 6 (Nov. 8-10, 2021), ARB 215.
[381] Board Meeting Transcript 2:1-25, 3:1-3 (Nov. 9, 2021).
[382] Board Meeting Transcript 3:20-25, 4:1-10 (Nov. 9, 2021).

opportunity to – I quote – have more representation, so they're certainly not going to be disenfranchised by the process, unquote. I don't believe that any of the arguments that she put on the record, and more importantly, the sound – sound – legal advice that we got from counsel in Executive Session supports this pairing. It defies logic that we would do a minority reach into South Muldoon and pair it with a very right district eight miles away on a highway that crosses one mountain range and expect the court to believe with any satisfaction that we have satisfied public trust in the process. We have received mounds and mounds of testimony compared to a handful including Member Marcum's personal experience that Eagle River is very integrated with South Muldoon. The natural pairing, if she wanted to do Muldoon would be North Muldoon, but she couldn't get to North Muldoon, so she took South Muldoon --[383]

21· · · · CHAIRMAN JOHN BINKLEY: I would just --
22· · · · BOARD MEMBER NICOLE BORROMEO: -- I'm not done --
23· · · · CHAIRMAN JOHN BINKLEY: Yeah, but I don't think --
24· · · · BOARD MEMBER NICOLE BORROMEO: -- I am not done --
25· · · · CHAIRMAN JOHN BINKLEY: -- we should attack members
·1· ·personally --
·2· · · · BOARD MEMBER NICOLE BORROMEO: I am not. I am -- I
·3· ·am stating this on the record --
·4· · · · CHAIRMAN JOHN BINKLEY: -- and I think you should be
·5· ·very cautious about that --
·6· · · · BOARD MEMBER NICOLE BORROMEO: I am stating this on
·7· ·the record.
·8· · · · CHAIRMAN JOHN BINKLEY: -- I think you should be
·9· ·cautious about attacking --
10· · · · BOARD MEMBER NICOLE BORROMEO: -- I appreciate what
11· ·you're saying --
12· · · · CHAIRMAN JOHN BINKLEY: -- fellow members of the
13· ·Board.
14· · · · BOARD MEMBER NICOLE BORROMEO: -- I appreciate what
15· ·you're saying. I am going to finish though because this
16· ·is discussion --
17· · · · CHAIRMAN JOHN BINKLEY: Be careful. Please.
18· · · · BOARD MEMBER NICOLE BORROMEO: I am being careful.
19· ·And you know what? She should have been careful when she
20· ·exposed this Board --
21· · · · CHAIRMAN JOHN BINKLEY: Please --
22· · · · BOARD MEMBER NICOLE BORROMEO: -- to liability
23· ·yesterday. John.
24· · · · CHAIRMAN JOHN BINKLEY: Please, let's not make this
25· ·personal –
1· · · · BOARD MEMBER NICOLE BORROMEO: Stop it. Let me
·2· ·finish, and I'll wrap it up.

[383] Board Meeting Transcript 8:20-25, 9:1-20 (Nov. 9, 2021).

·3· · · · You have opened us up to a ton of legal liability,
·4· ·and I want that vote reconsidered because of -- it is
·5· ·partisan gerrymandering --[384]

Board Member Binkley then called the question to end discussion and proceed to vote on reconsideration as Board Member Bahnke expressed that she did not have a chance to offer her discussion on the motion.[385] After asking to be allowed to make a statement after the motion was voted on, Chairman Binkley determined that would be appropriate.[386] The motion to call the question passed 3-2, and the motion to reconsider went to a vote.[387] It appears a member of the public who was at the meeting in person attempted to speak and Chairman Binkley informed the public that the Board was not taking comments at that time.[388] The motion to reconsider failed, also 3-2 with Board Members Borromeo and Bahnke voting "yes."[389] Board Member Bahnke then stated:

> The action that was just taken came as a complete surprise to me. I thought we had achieved consensus. I will accept the outcome for now. I had offered a alternative to the map that was just adopted for the Senate pairings that kept Eagle River intact, kept Muldoon intact, eliminated questions around dilutions of minority voters' ability to elect somebody into office. It also had paired Government Hill with the military base. I won't go on and on and on. I will say that there are times when you just have to say, "the Emperor has no clothes," and I think today is one of those days. And while not necessarily silencing completely the voters in Muldoon, one of the lowest income, most racially diverse parts of our community and our state, this has the effect of muffling their voices. And I appreciate the chance to have been heard here, but what happened here came as a complete surprise. And I don't appreciate that.[390]

On November 10, 2021, after signing the Proclamation in opposition, Member Borromeo stated the following:

> I want to begin by reminding Alaskans here today and listening across the state what the goal of redistricting is as defined by the framers of our

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[384] Board Meeting Transcript 9:21-25, 10:1-25, 11:1-5 (Nov. 9, 2021); *see also* Board Meeting Video at 1:33:55 (Nov. 9, 2021) Filename JRDB-20211109-0900.
[385] Board Meeting Transcript 11:6-20 (Nov. 9, 2021).
[386] Board Meeting Transcript 12:7-13 (Nov. 9, 2021).
[387] Board Meeting Transcript 12:14-25, 13:1-6 (Nov. 9, 2021).
[388] Board Meeting Transcript 13:18-22 (Nov. 9, 2021); *see also* Board Meeting Video at 1:33:55 (Nov. 9, 2021) Filename JRDB-20211109-0900.
[389] Board Meeting Transcript 13:6-25, 14:1-16 (Nov. 9, 2021).
[390] Board Meeting Transcript 14:22-25, 15:1-14 (Nov. 9, 2021).

constitution and instructed by the Court in Hickel. The goal of all apportionment plans is simple: a true, just, and fair representation. Regretfully, the Board lost sight of this goal yesterday and in the process, we have failed Alaskans and we abused the public's trust and state government. Over the last 90 days, I've listened to Alaskans in 23 out of the 26 communities that the board held public hearings in. I would have been to all 26 communities; I had to come off the Redistricting Board, though, for about 36 hours and fly to Washington DC to testify in Senate judiciary about the importance of voting rights and the VRA for the Native community. When I came back together with the Board, we used the local knowledge and insights of Alaskans to draw a fair House map. I'm happy to report that the Board took the same approach early this week when it came to the Senate pairings. We abandoned that approach, though, for Eagle River and East Anchorage. When it comes to these pairings, I want to offer five legal and constitutional observations.

First, the most reasonable Senate pairing for Eagle River would have been to join House districts 22 and 24. These districts share the same streets, neighborhoods, businesses, schools, watersheds, and more, including electrical co-ops. Eagle River has also been trying to exit the Municipality of Anchorage for some time now. Second point, there is no populated area – not even a military gate – that connects Districts 24 and 23. The only way that this part of Eagle River, which is actually a majority of Chugiak, Birchwood, Peter Creek, and the Native Village of Eklutna, can even access the military base is to get through the other part of Eagle River located in District 22. Member Marcum failed to offer a compelling reason not to pair the two Eagle River districts or the two Muldoon districts, besides for her subjective belief that the board failed to consider pairing JBER and Eagle River into a single House seat. We did, we considered it, and we firmly rejected it on two grounds: compactness and public testimony. Moreover, there was limited – almost no debate or justification really – for drawing these Senate districts this way on the record, and I apologize to Alaskans for that.

It's also worth noting that the now paired South Muldoon and Eagle River, through Senate Seat K, do not have a single road connected meaning the residents in District 21 have to drive almost four miles down Muldoon Road through District 20 before even reaching the Glenn highway and then having to drive another twelve miles north before they can exit into Eagle River. This part of Muldoon (the southern part) is not a bustling hot bedded economic enterprise. It's almost entirely residential and for us to pull the wool over the state's eyes and believe that this part of Muldoon is traveling this far to shop, play, and recreate is absurd.

My fourth point is yesterday it was told to me that I had already "won too much" and now it was time that I step aside and I allow others to get some wins. This isn't about me as an individual, this is about fair maps for our state. I didn't win anything; Alaska lost. I presented and I defended fair maps that stand on their own merit because I put in the time and energy, and I

> can defend my maps and will defend my maps in the next round of litigation. I thank Member Bahnke for standing alongside and accepting natural pairings of these districts. And second, even if it's true – whatever that means – that I had already won too much, it's hardly a reason for rejecting the natural pairings of Eagle River as a Senate district and North and South Muldoon themselves as a Senate district.
>
> Finally, Member Marcum said that splitting Eagle River into two Senate seats would extend the electoral influence of the community resulting in "more representation" – I played that for you, and you're going to hear it for the next several months because everybody that sues us is going to play it over and over again, too. So, far from being compelling rationale, her observation exposes the board to claims of racial and partisan gerrymandering in North and South Muldoon which contains some of the highest minority voting age population concentrations in Anchorage, and one of the most diverse neighborhoods in our country. The publicly stated goal of expanding Eagle River's influence into the legislature is not only an example of partisan gerrymandering, it is a direct path for future litigants to take us on in suing us.
>
> In closing, I want to sincerely thank Alaskans from Utqiagvik to Ketchikan, for their time and attention to the solemn constitutional duty; particularly the scores of rural Alaskans who welcomed the board into their communities through the pandemic. The type of hospitality you've shown us is something that is only experienced in Bush Alaska, and I mean that. Members of the Board, the constitution demands fairness from us and nothing less. I remain dedicated to drawing fair maps with you in the next round. An unfairness of gerrymandering in even two Senate districts is not meeting our constitutional mandate. The federal vote dilution and numerous violations that have occurred in Eagle River and Muldoon over the past two days have prevented me today from signing the proclamation. I very much look forward to for being deposed by opposing counsel and I pray that litigation is swift and just.[391]

Bahnke stated the following on November 10, 2021, after signing the Final Proclamation in opposition:

> As I reflect on the process – it's been 15 months of us putting our heads together. In terms of the process, I think what we saw throughout the process, for example, I started mentioning the way that the board took action to end discussion and debate yesterday which I think, procedurally and technically, was contrary to Robert's Rules of Order and I'm not expert on Robert's Rules of Order, but I don't think that was unintentional because as a former legislator, you're very well versed in Robert's Rules of Order. I'm not going to challenge that. It is symbolic of the greater issue that is our end outcome. Our outcome has resulted in the silencing or muzzling or muffling – whatever term you want to use – a particular segment of Alaskan

[391] Board Meeting Transcript 16:18-21:1 (Nov. 10, 2021).

> voters. Again, throughout the process there was even at one point where the legitimacy of my authority to speak on behalf of Alaska Natives in my own district was at play and I've attempted to walk through this process in a manner that maintains decorum in order to get us moving along. I thought the ends would justify the means, so I put up with a lot in terms of where I felt I was being silenced. The process played out on a micro level of the silencing of a particular segment of our population. I was discouraged yesterday, but I'm actually encouraged today. Had we adopted Senate pairings that were just, that would have been a great victory for the state, but I think the greater victory that I see playing out here is that it is shining the light of the need for Alaskans to expect and deserve better from, not only our elected officials, but also our appointed officials. Alaskans are now witnessing, on a micro level, what is happening at a statewide level. We deserve better as Alaskans whether we're Republicans, Democrats, Independents, Undeclared, rural Alaskans, urban Alaskans, brown, black, yellow, white – at the end of the day we're all Alaskans and I'm not going to end on a discouraged note. If anything, this has bolstered, not just me – because this is happening to me on a micro level, - but I think that it is going to shed a bigger light and motivate people on a statewide level to expect fairness and uphold the tenants of our democracy.[392]

Borromeo testified that she did not believe the Board considered the best option – pairing the Eagle River house districts together – because Marcum did not present it as an option.[393] Further, the two Board members who wanted to discuss the non-Marcum options were precluded from doing so by Binkley, who did not allow for such discussion, or even any on Marcum's proposals.[394]

While the Court does not make this finding lightly, it does find evidence of secretive procedures evident in the Board's consideration and deliberation of the Anchorage Senate seat pairings. Initially, in contrast to the process to craft house seats, overwhelming public testimony against splitting and combining Eagle River and Muldoon seemed to be all together ignored.[395] The public portion of the record leads to only one

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[392] November 8-10, 2021 Board Meetings Minutes, ARB 220 – ARB 221; November 10, 2021 Board Meeting Tr. pp.21-23.
[393] Borromeo Depo., pp. 31:14-32:14.
[394] Borromeo Depo., pp. 32:15-21, 37:17-38:2.
[395] *See e.g.*, September 7-9, 2021 Board Meeting Minutes, ARB 167-ARB 170; November 5, 2021 Board Meeting Minutes, ARB 202-205, 207; November 8, 2021 Board Meeting Minutes, ARB 211- ARB 212; November 4, 2021 letter from Anchorage Assembly Leadership, East Anchorage Plaintiffs ex. 6002; ARB 003202-ARB003203, ARB 1802-1803, 1808, 1817, 1819-1820, 1826-27, 1830-31, 1836, 1840-41, 1849-50, 1855, 1863, 1870, 1872, 1875-76, 1901, 1908-09, 1919, 1923, 1929, 1934-35, 1938, 1941, 1944, 1948, 1950-51, 1954-56, 1965-66, 1971-76, 1980, 1985, 1994-96, 1998, 2013-14, 2021-22, 2045, 2083, 2095-98, 2101, 2132, 2134, 2149, 2151, 2153-54, 2156, 2162, 2165, 2169-70, 2177, 2181-83, 2187, 2194, 2203,

reasonable inference: some sort of coalition or at least a tacit understanding between Members Marcum, Simpson, and Binkley. All three appeared to agree on all four of Member Marcum's maps with little public discussion.[396] Most surprising was that at that time, it is unclear in the transcript, and was apparently also unclear to Member Borromeo, which of Member Marcum's maps the Board had apparently reached a majority on when the deliberative discussion was ended.[397] It seems that what the three Board Members had reached a majority was the only element of the map that was consistent between them: that Eagle River was split and North Eagle River was paired with JBER. That confusion is highlighted in the Chairman's choice to move on from Anchorage Senate pairings in the midst of deliberations to talk about Fairbanks to the surprise of Members Borromeo and Bahnke.[398] There was no further public deliberation regarding Anchorage Senate pairings after this point, yet three Board members, the only three Board Members who signed the final proclamation in support, seemed to at some point understand which set map of senate pairings to offer for adoption among the four.[399]

The Court finds this all the more suspect when the Board enters into an executive session for the remainder of November 8, and then for the morning of November 9, and upon reentering public session, Board Member Marcum moves the Board to accept particular pairings so immediately, she appeared to nearly interrupt Chairman Binkley as he opened the public meeting.[400] This evidences not only secretive procedures, but suggests that certain Board members came to some kind of consensus either during executive session, or altogether outside of the meeting processes. While the Court stops short of a finding that this happened, the Court does see ample evidence of secretive process at play. Further, where the Court is left with such an impression, it is undeniable that these actions have eroded the public trust in the fairness and openness of the redistricting process.

2220, 2227, 2235-36, 2239.
[396] Board Meeting Transcript 202:5-204:24 (Nov. 8, 2021).
[397] Board Meeting Transcript 202:5-205:21 (Nov. 8, 2021).
[398] Board Meeting Transcript 202:5-205:21 (Nov. 8, 2021).
[399] Board Meeting Minutes at 1 (Nov. 8-10, 2021), ARB 210; Board Meeting Transcript 201:4-18, 202:5-9, 204:18-25 (Nov. 8, 2021).
[400] Board Meeting Transcript 2:1-25, 3:1-3 (Nov. 9, 2021).

Quite illuminating as well are the statements of Board Members Borromeo and Bahnke following the vote to adopt the Anchorage Senate pairings. Both members express surprise and/or outrage at the decision to adopt the Anchorage Senate pairings, as they were adopted so immediately after executive session. In particular, both members specifically took issue with the decision to split Eagle River into two Senate seats, and pair one of them with South Muldoon. Both members went as far as to call it "naked gerrymandering" and highlighted the contrast between the process that led up to the Board adopting the Senate pairings and the process the Board adhered to in adopting the remainder of the House and Senate maps.

The Court also expresses serious concern about any conversation about who "won" or lost.[401] The framers of the 1998 amendments to Article VI intended that partisanship be removed from the Redistricting process to the extent possible.[402] This process is not to concern "wins" and "losses" for particular political parties, but creating a redistricting map to the extent that is fair and treats all Alaskans equally. The Board seems to have articulated its understanding of this in the public sessions, but there are indications that there were times where the Board engaged in partisan decision making behind closed doors. To the extent that this may have happened, it is not acceptable.

While justification for pairing North Eagle River and JBER was strongly contested by other Board members, there was some justification provided for uniting Districts 24 and 23.[403] However, there is no real justification on the record that explains why the Muldoon community of interest was split and partially paired with Eagle River beyond the fact that their borders are contiguous and Eagle River residents travel to Muldoon,[404] though Muldoon residents do not regularly travel to Eagle River.[405] The Court is left with the impression that, where the North Eagle River/JBER pairing was deliberated and at

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[401] Board Meeting Transcript 19:3-17 (Nov. 10, 2021).
[402] Minutes, H. Judiciary Comm. Hearing on H.J.R. 36, 20th Leg., Tape 97-76 Side A No. 1874 (May 5, 1997) (statement of Rep. Brian Porter) ("I would think that it would be appropriate to try to get a procedure to put in place a board that would look at redistricting from a position of what is the most appropriate – under the law – district to put in place for the betterment of the voters of the state of Alaska, instead of, 'How much partisan gerrymandering can we do and get away with?").
[403] Board Meeting Transcript 174:4-25, 175:1-6, 181:19-25, 182:1-14 (Nov. 8, 2021).
[404] Board Meeting Transcript 187:19-25, 188:1-25, 189:1-12 (Nov. 8, 2021).
[405] Board Meeting Transcript 189:15-22 (Nov. 8, 2021); Affidavit of Dr. Chase Hensel, Ph.D. at 5 ¶¶25-26.

least explained, the Eagle River Valley/South Muldoon was ultimately a down-the-road consequence of the North Eagle River and JBER pairing. How intentional that particular pairing was is unclear. Though Ms. Borromeo makes another illuminating statement that in apparently deliberating a North Eagle River senate pairing outside of public session, it was recognized that it was not possible to "get to North Muldoon," so instead South Muldoon was paired.[406] This also implicates secretive procedures in making that pairing. Further, despite Board Member Marcum's arguments to the contrary, it is clear to the Court that the vast majority of public commenters were in favor of keeping Eagle River and Muldoon, both communities of interest, together in their own respective Senate seats.[407]

While Member Marcum provided justification, partially her own personal statements, as to how Eagle River residents frequent the Muldoon area,[408] Board Member Borromeo's comment supported by Dr. Hensel's testimony that this connection does not exist going the other way is well taken. There is ample public comment, as well as testimony during trial, that Eagle River and Muldoon are respective "communities of interest," with little convincing information to the contrary. The Court sees that the Senate Districts ignore the Muldoon and Eagle River communities of interest with very little justification.

The record also provides evidence of regional partisanship. Dr. Hensel testified that South Muldoon is a swing district, though it does lean Republican, while Eagle River is firmly Republican.[409] This usurps South Muldoon's voting strength in the event it chooses to elect a Democratic senator.[410] As clarified at trial, South Muldoon can also

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[406] Board Meeting Transcript 8:20-25, 9:1-20.
[407] *See e.g.*, September 7-9, 2021 Board Meeting Minutes, ARB 167-AR 170; November 5, 2021 Board Meeting Minutes, ARB000202-205, 207; November 8, 2021 Board Meeting Minutes, ARB 211- ARB 212; November 4, 2021 letter from Anchorage Assembly Leadership, East Anchorage Plaintiffs ex. 6002; ARB 003202-ARB003203, ARB 1802-1803, 1808, 1817, 1819-1820, 1826-27, 1830-31, 1836, 1840-41, 1849-50, 1855, 1863, 1870, 1872, 1875-76, 1901, 1908-09, 1919, 1923, 1929, 1934-35, 1938, 1941, 1944, 1948, 1950-51, 1954-56, 1965-66, 1971-76, 1980, 1985, 1994-96, 1998, 2013-14, 2021-22, 2045, 2083, 2095-98, 2101, 2132, 2134, 2149, 2151, 2153-54, 2156, 2162, 2165, 2169-70, 2177, 2181-83, 2187, 2194, 2203, 2220, 2227, 2235-36, 2239.
[408] Board Meeting Minutes 181:19-25, 182:1-14, 198:13-200:23 (Nov. 8, 2021).
[409] Affidavit of Dr. Chase Hensel, Ph.D. ¶¶ 70-71; Trial Transcript 59:19-23 (Jan. 21, 2022).
[410] Affidavit of Dr. Chase Hensel, Ph.D. ¶¶ 70-72, 74.

be seen as a "highly competitive" district.[411] However, according to the evidence in the record, there would be no competition in the election of its senate seat.[412] Further, Member Marcum stated on the record that doing so would give Eagle River "more representation."[413] Thus, it is apparent the Board understood the practical result of splitting Eagle River into two Senate districts.

This Court agrees with Ms. Marcum that Senate District K gives Eagle River more representation. However, it appears to also have the converse impact, of diluting representation in East Anchorage. There was testimony submitted that spoke directly to that impact, where one resident expressed that the last time the Board paired a portion of East Anchorage with Eagle River "it took Senator Bettye Davis from us and from having a voice."[414] Where the Board argues that the current senate pairings actually spreads Muldoon among more Senate districts, giving it more Senate seats, that argument falls flat in the face of the reality. Instead, it seems Muldoon is actually cracked among multiple senate districts and its voting strength is diluted as a result. At the same time, Eagle River's voting strength is strengthened. Pairing South Muldoon with the Eagle River Valley will solidify Senate Seat K as a firmly Republican seat, while providing more representation to Eagle River in splitting it into two Senate seats.[415]

The Board's process in selecting these Senate seats is unlike the process with regard to the rest of the senate and house maps in its disregard for the vast majority of public testimony, its actions in cutting off discussion,[416] and its lack of clarity as to what pairings it was apparently planning on adopting.[417] Further, in substance, Senate District K pairs two districts, that, while contiguous in the strict definition of the word, ignore the communities of interest in Eagle River and Muldoon. While there may be some interaction between the communities, the evidence in the record makes clear that any interaction

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[411] Trial Transcript 89:2-4 (Jan. 21, 2022).
[412] Affidavit of Dr. Chase Hensel, Ph.D. ¶¶ 70-72, 74.
[413] Board Meeting Transcript 175:16-25, 176:1-10 (Nov. 8, 2021).
[414] ARB 2479.
[415] Affidavit of Dr. Chase Hensel, Ph.D. ¶¶ 70-72, 74.
[416] Board Meeting Transcript 202:5-206:21 (Nov. 8, 2021); *see also* Board Meeting Transcript 21:6-22 (Nov. 10, 2021).
[417] Board Meeting Transcript 202:5-205:21 (Nov. 8, 2021).

includes only Eagle River residents driving into or through Muldoon, with Muldoon residents having no regular travel to or interaction with Eagle River.[418]

Given substantial evidence of secretive procedures, regional partisanship, and selective ignorance of political subdivisions and communities of interest, Court finds that the Board intentionally discriminated against residents of East Anchorage in favor of Eagle River, and this intentional discrimination had an illegitimate purpose. The Court now looks to the record to determine the Board's justification, and whether the Board's intentional discrimination led to more proportional representation.

b) Representation

Unlike in *Kenai*, where the challenged Senate seat was justified as a natural consequence of pairing other House districts in order to comply with the VRA, no such justification has been put forth here, either in the Board's deliberations or in response to the Equal Protection claim. The justification provided was that Board Member Marcum felt strongly that North Eagle River and JBER should be paired, citing minimal public testimony that attested to links between North Eagle River and JBER.[419] While the Court understands this argument, it also evaluates it in the face of overwhelming public testimony to the contrary, and given that some justification involved misconstruing public testimony that was very clearly against an Eagle River/JBER pairing.[420] Despite arguments in favor of pairing Eagle River and JBER, it was not necessary under the VRA, the constitution, or any other law, to pair North Eagle River and JBER.

Turning to proportionality, Eagle River Valley and North Eagle River/Chugiak are both underrepresented by -1.65% and -0.71% respectively.[421] South Muldoon is

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[418] Board Meeting Transcript 189:15-22 (Nov. 8, 2021); Affidavit of Dr. Chase Hensel, Ph.D. ¶¶25-26.
[419] Board Meeting Transcript 181:19-25, 182:1-14, 198:13-200:23 (Nov. 8, 2021).
[420] In her affidavit testimony, Major Wilson states that she testified to the Board regarding senate pairings and her belief that Eagle River house districts should be paired together into a single senate district. However, member Marcum took her comments out of context and "misconstrued the words of [Wilson's] testimony to misrepresent it as in favor of pairing Eagle River house districts with JBER or Northeast Anchorage districts." Wilson testified that "[t]here was no opportunity for the public to rectify this misrepresentation of [her] testimony, nor to give further comment on the senate pairings as selected by the Board." Affidavit of Felicia Wilson at ¶¶ 19, 21, 24-25, 27.
[421] ARB 117.

underrepresented by -1.70%.[422] Pairing Eagle River Valley with South Muldoon creates an average deviation of -1.68%, whereas pairing both Eagle River districts creates an average deviation of -1.18%. Thus, the Board's choice to pair Eagle River Valley with South Muldoon does not lead to more proportional representation.

District	All persons	Target	Deviation	Difference	Average
Senate District Pairings in 2021 Proclamation Plan					
South Muldoon -K- 21	18,023	18,335	-1.70%	-312	-307.5 -1.68%
Eagle River Valley -K- 22	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 as Advocated by Plaintiffs					
North Muldoon -J- 20	18,203	18,335	-0.72%	-132	-222 -1.21%
South Muldoon -K- 21	18,023	18,335	-1.70%	-312	
Eagle River Valley -K- 22	18,032	18,335	-1.65%	-303	-216.5 -1.18%
North Eagle River/Chugiak - L- 24	18,205	18,335	-0.71%	-130	

As the Eagle River Valley and South Muldoon pairing were made with illegitimate purpose, and do not lead to more proportional representation, Senate District K violates Alaska's Equal Protection Clause and thus is unconstitutional.

3. Remedy

The Court in *Kenai* determined that the Court may consider any effect of disproportionality *de minimus* in determining the appropriate relief to be granted.

[422] ARB 117.

Pairing Eagle River Valley with South Muldoon creates a Senate District that is underrepresented by 1.68%. An Eagle River senate district would be less underrepresented, at -1.18%, a difference of -0.50%. These deviations are even smaller than the *de minimus* deviations in *Kenai*. As such, the effect of disproportionality here is *de minimus*. Yet, this Court does not feel that, on the facts of this case, which are distinct from *Kenai*, the same declaratory relief is warranted. In *Kenai*, the Board expressed that it explicitly discriminated against Anchorage voters in order to "retain the balance between regional and Anchorage senate representation."[423] This purpose, while ultimately illegitimate, lacked the secretive processes and discrimination against the communities of interest and political areas apparent in this case.

Justice Compton was particularly concerned for the potential future harm to the redistricting process that the majority's *de minimus* exception would cause.

> Although we are willing to "declare" Senate District E unconstitutional, we refuse to grant affirmative relief[1] because the effect of disproportionality is de minimus. . . .If indeed the harm in this case is de minimus then we should have declined to reach the constitutional issue in the first place. However, after having articulated the Alaska constitutional standard the court should not now be heard to say that it is not going to do anything about it.
>
> The court reaches the incredible conclusion that a mere "declaration" of illegitimate purpose is an adequate remedy. Such a declaration is no remedy at all. The United States Supreme Court has stated: "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." Merely opining that Senate District E is unconstitutional is no guarantee that a reapportionment board will "scrupulously observe" the mandate of the Alaska constitution in the future. If there is no sanction for engaging in an unlawful process, a board can continue to do so risking only the inconvenience and expense of defending another declaratory suit. Accordingly, awarding only declaratory relief may encourage a board to cut corners when by so doing it can further illegal goals at little or no risk.[424]

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[423] *Kenai Peninsula Borough*, 743 P.2d at 1372.
[424] *Kenai Peninsula Borough*, 743 P.2d at 1374–75 (Compton, J dissenting) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

The Court in *Kenai* did not undergo an assessment of the totality of the circumstances, as the Board's discrimination was explicitly stated and explained. Here, the discrimination was the result of procedures that are suggestive of underlying political motives and evidence a concerted effort to push a pairing through that split the Eagle River house districts into two senate districts amidst staunch pushback from a minority of Board members and the vast majority of public comment. Declaratory relief in this case would not be appropriate, as the injury here is the dilution of voters in East Anchorage. Thus, the Anchorage Senate Pairings should be remanded to the Board to craft a pairing that complies with Alaska's Equal Protection Clause.

IX. THE HOUSE DISTRICT CHALLENGES

A. Mat-Su and Valdez Districts 29, 30 and 36

Both Mat-su and Valdez challenge the Board's proposed Districts 29 and 36. In addition, Mat-su challenges District 30. These challenges are interrelated, and will be considered together.

1. Article VI, Section 6 Challenges

As an initial matter, the Alaska Supreme Court has established the following order of priority relating to redistricting under Article VI, section 6: (1) contiguous and compactness; (2) relative socioeconomic integration; (3) consideration of local government boundaries; and (4) use of drainage and other geographic boundaries.[425]

a) District 29

1) Is District 29 Contiguous?

Contiguous territory is "territory which is bordering or touching."[426] The court in *Hickel* noted that "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e. the district is

[425] *Hickel*, 846 P.2d at 62 (order of remand directing priority); *see* also *In Re 2001 Redistricting Cases*, 44 P.3d 141, 143 n2 (Alaska 2002) (following the same order of priority after the 1998 amendments).
[426] *Hickel*, 846 P.2d at 45.

not divided into two or more discrete pieces."[427] But, contiguity is not absolute in Alaska because of its numerous archipelagos.[428]

Here, it is undisputed that District 29 is a single land mass in which all portions of the district are "bordering or touching" another portion, and "the district is not divided into two or more discrete pieces."[429] The Mat-Su and Valdez argue the district is not contiguous because a person would have to cross out of District 29 and into District 36 in order to drive from one side of the district to the other (for example from Valdez to Palmer or vice versa).[430] That argument draws some support from the language of *Hickel* quoted above. But in *Hickel*, the only argument about contiguity was actually raised by the Court on its own because the Board separated the Aleutian Islands into two districts. The Court held that severing the islands into that manner violated the contiguity requirement of Article IV, section 6.[431]

Mat-Su and Valdez essentially argue there must be "transportation contiguity" within a district.[432] This argument was specifically rejected when Valdez raised it in an earlier redistricting cycle. As the Superior Court explained in the 2001 redistricting litigation,

> Both the Valdez plaintiffs and the Fairbanks North Star Borough urge this court to adopt a definition of contiguity such that a district could be found not to be contiguous if existing transportation systems required residents of the district to cross other districts in order to transverse the district in question. There is no support under Alaska law for such a definition of contiguity and this court rejects this approach. Contiguity is not dependent on the vagaries of existing transportation systems. Rather, the concept is a

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[427] *Id.*
[428] *Id.*
[429] *Hickel*, 846 P.2d at 45 (Alaska 1992) (citation omitted).
[430] Mat-Su argues that District 29 is not contiguous with Valdez because of the way the Board drew the land area for District 29 south, or below, the portion of the Glenn Highway. That section of the Glenn runs approximately from Nelchina to Glennallen and south/southwest or below the portion of the Richardson highway that runs from Glennallen to a road in the area south of Tonsina described as 8-APL-2 Road. As a result, Mat-Su says it is not joined with Valdez by the road system. Affidavit of Steve Colligan at ¶¶ 48, 51.
[431] *Hickel*, 846 P.2d at 54.
[432] *See, e.g.*, Jan. 24 Trial Tr. 381:23-388:21.

visual one designed to assure that no district contains two or more discrete or unconnected parts.[433]

This Court agrees with Judge Rindner's analysis. 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.

2) Is District 29 Compact?

District 29 encompasses the eastern side of the Mat-Su Borough. It picks up the predominately residential area between Wasilla and Palmer to the north of Bogard Rd, and then extends eastward to gather in Valdez along the Glenn Highway, it gathers in several communities, including Sutton, Chickaloon, Glacier View, and Eureka before the Glenn crosses into District 36. District 29 then turns south near Glenallen and follows along to the west side of the Richardson Highway to Valdez. In so doing, District 29 excludes several Glenn Highway communities (Nelchina, Mendeltna, Tolsona,) and Richardson Highway communities (Glenallen, Tazlina, Copper Center, Kenny Lake, Tonsina). However, none of these Glenn or Richardson Highway communities are located in the Mat-su Borough.

The Alaska Supreme Court has held that "corridors of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement" and "appendages attached to otherwise compact areas may violate the requirement of compact districting."[434] The compactness requirement should not result in "bizarre designs" for districts.

There is a small appendage between Districts 29 and 36 along the Glenn Highway. Nonetheless, it does not appear "bizarre." There is also a large swath of land between Valdez and Sutton.[435] Valdez and Mat-su also challenge the district's compactness

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[433] *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at *59 (Alaska Super. Feb. 01, 2002), *aff'd in relevant part*, 44 P.3d 141, 143 (Alaska 2002).
[434] *Hickel*, 846 P.2d at 45-46.
[435] Affidavit of Steve Colligan at ¶ 51.

because it contains a large unpassable area of mountains, ice fields, and glaciers.[436] Valdez notes the Board has paired population centers separated by over 240 road miles and the Chugach mountain range. It is true that most of District 29 is made up almost entirely of urban areas – Wasilla, Palmer and Valdez. Together, these communities make up more than 97% of the population of District 29, but account for 5.84% of the land mass.[437] The remaining 2.57% of District 29's population is spread over 94% of the land mass. In addition, Valdez notes it is separated from the Palmer-Wasilla population centers by more than 200 miles of roadway. But these features of District 29 are the very nature of Alaska's natural landscape. Further, many of the districts in this and earlier redistricting cycles have been composed of similar stretches of open space.

Members of the Board testified that they used an "eye test" to determine compactness, rather than objectively measuring the districts.[438] Viewed in this manner, the Court cannot say that District 29 lacks for compactness. In this Court's view, District 29's shape is the natural result of Alaska's landscape and irregular features. It is relatively compact for purposes of Article VI, section 6.

3) Is District 29 Socio-Economic Integrated?

Most of the presentation at trial both by Valdez and Mat-Su focused on whether Valdez is sufficiently integrated with the Mat-Su Borough. The court in *Hickel* noted that "[i]n addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote."[439] Looking back to the constitutional Convention, the Court defined an integrated socio-economic unit as "an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio- economic, following if possible, similar economic

[436] Affidavit of Steve Colligan at ¶ 51.
[437] Affidavit of Kimball Brace at ¶ 99.
[438] In past Redistricting cases, it appears the Board had considered various mathematical tests to determine compactness of the area, but no evidence was presented at trial suggesting that this board ever engaged in that process.
[439] *Hickel*, 846 P.2d at 46.

pursuits."[440] Therefore, to satisfy this portion of the constitutional requirement, there has to be "sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction, and interconnectedness rather than mere homogeneity."[441]

Election districts were intended to be composed of economically and socially interactive people in a common geographic region.[442] The Alaska Supreme court has identified several characteristics of socio-economic integration in redistricting. These include geographic proximity, shared transportation ties or linkage by road, ferry or scheduled air service, a common major economic activity, shared recreational and commercial fishing areas.[443]

The term "relatively" is included to suggest the court will "compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient."[444] The term "relatively" does not mean "minimally," nor does its use intend to weaken the constitutional requirement of integration.[445] However, the Alaska Supreme Court has also noted this requirement is permitted "some flexibility by the constitution since districts need be integrated only 'as nearly as practicable.'"[446] But, "the flexibility that this clause provides should be used only to maximize the other constitutional requirements of contiguity and compactness."[447]

The Board apparently recognized the difficulty in placing Valdez early in the process. Indeed, the decision where to place Valdez has been hotly debated in earlier redistricting cases.[448] The initial proposed drafts adopted by the Board both placed Valdez

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[440] *Id.* at 46 (citing *Kenai Peninsula Borough*, 743 P.2d at 1360, n.11) (internal citation omitted).
[441] *Hickel*, 846 P.2d at 46 (citing *Kenai Peninsula Borough*, 743 P.2d at 1363).
[442] *Carpenter*, 667 P.2d at 1215.
[443] *Hickel*, 446 P.2d at 46; *Carpenter,* 667 P.2d at 1215; *Kenai Peninsula Borough*, 743 P.2d at 1362-63; *Groh*, 526 P.2d at 879.
[444] *Hickel*, 846 P.2d at 47.
[445] *Id.*
[446] *Hickel*, 846 P.2d at 45, n.10.
[447] *Hickel*, 846 P.2d at 45, n.10.
[448] In re 2001 Redistricting Cases, 2002 WL 34119573, at *46 (Superior Court Decision, Feb. 1, 2002).

in a district similar to the 2001 and 2011 districts which followed along the Richardson Highway.[449] This is also the district preferred by Valdez.

Public testimony strongly supported keeping Valdez in its traditional corridor. Indeed, there was no public testimony from either the Valdez side or the Mat-Su side which favored placement of Valdez with the communities of Palmer and Wasilla. Instead, it appears the Board found itself with essentially nowhere else to turn. But simply because Valdez is unique and difficult to place does mean that it cannot be done.

Asked to describe the socio-economic connections between Valdez and the Mat-Su, board members described the highway transportation between Valdez, the proximity of the Mat-Su Regional Hospital (as opposed to the Fairbanks Memorial Hospital), the similar funding for schools, some interaction by Valdez sports teams, and some overlap in "oil workers." By contrast, witnesses from Valdez and the Mat-Su consistently described the significant differences between the communities. Valdez is a coastal community; the cities of Palmer and Wasilla are not. While there is a road connecting Valdez to the Mat-Su Borough, the testimony was uniform that the Mat-Su is not a "destination" for Valdez residents; it is little more than a pass-through. Similarly, Mat-Su residents are rarely, if ever destined for Valdez. The two communities do not share common workers, even if both have a connection to the oil industry. Valdez is the terminus of the Trans-Alaska Pipeline. The vast majority of its funding comes from taxes it receives on the pipeline infrastructure. Valdez residents may work in the Terminal or along the pipeline itself. Mat-Su has oil field workers who reside there, but they commute to the North Slope. Valdez' other main economic staple involves commercial fishing. By contrast, Mat-Su residents may be involved in sport fishing. There are no regular commercial flights to the Mat-Su from Valdez.

The evidence establishes that Valdez has greater socio-economic links with Fairbanks and Anchorage than it does with Palmer or Wasilla in the Matanuska-Susitna Borough. Similarly, Valdez has greater links with other communities in Prince William

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[449] *Compare* ARB 47 (2021 Proclamation, District 29) *with* ARB 1590 (2013 Proclamation, District 9) *and with* Scheidt Aff. Ex. C at 2 (2002 Proclamation, District 12).

Sound such as Cordova than it does with Palmer or Wasilla. The testimony of the Valdez witnesses establishes that utility services for Valdez are generally oriented to communities along the Richardson Highway rather than down the Glenn to Palmer and Wasilla. Shipments into and out of the Port of Valdez, are primarily oriented towards the Richardson Highway and Fairbanks. By contrast, Palmer and Wasilla are oriented towards Anchorage. Marine transportation and commercial fishing activities are oriented towards Prince William Sound communities. Valdez residents clearly do not consider themselves oriented in their socio-economic relationships with Palmer and Wasilla, and neither do the witnesses from the Mat-Su Borough.

The Board points out that Valdez and Mat-Su are essentially arguing that Valdez is *more* socio-economically integrated with the Richardson Highway corridor or with the other communities of Prince William Sound than with the Mat-Su Borough. Neither the Board nor the Intervenor-Defendants challenge the basic premise that Valdez is socio-economically integrated with both the Richardson Highway and Prince William Sound. However, Alaska law is abundantly clear that no community is entitled to be districted with the communities it is *most* closely linked to: the Alaska Constitution requires the Board to create districts that are "relatively" socio-economically integrated in light of the other constitutional factors and balancing the needs of the whole state.[450] Specifically, courts will find a district unconstitutionally lacking in relative socio-economic integration if "[t]he record is simply devoid of significant social and economic interaction among the communities within an election district."[451]

Mat-Su and Valdez argue that Valdez does not share socio-economic ties to the Mat-Su Borough. However, the record, as well as testimony elicited by the Board and the Intervenor-Defendants, contains evidence of at least minimal socio-economic links between Valdez and the Mat-Su. These include geographic proximity and connection via

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[450] *In re 2011 Redistricting Cases*, No. 4FA-11-2209CI, 2013 WL 6074059, at *27 (Alaska Super. Nov. 18, 2013) ("[J]ust because [certain communities] . . . could be more socio-economically integrated, does not mean that they are not socio-economically integrated enough where they are for constitutional purposes.").
[451] *Hickel*, 846 P.2d at 46 (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983) (internal quotation marks omitted)).

the road system,[452] shared interests in the outdoor recreation industry,[453] and common hunting and fishing areas in the region around Lake Louise, Klutina Lake, and Eureka.[454] They also have at least some shared ties to the oil industry.[455] The nearest hospital to Valdez, at least by road, is located in the Mat-Su Borough.[456] Similarly, the nearest car dealerships, and large box stores are located in the Mat-Su.[457] Valdez and Mat-Su also share an interest in maintenance and development of the state highway system,[458]

The communities in District 29 are served by school districts that are a part of home rule or first-class municipalities or boroughs, meaning their funding is obtained in part from a local tax base,[459] and these home rule communities also have a shared interest in debt reimbursement from the legislature.[460] Similarly, Valdez school sports teams compete against sports teams in the Mat-Su Borough.[461] Together these links are constitutionally sufficient to establish *relative* socio-economic integration. Although there is evidence that Valdez and the Mat-Su Borough may have divergent interests on certain issues,[462] those interests do not negate the ties that *do* exist between the communities.

Looking at "previously existing" districts as a guide to relative socio-economic integration, as instructed by the Supreme Court,[463] the record evidence demonstrates substantial similarities between District 29 in the 2021 Proclamation and both District 9 in the 2013 Proclamation and District 12 in the 2002 Proclamation.[464] In short, Valdez and

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[452] Binkley Aff. ¶ 26; Jan. 24, 2022 Trial Tr. 215:2-8 (Brown cross Q: "[T]here's a road that connects Eastern Mat-Su to Valdez, correct?" A: "Yes, sir.").
[453] Jan. 24, 2022 Trial Tr. 179:19-180:15, 184:25-185:2 (DeVries cross); 263:14-17 (Scheidt cross); 283:10-12 (Scheidt cross discussing helicopter skiing).
[454] Jan. 24, 2022 Trial Tr. 180:16-20 (DeVries cross); 219:5-13 (Brown cross), 262:16-263:13 (Scheidt cross discussing Valdez residents recreating at Lake Louise and Tazlina and Klutina Lakes); Jan. 25, 2022 Trial Tr. 481:5-20 (Duval hunting in Eureka and recreating at Klutina Lake). Mat-Su residents also fish in Valdez. Jan. 24, 2022 Trial Tr. 218:24-219:4 (Brown cross).
[455] Jan. 24, 2022 Trial Tr. 178:7-13 (DeVries cross); Jan. 24, 2022 Trial Tr. 218:9-19 (Brown cross).
[456] Jan. 24, 2022 Trial Tr. 183:5-18 (DeVries cross discussing Palmer amenities as the closest to Valdez).
[457] *Id.*
[458] Binkley Aff. ¶ 26; Jan. 24, 2022 Trial Tr. 182:10-14 (DeVries cross); 283:6-9 (Scheidt cross).
[459] Binkley Aff. ¶ 27; Jan. 24, 2022 Trial Tr. 182:15-24 (DeVries cross discussing Mat-Su Borough home rule school district); 258:6-10 (Scheidt cross).
[460] Binkley Aff. ¶ 27.
[461] Torkelson Aff. ¶ 53; Jan. 24, 2022 Trial Tr. 260:15-20, 261:12-262:14 (Scheidt cross).
[462] Jan. 24 Trial Tr. 345:23 – 345:7 (Colligan cross); Jan. 28 Trial Tr. 1276:13-19 (Pierce direct on rebuttal).
[463] *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992).
[464] *Compare* ARB000047 (2021 Proclamation, District 29) *with* ARB001590 (2013 Proclamation, District 9) *and with* Scheidt Aff. Ex. C at 2 (2002 Proclamation, District 12).

the Mat-Su Borough have been districted together in the past two redistricting cycles, and the courts have upheld those districts.[465] The Valdez district was specifically challenged in the 2011-2013 litigation, and the courts found the district constitutional.[466]

Although Valdez has presented evidence of *some* differences between the 2013 District 9 and the 2021 District 29, on the whole the evidence demonstrates that the two districts are substantially similar. In addition, there is evidence showing the majority of the residents of District 9 under the 2013 Proclamation will be represented by District 29 under the 2021 Proclamation.[467] Valdez has emphasized that District 29 removed several Richardson Highway communities such that it is not possible to drive from Valdez to the other parts of District 29 without leaving the district. But transportation connectivity is not a constitutional requirement, as discussed above. Moreover, the Mayor of Valdez testified—and a review of the maps confirms—that both the 2013 and 2002 districts *also* omitted a portion of the road connection so that it was not possible to drive from one end to the other without leaving the district.[468]

Valdez's expert Kimball Brace testified that if two places have been districted together in the past, it creates a presumption that they are socio-economically integrated and may be districted together again.[469] Valdez has not pointed to any significant change in circumstances that would suggest that Valdez and the Mat-Su Borough are any less

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[465] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *12-17 (Alaska Super. Nov. 18, 2013); *In re 2001 Redistricting Cases*, 47 P.3d 1089 (Alaska 2002).
[466] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *12-17, *pet. for review denied*, No. S-15422 (Jan. 23, 2014). While this challenge was primarily focused on compactness rather than socio-economic integration, *see id.*, it nonetheless provides strong evidence that the current district is constitutional if it is substantially similar to the district previously upheld by the court. In the 2001 cycle, the Supreme Court even directed the Board to consider combining the Mat-Su Borough with communities to the north, south, or east in order to accommodate excess population. *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 n.7 (Alaska 2002). The Board ultimately combined the Mat-Su with communities to the east, resulting in the district that combined the Mat-Su and Valdez. *See* Scheidt Aff. Ex. C at 2 (2002 Proclamation, District 12).
[467] ARB 116 (House core constituency report); Torkelson Aff. ¶ 52.
[468] Jan. 24 Trial Tr. 294:9-23 (Scheidt Cross); *see* Scheidt Aff. Ex. C, at 2, 6 (Valdez district in 2002 and 2013 Proclamations); *see also* ARB 1590 (District 9 in 2013 Proclamation).
[469] Jan. 26 Trial Tr. 741:4-12 (Brace cross). The Court notes that much of Mr. Brace's direct testimony in his affidavit seemed to have been crafted for him. This was particularly true of various deposition passages he quoted. At a minimum, Mr. Brace was simply sloppy in his work. While the court has no doubt that Mr. Brace is a longstanding expert in redistricting, his testimony demonstrated a lack of specific understanding about Alaska's unique landscape and the challenges it creates for redistricting.

integrated than they were in the past.[470] The pairing of Valdez and the Mat-Su Borough in prior districts therefore provides further evidence that they are "relatively integrated" for present constitutional purposes.

The question of whether Valdez and the Mat-Su borough are socio-economically connected, or simply homogenous communities is a close one. There are certainly many differences between the two, and indeed there is direct competition in some respects. But it is also significant to the Court that the language of section 6 includes two qualifiers when describing the need for socioeconomic integration. The district shall be formed of territory containing "*as near as practicable* a *relatively* integrated socio-economic area."[471] This standard is intended to provide both flexibility and a check on the Board in determining the districts.

In the *Kenai Peninsula* case, the Supreme Court determined there was sufficient socio-economic integration between North Kenai and South Anchorage for them to be districted together. The Supreme Court accepted a similar series of connections between Kenai and south Anchorage to those presented by the Board here. Despite the considerable geographic separation, and different interests, the two communities were *relatively* integrated.[472] Although the Court recognized the actual interconnectedness between North Kenai and South Anchorage was minimal[473], it concluded the connections outside the district but within the common region were sufficient to demonstrate the required level of interconnectedness.[474]

The same situation holds in this case.[475] Valdez and the Mat-Su Borough are also relatively socio-economically integrated for the purposes of Article VI, § 6 because both

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[470] To be sure, Valdez takes issue with the fact that a greater percentage of the population in the district is now based in the Palmer and Wasilla suburbs than was the case in prior districts. But this argument pertains to Valdez's vote dilution claims, not to the issue of socio-economic integration.
[471] Alaska Const. art. VI, § 6 (emphasis added).
[472] *Kenai Peninsula*, 743 P.2d at 1363.
[473] *Id.* at 1362.
[474] *Id.* at 1363.
[475] This Court's conclusion about socioeconomic integration between Valdez and Mat-Su is greatly influenced by the Supreme Court's determination in *Kenai.* If the Court had not taken such a broad view of the issue and held that regional integration was enough, this Court might have reached a different conclusion on the issue. But *Kenai* is the established law on this issue.

communities are socio-economically integrated with Anchorage.[476] The courts have expressly held that Valdez and Anchorage are socio-economically integrated for purposes of redistricting,[477] and the testimony at trial confirms this link.[478] There is no dispute that the Mat-Su Borough and Anchorage are socio-economically integrated, and again the testimony amply confirms that connection.[479] In the 2001 redistricting litigation, the Alaska Supreme Court expressly held that the Matanuska-Susitna Borough and Anchorage could be treated as one and the same for purposes of socio-economic integration, and that there existed sufficient socio-economic integration to the north, south, and east of the Mat-Su-Anchorage area.[480] These shared ties to Anchorage further strengthen the socio-economic integration of Valdez and the Mat-Su Borough.

Finally, the Board reasonably determined that placement of Valdez with the Mat-Su Borough was the best of the available options in the context of the entire 40-district map. By the very nature of the term "relatively," whether a district is "relatively integrated" must be analyzed in the context of the map overall, in balancing the "constitutional troika of compactness, contiguity, and socio-economic integration."[481] When viewed in that light, it is evident that the Board made a reasonable choice in creating a Valdez/Mat-Su district that is sufficiently integrated to satisfy § 6 and also allows the Board to meet constitutional standards elsewhere.

Although as discussed elsewhere, this Court has concerns about the process used by the Board in a number of respects, it is clear from the record that the Board worked hard to find a fit for Valdez that took its preference into account. The same is true for Mat-Su. There is substantial evidence supporting the conclusion that the Board, faced with the challenge to create a statewide map, carefully considered the available options and

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[476] *See Kenai Peninsula Borough*, 743 P.2d at 1363.
[477] *In re 2001 Redistricting Cases*, No. 2002 WL 34119573, at *103-13 (Alaska Super. Feb. 1, 2002).
[478] Jan. 24, 2022 Trial Tr. 255:4-10 (Scheidt cross) (discussing Valdez's ties to Anchorage for shopping, commercial flights, and professional services). The only commercial flights out of Valdez are to Anchorage. Jan. 24, 2022 Trial Tr. 266:22-24 (Scheidt cross).
[479] Jan. 24, 2022 Trial Tr. 178:23-179: 9 (DeVries cross); 224:3-225:1 (Brown cross discussing ties between Mat-Su and Anchorage to include: air travel, restaurants, concerts and entertainment, commuting to work, shopping, the Alaska Railroad, and the Glenn Highway).
[480] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 & n.7 (Alaska 2002).
[481] *In re 2011 Redistricting Cases*, No. 4FA-11-2209CI, 2013 WL 6074059, at *7 (Alaska Super. Nov. 18, 2013).

acted reasonably in placing Valdez in a district with a portion of the Mat-Su Borough. As stated above, the socio-economic ties between Valdez and the Mat-Su Borough meet the constitutional threshold. And none of the other options available to the Board created greater socio-economic integration for the district that includes Valdez without sacrificing constitutional compliance elsewhere.

The primary options considered by the Board are represented by the six proposed maps the Board took on its public hearing "road show." These maps were "Board Composite v.3,"[482] "Board Composite v.4,"[483] and the third-party maps prepared by Alaskans for Fair Redistricting ("AFFR"),[484] Alaskans for Fair and Equitable Redistricting/Calista Corporation ("AFFER/Calista"),[485] the Senate Minority Caucus ("SMC"),[486] and the Coalition of Doyon, Limited; Tanana Chiefs Conference; Fairbanks Native Association; Ahtna, Inc.; and Sealaska ("Doyon Coalition").[487]

Valdez also submitted a partial map for the Board's consideration on October 19th, known as "Valdez Option 1."[488] This map shows only 11 districts, and the evidence makes clear that Valdez focused on drawing the boundaries of its own district to its liking, rather than on developing a comprehensive statewide map. Because Valdez Option 1 does not necessarily attempt to harmonize the constitutional factors statewide, it does not provide a full picture of "proposed" or "principal alternative districts" against which to measure the Board's final plan.[489] Valdez counters that it was never intended to be a "full-40" map, but rather was intended as a "concept map" for the Board to consider.[490] Nonetheless, because Valdez Option 1 was submitted to and considered by the Board, the Court will

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[482] ARB 1341-ARB 1387.
[483] ARB 1388-ARB 1434.
[484] ARB 1294-ARB 1340.
[485] ARB 1232-ARB 1293.
[486] ARB 1482-ARB 1528.
[487] ARB 1435-ARB 1481.
[488] *See* ARB 4104-ARB 4105 ("Valdez Option 1" map and notes); Valdez First Am. Compl. Ex. E (same).
[489] *Hickel*, 846 P.2d at 47.
[490] Valdez has also relied heavily on a new map prepared specifically for this litigation by its expert, Kimball Brace, referred to as "Valdez Alternative 3." Brace Aff. ¶¶ 135-164; *id.* at Ex. DD. Because it was not prepared or submitted until well after the Board completed its process, this map could not possibly have been considered by the Board and is not one of the "principal alternative[s]" against which the Board's own map can be measured. *See Hickel*, 846 P.2d at 47.

analyze it to the extent that it sheds light on the constitutional options available to the Board.

Given the 2020 census numbers, the Board understood at the outset that it is "not mathematically possible to couple Valdez, Cordova, and the Kodiak Borough" into a single district.[491] The Board also understood[492] that the Fairbanks North Star Borough ("FNSB") had enough population for 5.2 House districts, and thus its districts would either need to be significantly over-populated or the Borough would need to shed approximately 4,000 people into an adjacent district.[493] These two realities had significant implications for all of the maps considered by the Board. It is also worth noting that Valdez's remote location and the realities of geography, including an ocean border to its south, further constrain the available options.

One option was to combine Valdez and Kodiak. Both AFFER/Calista and the SMC proposed this option, placing Valdez in a coastal district with part of Prince William Sound and with Kodiak.[494] This choice leaves only one option for the placement of Cordova in a contiguous district: the rural Interior district.[495] That approach was unpalatable because Cordova, a coastal, non-road system Prince William Sound community shares no perceptible socio-economic integration with any of the rural Interior communities or the Interior hub community of Fairbanks. In light of the options before it, the Board

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[491] Jan. 26 Trial Tr. at 799:7-25 ("Q: [I]s it mathematically possible, with the ideal population of 18,335, to put Valdez, Cordova, and Kodiak into the same district? A: Absolutely not. . . . [Kodiak's population] . . . made it difficult to populate the Gulf District and to figure out where all of the other communities were going to go. So, it was not mathematically possible to couple Valdez, Cordova, and the Kodiak Borough."); *see also* ARB008409 (Sept. 17 Meeting Tr. at 107:18-24) (Doyon Coalition testimony that Valdez, Cordova, and the Prince William Sound communities "have too much population to form a district with Kodiak").

[492] Valdez argues that Chair Binkley refused to consider breaking the FNSB until very late in the process, thereby boxing itself into a corner when the time came to address Valdez.

[493] Jan. 27 Trial Tr. at 1131:24-1132:11 (Binkley redirect).

[494] *See* ARB 1289 (AFFER/Calista Proposed District 36); ARB 1520 (SMC Proposed District 32).

[495] *See* ARB 1258 (AFFER/Calista Proposed District 5); ARB 1494 (SMC Proposed District 6). Cordova could also, arguably, be combined with a Southeast Alaska district, but doing so would require significantly overpopulating Southeast. The Board received no testimony throughout the process advocating for that approach, and it determined early in the mapping process that doing so would not have been reasonable. Early Alaska redistricting cases found Cordova not to be socioeconomically integrated with Southeast, *Groh v. Egan*, 526 P.2d 863, 879 (Alaska 1974); *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983), but later cases found it necessary to include Cordova with Southeast to avoid unconstitutionally high population deviations, *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 (Alaska 2002). Because including Cordova with Southeast would have *increased* (rather than decreased) deviation in this redistricting cycle, it was not a feasible option under this line of precedent.

determined that a district combining Cordova with the rural Interior Athabascan villages of the Western Interior and the southern Brooks Range would not have been relatively socio-economically integrated. When faced with the option of combining Cordova with Arctic Village or Valdez with the Mat-Su Borough, the Board concluded the Mat-Su/Valdez pairing was the better alternative.[496] In addition, the inclusion of the population of Cordova (approximately 2,600 people) in the rural Interior district would have meant that 2,600 residents of rural Interior villages that would otherwise be in the Interior district would be pushed elsewhere. This relatively small move to address Valdez' situation would ripple across the state.

Another option would have combined Cordova and Valdez, leaving out Kodiak. Valdez's "Option 1" map presented this option.[497] Valdez acknowledged that its "Option 1" proposal focused primarily on creating a district that worked for Valdez[498] and it was not intended to be a 40-district map which would harmonize the constitutional criteria across the full state. The record and the evidence at trial demonstrate that it creates constitutional issues across several regions. In Valdez Option 1, the Valdez-Cordova district runs up the Richardson Highway and into the southern portion of the FNSB. Board members testified to the problems created by this proposal. First, due to the number of people living in Valdez, Cordova, and the Richardson Highway corridor, this district only has "room" to include approximately half of the FNSB's excess population. In order to avoid excessively overpopulating the rest of the FNSB districts, Valdez Option 1 puts the rest of the FNSB's excess population into a second Interior district. This runs counter to the Alaska Supreme Court's instruction in *Hickel* that "where possible, all of a municipality's [or borough's] excess population should go to one other district."[499] The Board ultimately chose an option that split the FNSB only once and put all of its excess

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[496] Jan. 26 Trial Tr. at 801:24-802:2 (Borromeo cross) ("Q: . . . what do you think is more socioeconomically integrated, Valdez and the Mat-Su or Cordova and Arctic Village? A: Valdez and the Mat-Su."); *see also* Jan. 24 Trial Tr. at 395:11-396:1 (Colligan cross) (discussing district combining Cordova, Arctic Village, and Kaltag, describing Kaltag and Cordova as "very different").
[497] ARB 4104-ARB 4105 (Valdez Option 1 map).
[498] Jan. 25 Trial Tr. at 533:24-534:1 ("our hope was that the redistricting board would take a look at this conceptual map and how we had drawn the lines from Valdez").
[499] *Hickel*, 846 P.2d at 52.

population into a single district. It was reasonable for the Board to determine that Valdez Option 1 was not a viable option in this respect.

Valdez Option 1 also created problems for the socio-economic integration of several districts. It placed Cordova (a coastal city that is not on the road system) with Fairbanks (a road system community in the heart of the Interior), and there is no evidence of socio-economic integration between those communities. Instead, there was evidence that Cordova residents "did not want to be districted with the Fairbanks North Star Borough. They thought the suggestion was just unfathomable and off the table." [500] Valdez Option 1 also included a district stretching from Nunivak Island off the coast of Southwest Alaska to Bettles, in the northern Interior.[501] At trial, Valdez was unable to show why this proposed district is relatively socio-economically integrated.[502] Board members also testified at trial that this proposed district would not have been relatively socio-economically integrated.[503] The Board made a reasonable determination that Valdez Option 1 was not a viable or preferable alternative.[504]

At the end of the day, the Board was simply unable to find an alternative[505] that it considered to be better than the ultimate pairing.[506] The Board clearly understood that

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[500] Jan. 26 Trial Tr. at 809:12-16 (Borromeo cross) (summarizing public comment from the Cordova hearing); *see also, e.g.*, ARB001937 (Cordova resident testifying that being districted with the Interior had been "nightmare-ish" for Cordova, "as there were no socio-economic ties with the Delta Junction and Tok."); ARB003003 (Cordova Mayor testifying that Cordova is best placed in a coastal district with Kodiak).
[501] *See* ARB 4104.
[502] Jan. 25 Trial Tr. at 534:10-19 (Pierce cross).
[503] *E.g.*, Jan. 26 Trial Tr. at 869:25-870:16 (Borromeo cross); Bahnke Aff. ¶¶ 23-25.
[504] *See, e.g.*, Bahnke Aff. ¶¶ 23-25 (explaining constitutional problems with Valdez Option 1); Binkley Aff. ¶ 34 (similar); Borromeo Aff. ¶¶ 39-40 (similar).
[505] Another option for the Valdez-Cordova-Kodiak triangle would combine Cordova and Kodiak. That in turn would mean that Valdez is districted either with the Richardson Highway *and* the Interior, or with the Mat-Su Borough. The Board considered maps that used both of these approaches, and ultimately it reasonably determined that the Valdez/Mat-Su combination was the best available option. Faced with the question whether Valdez was more socio-economically integrated with the Mat-Su Borough or with Arctic Village and other communities deep in the Interior, the Board chose to place Valdez and Mat-Su together. That conclusion was not unreasonable.
[506] The AFFR map also placed Valdez in a proposed district that includes the road system communities of the Richardson Highway corridor (excluding Glennallen), many of the rural Interior villages (but not all), and significant population from the FNSB communities of the Harding-Birch Lakes area, Salcha, Moose Creek, and Eielson Air Force Base. ARB001336 (AFFR Proposed District 36). That district also stretches all the way to the southern Brooks Range, putting Valdez in a district with Arctic Village. AFFR's Valdez-to-Arctic Village district created ripple effects elsewhere as well. The only district that could accommodate the rest of the rural Interior villages was the proposed District 39, which would stretch from St. Lawrence Island to the border of the FNSB in the Interior.

Valdez wanted to be placed in a district with the Richardson Highway communities, as proposed in Valdez Option 1. Several Board members testified that none of the other proposed maps were *constitutionally better* than the map drawn by the Board, and the evidence supports this conclusion. As Member Borromeo testified, Valdez "couldn't tell us how they would populate their own district, let alone the other 39, in a way that was better than the option that the board ultimately adopted."[507]

The Court well recognizes that the Board has to draw 40 districts that meet constitutional criteria for the entire state. The process has been described as "Herculean" and this Court agrees. It is an extraordinary undertaking, and the Court sees no evidence the Board's intentions for Valdez and Mat-Su were dishonorable. Further, Mat-Su and Valdez are clearly oriented towards their own needs.

But based on all of the evidence, this court concludes that District 29 pairing Valdez with the Mat-Su Borough communities of Palmer and Wasilla is "*as nearly as practicable* a relatively integrated socio-economic area." While the question is a close one, given the Supreme Court's decision in *Kenai*, the level of socioeconomic integration is sufficient to meet the constitutional requirement of Article VI, section 6.

b) Challenge to District 36

Valdez and Mat-Su also challenge the Board's creation of District 36.[508] District 36 is apparently the largest voting district in the United States. It stretches from the Yukon River village of Holy Cross to the Copper River Valley community of McCarthy. District 36 combines 35 percent of Alaska's geographic area into only one of the forty house districts. It is a massive horseshoe shaped swath of land that stretches from the Canadian

[507] Jan. 26 Trial Tr. 873:5-8.

[508] The Court notes that it has referred to "Valdez" throughout this Order. Because this portion of the challenge relates to a different District than Valdez was placed in, the Court notes that a question of standing might be raised. The Alaska Constitution allows any qualified voter to bring suit in the Superior Court to compel the Board to "correct any error in redistricting . . .." However, the Alaska Supreme Court has broadly interpreted the concept of standing. *Carpenter v Hammond*, 667 P.2d 1204, 1209-1210 (Alaska 1983). In the 2001 Redistricting case, Judge Rindner recognized the right of government entities to bring suit in addition to individual voters. That determination was affirmed by the Supreme Court.

border in the east almost to the Bering Sea coast in the west. It is larger than most of the states.

Neither Valdez or Mat-Su argue that District 36 is not contiguous. It is undoubtedly a large expanse of land, but every part of it is touching another part. It does cross numerous geographic features, including both rivers and mountain ranges. It also crossed different Boroughs. But, given the sparse population of this immense and predominately roadless rural area, it is difficult to see how a district could be drawn for this area of the State without taking in a large area. Under the circumstances it is contiguous.

Whether District 36 is sufficiently compact is a different question. In the last days of the Board's work, Chair Binkley stated on the record that District 36 as it appeared in v.3 and v.4, which is substantially similar to District 36 in the Final Plan, is not compact. Looking at what had been described as the "Doyon Region" on a map the Board was then considering, Chair Binkley stated "if you want to talk about compact, look at the Doyon region in version 3 and 4. That wouldn't be compact by any stretch of the imagination."[509]

Alaska courts "look[] to the *shape* of a district," not its size.[510] Looking at the overall shape of the district, it appears like a horseshoe to surround the more urban areas of the state. It also takes in portions of three different boroughs. The 2013 Proclamation district 6-C took in a similar mass of land to the east, and swung north around the city of Fairbanks.[511] But District 6 did not extend so far to the west. Instead, it followed the western edge of the Denali and Mat-Su borough lines. Both the 2002 Plan and the 1994 Plan contained a similarly large interior district with the same characteristic horseshoe shape.[512]

Given Alaska's unique geography and relatively low population, which is spread unevenly across a state that is larger than most States and many countries, "neither size

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[509] Nov. 3, 2021, Board Meeting Tr. at 198, lines 9-12 (ARB 7558).
[510] *Hickel v. Southeast Conference4*, 846 P.2d 38, 45 (Alaska 1992) (emphasis added). In other words, the inquiry looks at the district's "perimeter *in relation to* the area encompassed." *Id.* (emphasis added). The area itself is not useful as a stand-alone metric.
[511] ARB 1581; ARB 1587.
[512] Exhibit VDZ-3005 p.1 (1994 Map), and p. 4 (2002 Map).

nor lack of direct road access makes a district unconstitutionally non-compact."[513] Indeed, in a previous redistricting case, Judge Rindner specifically noted that "[d]istricts within Alaska have often been the size of several States in the Lower 48. Often the communities within such large districts are geographically isolated and small in population."[514] That is the case with District 36. The evidence in the record shows that the size of District 36 is "a result of the geography and the population" in that region,[515] as it covers a sparsely populated area in which a map-drawer may sometimes need to go "hundreds of miles" to find the next block of population to assemble enough population for a full district.[516] Such expanses are inherent in Alaska redistricting, and they do not make a district unconstitutional.

In *Hickel*, the Supreme Court recognized that odd-shaped districts may be the result of Alaska's irregular geometry. But "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Similarly, appendages attached to otherwise compact areas may violate the requirement of compact districting.[517]

Both Mat-Su and Valdez argue the inclusion of the "Cantwell cutout" in District 36 is an unconstitutional appendage. The addition of Cantwell does make the district appear less compact. The Board and the Intervenors argue the inclusion of Cantwell is justified because Cantwell is socio-economically integrated with the Ahtna region (the rest of which was placed with District 36) and should be included in the rural Interior district.[518] There is evidence in the record supporting this view.

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[513] *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1092 (Alaska 2002).
[514] *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at *61 (Alaska Super. Feb. 01, 2002).
[515] ARB 7953 (Nov. 5 Meeting Tr. at 96:12-13).
[516] Jan. 26 Trial Tr. 730:12-18 (Brace cross).
[517] *Hickel*, 846 P.2d at 45-46
[518] ARB001793-ARB001794 (testimony of Michelle Anderson that "villages within [the] Ahtna region have strong and extensive family ties, customary and traditional Ahtna practices and thousands of years of familial, cultural & traditional, land use, and economic connection"); ARB002873 (testimony supporting inclusion of Cantwell in Interior district, as done in the Doyon Coalition map); ARB003418 (testimony that the Ahtna villages share all the customary and traditional values, are related to the Cantwell residents, share the same values, and speak the same language"), ARB003998, ARB004220 (testimony that "Cantwell is a part of the Ahtna region and should be represented as such. Cantwell is compacted with 5 other Ahtna Villages to comprise the Copper River Native Association"); *see* ARB009242 (Nov. 4 Tr. at

For example, there was testimony that Cantwell and the other Ahtna villages "all have the same language, customs, traditions, and they hunt, fish, and do berry picking together."[519] Cantwell is one of the eight traditional Ahtna villages. In addition, Cantwell is one of the villages comprising the Copper River Native Association based in Copper Center.[520] The record testimony spoke to the integration of the Ahtna region as a whole, as well as the integration of that region with the rest of the Interior (primarily the Doyon region). Trial evidence demonstrated the same, highlighting socio-economic and cultural links such as shared potlatch, art, and subsistence traditions.[521] The Alaska Supreme Court has previously noted such cultural links may be relevant in determining socio-economic integration.[522]

Additionally, both the Board and Intervenors offered testimony from witnesses attesting to the historical connection between Cantwell and other rural communities to the east. Michelle Anderson, Ahtna's president, testified to Cantwell's status as one of the eight native villages in the Ahtna region. She further testified to the common heritage, history and way of life that Cantwell shares with the other Ahtna villages. In fact, Ahtna is involved in this case in part to advocate to the Board that it should respect the ANCSA regional corporation boundaries as an indicator of socioeconomic integration. Several board members testified that ANCSA regional boundaries are an indicator they considered in determining district boundaries, but only as one measure of socioeconomic integration.

The Board also offered testimony at trial that people in the Doyon and Ahtna regions "share some socioeconomic similarities" because they engage in subsistence, access similar types of healthcare, face similar challenges with regard to access to

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72:7-22) (Board discussion of the public testimony); *see also* ARB000639, ARB001795-ARB001796, ARB001822 (additional public testimony supporting inclusion of Cantwell in rural Interior district).

[519] ARB 3089.

[520] ARB 4220.

[521] Jan. 26 Trial Tr. 887:21–888:8 (Otte cross) (Native peoples in Doyon and Ahtna regions "share the same cultures, we hunt and eat the same subsistence [foods] in the areas"); Jan. 26 Trial Tr. at 919:7 – 920:23 (Wright cross) (describing historical and current family ties between Doyon and Ahtna regions); Anderson Aff. ¶¶ 5, 9-13; Wright Aff. ¶¶ 20-21; Otte Aff. ¶ 27.

[522] *See, e.g.*, *Hickel v. Southeast Conference*, 846 P.2d 38, 53-54 (Alaska 1992) (discussing the distinct nature of Athabascan and Iñupiaq cultures).

utilities, and have similar concerns with regard to the quality of rural schools.[523] Similarly, there was evidence the district covered the regions of two ANCSA corporations, Ahtna and Doyon. Both companies have intervened in the case, and participated at trial.[524] Asked about socio-economic integration throughout the region, Vicki Otte testified that both Doyon and Ahtna have primarily Athabascan shareholders, and they share the same cultures.[525] Similarly, residents across the region, both native and non-native share socioeconomic similarities, including subsistence activities.[526]

On the other hand, Valdez points to comments by members Binkley and Borromeo suggesting the absence of socioeconomic integration. Chair Binkley discussed the issue specifically at the Board Meeting on November 5, 2021 when addressing where to put the excess Fairbanks population: "that whole district 36 is so not socioeconomically integrated that I think it would be difficult to make a case that it's -- it's going to disrupt that somehow."[527] At another meeting a few days later, Chair Binkley further explained:

> CHAIRMAN JOHN BINKLEY: I think it's a judgment call. I think there's -- you know, you can make – when you look at the -- 36, it's very diverse as well; you know, there's a lot of differences between Glennallen versus some of their remote villages on the (indiscernible), or you look at Tok that's on the highway system or Delta on the highway system. Those are different communities, completely, in many of the rural communities out north and -- and out west. And so it's difficult to say, socioeconomically, you know, that 36 is homogeneous. It's very different, and you can find different areas of Fairbanks that related to different areas of District 36. So it's hard to make a generalization.[528]

During depositions and in trial testimony, the Board took a very broad view of socio-economic integration when it came to District 36. For example, Member Borromeo was asked about the socio-economic drivers the board was required to consider as part of its constitutional mandate.

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[523] Jan. 26, 2021 Trial Tr. 888:6 – 889:6 (Vicki Otte).
[524] Ahtna and Doyon were also part of an active coalition which proposed a redistricting map, and included representatives, including its lawyer on the "roadshow."
[525] Jan. 26 Trial Tr.888:6-9 (Vicki Otte cross by the Board) ("We're Athabascans, they are all interior villages, we share the same cultures, we hunt and eat the same subsistence in the areas.").
[526] Jan. 26 Trial Tr.888:16-21 (Vicki Otte cross by the Board).
[527] Nov. 3, 2021, Board Meeting Tr. at 279, lines 1-11.
[528] Nov. 5, 2021, Board Meeting Tr. at 242, line 15 – page 243, line 3 (ARB 8098-8099).

> But as I view our state, we are an oil and gas driven state, so there's not one region of the state that does not depend on the oil and gas industry to fuel our economy. So we're all socio-economically integrated that way.[529]

Ms. Borromeo was more specifically asked about her view when questioned about the connection between the east and west parts of District 36. As an example, when questioned whether Glennallen is socio-economically integrated with the native villages in the western part of the state, she said:

> If we go back to my earlier premise that the whole entire state is connected through the oil and gas industry, I would say "yes."
>
> Is – is Glennallen socio-economically integrated to the degree that it should be districted with Bethel? There are other factors to consider that would prohibit that, such as compactness and contiguity.[530]

Similarly, in Ms. Borromeo's view, Holy Cross has sufficient socio-economic integration with Glennallen and Copper River to the degree that they may be districted together.[531] Asked to explain the socio-economic indicators for pairing Glennallen and Holy Cross in a district, Ms. Borromeo noted "the ANCSA region ties", "historic trade routes between the Athabascans from the Dena'ina country and the Ahtna part of the region," and potential ties to the oil industry working "as contractors for some of the drillers on the North Slope."[532]

At trial and during depositions, Valdez challenged the Board's formation of District 36 suggesting it favored Ahtna because of a possible conflict of interest involving Board counsel. However, it appears from the record and the trial evidence that the decision to include Cantwell in District 36 was the Board members' own decision, not made at the urging of counsel. The transcript of the Board meeting where this issue was discussed, on November 5, shows that in response to a question from Member Marcum, the Board's counsel stated it was a "coin toss" as to whether the reduction in compactness from including Cantwell in District 36 would be outweighed by the increase in socio-economic

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[529] Deposition of Nicole Borromeo at p125, L14-18.
[530] Deposition of Nicole Borromeo at p127, L21-25 – p128, L1-2.
[531] Deposition of Nicole Borromeo at p128, L9-15.
[532] Deposition of Nicole Borromeo at p132, L3-16.

integration.[533] While much was made of Board counsel's potential conflict, the Court does not find any evidence that Board counsel steered the Board's decision in any way to favor Ahtna. The Board was informed of potential conflicts for Board counsel during its interview process, and the board members who were questioned at trial said the decision to place Cantwell with the other Ahtna villages in District 36 was the Board's, and the Board's alone.[534]

The evidence in general shows the board viewed District 36 as a "rural" district, and concluded that rural communities generally share socio-economic ties. The record contains significant evidence of the social, economic, and cultural ties across the district. District 36 is made up of Interior towns and villages, largely small communities in rural regions. These communities share many characteristics of rural life. There are also specific historic and present cultural ties across District 36, as it broadly spans the region inhabited by Interior Athabascan peoples. There was considerable testimony, both in the public comment period and at trial, of the significant cultural similarities across Athabascan peoples.[535] This testimony showed numerous socio-economic links across the region, including (but not limited to) common language and culture across "all Athabascan speaking people,"[536] a dependence on similar subsistence foods, including moose and caribou,[537] reliance on shared rural healthcare and social services systems,[538] and shared concerns about the quality of rural schools.[539]

District 36 generally (though not perfectly) encompasses the Doyon and Ahtna ANCSA regions. The courts have acknowledged that ANCSA regions are indicative of

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[533] ARB008110 (Nov. 5 Meeting Tr. at 253:8-19).
[534] Jan. 27 Trial Tr. 1163:10-11 (Binkley cross); *see also* Jan. 27 Trial Tr. 1167:24–1168:7 (Binkley redirect) (the Cantwell "decision was not based on [Counsel's] advice.").
[535] *E.g.*, ARB001793-ARB001794; ARB002086-ARB002087; ARB002257-ARB002260; ARB002261-ARB002268; ARB002269-ARB002270; ARB002330; ARB002331; ARB003346; ARB003650-ARB003652; ARB003354; ARB003998; ARB004041 (public testimony discussing the integration of the Interior); Otte Aff. ¶¶ 23-27; Wright Aff. ¶¶ 14-21; Anderson Aff. ¶¶ 6-17; Jan. 26 Trial Tr. 885:3–890:4 (Otte cross); *id.*at 910:24-922:13 (Wright cross); *id.* at 933:17-20 (Wright redirect).
[536] *E.g.*, Jan. 26 Trial Tr. 914:25-915:9 (Wright cross).
[537] Jan. 26 Trial Tr. 886:11-14, 888:6-21 (Otte cross); *id.* at 916:10-20 (Wright cross); *id.* at 943:19–944:3 (Anderson cross).
[538] Jan. 26 Trial Tr. at 906:14-23 (Otte cross); *id.* at 952:10-25 (Anderson cross).
[539] Jan. 26 Trial Tr. at 888:16-889:6 (Otte cross).

socio-economic integration and may be used to guide redistricting decisions, and they may even justify some degree of population deviation.[540]

On the other hand, Valdez argues that it is inappropriate to use ANCSA boundaries to guide the drawing of districts that are not predominantly Alaska Native. This argument is unpersuasive for several reasons. First, the border that Valdez primarily takes issue with—the boundary between District 36 and the coastal District 39 (which coincides with the boundary between Doyon and the Bering Strait region)—*is* in an area where the communities are predominantly Alaska Native.[541] It is both logical and reasonable to use an ANCSA boundary to guide the drawing of district lines in this area of the state. Second, there is evidence that ANCSA boundaries are significant for non-Native residents too, particularly in rural areas. ANCSA regions coincide with the regions served by non-profit "sister organizations," which in many rural communities provide healthcare for Native and non-Native residents alike.[542] Finally, the evidence shows that the western border of District 36 is also a boundary between school districts, and that school districts are a primary form of local government in that region of the state.[543] Given the constitution's explicit provision that local government boundaries may be taken into consideration, there is no reason the Board should disregard such a boundary just because it happens to coincide with an ANCSA boundary.[544]

At trial and in depositions, Valdez took pains to question the Board about socioeconomic integration between disparate communities on opposite sides of the state.[545] In effect, Valdez suggests that District 36 lacks socio-economic integration because the residents of every community do not necessarily "live, work, and play" with

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[540] *E.g.*, *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1359 n.10 (Alaska 1987) (citing *Groh v. Egan*, 526 P.2d 863, 877 (Alaska 1974)); *see also Hickel*, 846 P.2d at 48. Indeed, ANCSA regions were drawn with the specific statutory intent that "each region [be] composed as far as practicable of Natives having a common heritage and sharing common interests." 43 U.S.C. § 1606(a); *see also* Jan. 26 Trial Tr. 941:10-14 (Anderson cross) (testifying that ANCSA "boundaries were drawn based on the characteristics and similarities between peoples . . . for instance, culture, language, connection to the land, traditional foods, to name a few things").
[541] Jan. 26 Trial Tr. at 921:1-922:13 (Wright cross) (affirming that the residents of Nulato, Galena, Ruby, Kaltag, Grayling, Anvik, Shageluk, and Holy Cross are all "predominantly Alaska Native.").
[542] Jan. 26 Trial Tr. 952:7-953:23 (Anderson cross); *id.* at 956:8-25 (Anderson redirect).
[543] Jan. 28 Trial Tr. 1318:2–1321:25 (Brace cross on rebuttal).
[544] Alaska Const. art. VI, § 6; *see* Jan. 28 Trial Tr. 1320:11-16 (Brace cross on rebuttal).
[545] *E.g.*, Jan. 26 Trial Tr. 835:1–839:4 (Borromeo cross).

the residents of every other community within the district. Although it may be true that the residents of Glennallen do not frequently find themselves working or recreating with residents of Holy Cross, this fact does not defeat the socio-economic integration of the district as a whole. As the courts have aptly noted:

> Often the communities within such large districts are geographically isolated and small in population. They are not interconnected by road systems or by other convenient means of transportation. Such communities are not integrated as a result of repeated and systematic face to face interaction. Rather they are linked by common culture, values, and needs. The constitutional requirement of socio-economic integration does not depend on repeated and systematic interaction among each and every community within a district. Rather, the requirement in Article VI, Section 6 of the Alaska Constitution may, by its very terms, be satisfied if the "area" comprising the district is relatively socio-economically integrated without regard to whether each community within the "area" directly and repeatedly interacts with every other community in the area.[546]

Such is the case with District 36, as the Board determined.[547]

In sum, House District 36 is sufficiently compact, contiguous and relatively socio-economically integrated to the extent practicable, and is therefore constitutional Under Article VI, section 6.

c) Challenge to District 30

Mat-Su separately challenges the Board's proposed District 30. Specifically, Mat-Su claims District 30 fails to "contain as nearly as practicable a relatively integrated socioeconomic area."[548] It further claims District 30 fails to properly consider local government boundaries.[549]

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[546] *In re 2001 Redistricting Cases*, No. 3AN-01-8914CI, 2002 WL 34119573, at *61 (Alaska Super. Feb. 01, 2002).
[547] *See, e.g.*, Jan. 26 Trial Tr. at 838:16-24 (Borromeo cross) (testifying that the "rural interior villages . . . don't also have enough numbers, in and of themselves, to be in their own district. So, they need to be coupled with other communities that are as close to socioeconomically integrated as possible, and because these are all rural interior villages the board thought it was best to group them together into one district.").
[548] Mat-Su Trial Brief at p24.
[549] Mat-Su Trial Brief at p24.

District 30 extends from the shores of Cook Inlet in the south northward through a portion of the Denali Borough to the edge of the Fairbanks North Star Borough in the north. Along the way, it picks up the city of Houston, and several communities along the Parks Highway as it moves north. The notable exception is Cantwell, which is placed in District 36. To the west, District 30 follows the borough boundaries of both the Mat-Su and Denali Boroughs.

1) Contiguity

Mat-Su does not appear to challenge the contiguity of the Mat-Su districts (other than 29, as discussed above), and a review of the map demonstrates that District 30 is contiguous unto itself. Every part of the district is "territory which is bordering or touching."[550] All portions of the district are "bordering or touching" another portion, and "the district is not divided into two or more discrete pieces."[551] As it did with District 29, Mat-Su argues the district is not contiguous because a person would have to cross out of District 30 and into District 36 in order to drive from one side of the district to the other. This argument was rejected in the discussion above regarding District 29, and is rejected for District 30 as well. Simply because the Parks Highway may pass between districts as it traverses the Alaska Range does not take away from the fact that every part of the district is physically connected.

2) Compactness

Mat-Su's Section 6 compactness challenge to District 30 principally argues the Cantwell "appendage" should not have been included in District 36. Cantwell is a relatively small town on the Parks Highway just north of the Mat-Su Borough boundary. In pairing Cantwell with the rural District 36 to the east, the Board cut both the Mat-su and Denali Borough boundaries. As discussed previously, the Alaska Supreme Court has held that "appendages attached to otherwise compact areas may violate the requirement of

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[550] *Hickel*, 846 P.2d at 45.
[551] *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992) (citation omitted).

compact districting."[552] The compactness requirement should not result in "bizarre designs" for districts.

The Cantwell "cutout" or appendage was discussed above in the discussion of District 36, and will not be repeated here. If District 36 is compact with the addition of the Cantwell appendage, then District 30 is similarly compact with the area cutout.

3) Socio-Economic Integration

As noted previously, the Alaska Supreme Court considers all areas within an organized borough to be socioeconomically integrated as a matter of law.[553] This is because Alaska statutes require a Borough, by definition, to have a "population of the area [that] is interrelated and integrated as to its social, cultural and economic activities . . .."[554] It is therefore "axiomatic that a district composed wholly of land belonging to a single borough is adequately integrated."[555]

In this case, District 30 is composed of two adjoining boroughs – the Mat-Su and Denali Boroughs. By law, the two adjoining boroughs are each socioeconomically integrated within themselves. Mat-Su does not seriously argue that District 30 is *not* socioeconomically integrated. Instead, its expert witness argues there were better alternatives that provided for greater socio-economic integration.[556] In fact, the expert, Mr. Colligan testified at trial that District 30, at least the Mat-Su portion, along with four other Mat-Su Districts 25, 26, 27 and 28 are all socio-economically integrated.[557]

District 30, which combines the Mat-Su and Denali Boroughs, is socio-economically integrated overall. The record contains sufficient evidence to support the conclusion that the Mat-Su and Denali Boroughs are integrated by such ties as the Parks

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[552] *Hickel*, 846 P.2d at 45-46.
[553] *Hickel*, 846 P.2d at 52.
[554] AS 29.05.031(a)(1).
[555] *Hickel*, 846 P.2d at 52; *see also In re 2001 Redistricting Cases* No. 3AN-01-8914CI, 2002 WL 34119573, at *71 (Alaska Super. Feb. 01, 2002) (citing *Hickel*, 846 P.2d at 51-52).
[556] Affidavit of Steve Colligan ¶ 60, 62.
[557] Jan. 24, 2022 Trial Tr. 377:16 – 380:3 (Colligan cross); *see also* Jan. 24, 2022 Trial Tr. 185:3-11 (DeVries cross) ("Q: And then, as I understand your testimony from your affidavit, you believe all of the Mat-Su Borough is socioeconomically integrated?" A: "Yes.").

Highway, the Alaska Railroad, and a shared tourism economy.[558] Further, the Mat-Su Borough specifically requested that it be paired with the Denali Borough to fill out a portion of the population necessary to reach a sixth House district, and it does not argue with that pairing now. The Court accordingly concludes that District 30 is adequately integrated.

Because the Court District 30 is compact, contiguous and relatively socio-economically integrated, it is declared to be constitutional under Article VI, section 6.

2. *Mat-Su's Overpopulation Challenge*

"Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by 40."[559] Mat-Su challenges Districts 25-30 claiming the Board overpopulated the six Mat-Su districts and thereby violated Article VI, section 6 because the deviations were too high.

Similar to the quantitative element of an equal protection analysis (discussed below), this provision requires any district formed by the board be "as near as practicable" to the ideal population arrived at when dividing the most recent census numbers of Alaska citizens by the available 40 house districts. While analyses under the federal standard and an old iteration of the State Constitution allowed *de minimis* deviations up to 10% without any justification from the board, revisions to Alaska's Constitution have removed such exclusions and require the board to justify any case in which population deviance is not minimized.[560] This requirement is by and large synonymous with the quantitative analysis under an equal protection argument which protects the right to "one person, one vote" and is discussed further below.

The Mat-Su Borough as a whole grew substantially in the last decade. From 2010 to 2020, Mat-Su grew from a population of 88,995 residents to a population of 107,081 residents. It represented 78% of the statewide population growth over the decade.[561] Based on the 2020 census figures, the Borough was entitled to 5.84 house seats. Mat-

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[558] Jan. 24 Trial Tr. 189:16-190:5 (Brown cross).
[559] Alaska Const. art. VI, § 10.
[560] *In re 2001 redistricting Cases*, 44 P.3d 141, 146 (2002).
[561] Mat-Su Trial Brief at p5.

Su presented a plan to the board for an allocation of six house districts, partnering with the Denali Borough to pick up the balance of the population necessary to fill out six seats.[562]

Mat-Su offers testimony from Borough manager Michael Brown and its expert Steve Colligan in support of its challenge. Much of Mat-Su's evidence generally argues that its plan was better than the final plan adopted by the Board for the six districts covering the Mat-Su. But simply because Mat-Su would have preferred a different plan does not make the Board's plan unconstitutional. It is true that the Mat-Su districts as a whole appear to be overpopulated. This is particularly true when compared to the average deviation of other districts statewide.

The Board was focused on obtaining small deviations until it waited until the very end to place Valdez. Because they did not place Valdez until the end, they had 4,000 people that had to be placed in a district. Rather than consider evenly distributing this population, as the evidence demonstrates, the Board dumped the population into the Mat-Su, the area that had grown the most since the last census. This area had nearly the population to populate six districts, but the Board made the decision to overpopulate every district within the Mat-Su. The evidence demonstrates statewide there are only seven districts that have a deviation of over 2%, and of those seven, five are within the Mat-Su.

Mat-Su's overpopulation argument stems from the Board's decision to include Valdez in District 29. As discussed previously, that decision was based upon a lack of other reasonable and feasible alternatives. And that one decision led to the final deviation in District 29 of 2.53%. By historical standards, that deviation would have been considered *de minimis*. With the changes in technology, the overall deviations have come down in the last two re-districting cycles.

Considering the hard, but reasonable, choices the Board had to make about where to place Valdez, the Court concludes the population of Mat-Su's districts 25-30 was "as

[562] Affidavit of Michael Brown at ¶ 4; ARB 005969, ARB 005973-005974.

near as practicable to the quotient" as required by Article VI, section 6 and is therefore constitutional.

3. *Mat-Su Equal Protection*

There are two basic principles of equal protection in the context of voting rights in redistricting: (1) "one person, one vote," which is the right to an equally weighted vote; and (2) "fair and effective representation," which is the right to group effectiveness or an equally powerful vote.[563] Mat-Su claims the Board violated its right to equal protection under both prongs of equal protection.

a) One Person, One Vote

The Mat-Su Plaintiffs allege that House Districts 25-30 in the Mat-Su Borough are over-populated, implicating residents' right to an equally weighted vote. But the small population deviations in the Final Map—just 2.66% for the most populous district the Borough complains of—do not come close to making out a claim for violation of the "one person, one vote" principle. No court decision in Alaska has ever struck down a district with a deviation of 2.66% or smaller, and there does not appear to be any reason to depart from past precedent here.

The goal of "one person, one vote" is "substantial equality of population among the various districts."[564] This principle is also reflected in Article VI, § 6, in the requirement that House districts be "as near as practicable to the quotient obtained by dividing the population of the state by forty."[565] Under Alaska law, "minor deviations from mathematical equality" do not implicate equal protection.[566] The Alaska courts evaluate deviations by measuring the maximum deviation across districts (either in a particular

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[563] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at *14 (Alaska Super. Feb. 1, 2002) (quoting in part *Kenai Peninsula Borough*, 743 P.2d at 1366).
[564] *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).
[565] *See In re 2001 Redistricting Cases*, 44 P.3d 141, 145-46 (Alaska 2002) (discussing the Article VI, § 6 "as near as practicable" standard).
[566] *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992) (quoting *Kenai Peninsula Borough*, 743 P.2d at 1366).

region or statewide)—meaning "the sum of the absolute values of the two . . . districts with the greatest positive and negative deviations."[567]

Although deviations of up to 10% were historically permissible without any justification, "newly available technological advances" have made it possible to achieve lower deviations, particularly in urban areas where "population is sufficiently dense and evenly spread" to allow for lower deviations without unduly sacrificing compactness or socio-economic integration.[568]

The quantitative analysis under both federal and state constitutional analyses require the Board to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[569] The "overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[570] Because of the State's stricter standard for equal protection, Mat-Su argues the Board must justify any failure to reduce population deviance.[571] This Court disagrees.

In the 2001 redistricting cycle, for instance, the Alaska Supreme Court found a 9.5% deviation across districts within Anchorage to be unconstitutional but "upheld deviations of up to 5%" in other regions.[572] In part, the Supreme Court's decision in the 2001 case was due to the Board's incorrect view that *any* deviation below 10% would automatically satisfy constitutional requirements. Because the 2001 board made no effort to reduce deviations in Anchorage below ten percent, the Court said the burden shifted to the board to demonstrate that further minimizing the deviations would have been impracticable.[573] Contrary to Mat-Su's argument, the Supreme court did not hold the board must justify *any* failure to reduce population deviance.

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[567] *In re 2001 Redistricting Cases*, 44 P.3d at 145.
[568] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *5 (Alaska Super. Nov. 18, 2013) (citing *In re 2001 Redistricting Cases*, 44 P.3d at 145-46).
[569] *Hickel*, 846 P.2d at 47.
[570] *Hickel*, 846 P.2d at 47
[571] Mat-Su PFFCL at p121 (citing *In re 2001 redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002)).
[572] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *5 (Alaska Super. Nov. 18, 2013) (citing *In re 2001 Redistricting Cases*, 44 P.3d at 145-46).
[573] *In re 2001 Redistricting Cases*, 44 P.3d at 146.

The Redistricting Board in the 2011-2013 cycle focused on achieving extremely small deviations across the state, resulting in a statewide total deviation of just 4.2% in the final map.[574] The Superior Court specifically found that those deviations were "very low, lower than necessary to pass constitutional muster"[575] and noted that the goal of achieving low deviations "must live in harmony with the other constitutional requirements."[576]

Here, the population deviations challenged by Mat-Su fall within the range of deviations that previous courts have accepted as "minor" and requiring no special justification. The highest deviation of the districts challenged by Mat-Su—House District 25—is just 2.66%.[577] Among the Mat-Su Region districts, the difference between the highest-population Mat-Su district (District 25) and the lowest-population Mat-Su district (District 30, at 1.10%) is just 1.56%.[578] And when compared to the Anchorage districts that Mat-Su points to as evidence of unequal voting power, the evidence in the record shows that the deviation between the highest-population Mat-Su district and the lowest-population Anchorage district (District 24, at -1.65%) is just 4.31%.[579] As a measure of total deviation across different regions, this is within the range of constitutional permissibility.[580]

b) Fair and Effective Representation

The Mat-Su Plaintiffs also suggest the votes of borough residents have been unconstitutionally diluted by the slight over-population of the House districts within the borough. But here again, the evidence supports the conclusion that that these districts

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[574] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *5
[575] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *7.
[576] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *6.
[577] ARB007234 (Population tabulation for 2021 Proclamation).
[578] *Id.*
[579] *Id.*
[580] The Mat-Su Plaintiffs have also suggested that their equal protection rights are implicated by the fact that the Borough has seen higher rates of population growth than any other part of the state, and they expect this trend to continue. But anticipated future growth is not a basis upon which the Board may adjust the boundaries. The Board is constitutionally charged with drawing districts "based upon the population within each house and senate district as reported by the official decennial census of the United States." Alaska Const. art. VI, § 3. Anticipated future population growth—which may or may not actually occur—does not implicate equal protection issues in the Board's Final Map.

are the result of relatively careful balancing of constitutional criteria, not any sort of intentional discrimination.

Mat-Su argues the Board failed to accomplish equal population among the districts statewide without justification.[581] It further asserts the Board has a duty to demonstrate the lower deviations available to the Board in several other plans were impracticable in light of competing requirements. Finally, it claims the Board has not proffered any justification, let alone non-discriminatory motivation for its actions.[582]

It is true that Mat-Su boroughs were overpopulated in several districts in the Final plan. It is also true that the Board had other plans before it when it went on the roadshow that showed lower overall plan deviations.[583] But, notably, neither of the two board proposed plans (v.3 and v.4) had lower overall deviations than the final plan.[584] Mat-Su argues that the over-population of its six districts was the result of discrimination against the Borough. But the evidence demonstrates the slight over-population of the Mat-Su districts results from bringing the 4,000 residents of Valdez into District 29 with the eastern portion of the Mat-Su Borough. As noted previously, this action was constitutionally permissible in light of competing § 6 factors elsewhere.[585] There is evidence in the record showing the Board considered the possibility of pairing Valdez with Anchorage. That change would have reversed the population ratios that the Mat-Su Borough complains about (over-populating the Anchorage districts and under-populating the Mat-Su Borough). However, the record shows the potential Anchorage pairing was abandoned because it was not feasible within other constitutional parameters, not because of any intent to discriminate against the Mat-Su Borough.[586] The record does not show evidence

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[581] Mat-Su PFFCL at p123.
[582] Mat-Su PFFCL at p123.
[583] *See* ARB001232 (AFFER Plan showing total plan deviation of 3.36%); ARB001234 (AFFR Plan showing total plan deviation of 4.79%); ARB001435 (Doyon Coalition Plan showing total plan deviation of 5.91%); ARB001482 (Senate Minority Plan showing total plan deviation of 4.77%).
[584] *See* ARB001341 (ARB v3 showing total plan deviation of 8.9%); and ARB001388 (ARB v4 showing total plan deviation of 9.19%).
[585] *See, e.g.*, ARB009210-ARB009224 (Nov. 4 Meeting Tr. at 40:2–54:17) (discussing breaking FNSB boundary, including implications for Valdez and Mat-Su districts).
[586] *E.g.*, ARB009207 (Nov. 4 Tr. at 37:3-7); ARB009333-ARB009334 (Nov. 4. Tr. at 163:24-164:5); ARB007862 (Nov. 5 Tr. at 5:1-22).

of such discrimination, and the Court concludes that the Board acted reasonably in making these choices.

With respect to overall representation, the Mat-Su Borough appears to have mostly obtained what it asked for in its proposal to the Board. The Mat-Su Borough submitted public testimony stating that it wished to have six House districts[587]—despite having population equivalent to only 5.84 districts[588]—and in the Final Map the Mat-Su Borough indeed controls six districts, four of which are wholly within the Mat-Su Borough and two of which also bring in population from outside the Borough.[589] If anything, then, the Mat-Su Borough will be slightly over-represented in the House.

4. Valdez Equal Protection

Valdez also challenges the Board's plan on Equal Protection grounds, asserting it has been deprived of fair and effective representation. As noted elsewhere, "fair and effective representation" claims stem from the second component of Equal Protection analysis. Accordingly, this claim addresses whether "the Board acted intentionally to discriminate against the voters of a geographic area,"[590] in this case voters from Valdez. The right to fair and effective representation may be implicated if members of a particular group are "fenced out of the political process and their voting strength invidiously minimized."[591] A voter's right to an equally geographically effective or powerful vote, while not a fundamental right, represents a significant constitutional interest.[592]

The Alaska Supreme Court has held that the Board "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."[593] Voters within an incorporated area like a borough are a "politically salient class" of voters.[594] It is a

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[587] ARB000662-ARB000667.
[588] Borromeo Aff. ¶ 14; *see also* Mat-Su Plaintiffs' First Amended Compl. ¶ 15.
[589] ARB000017 (overview of Mat-Su districts), ARB000043-ARB000048 (Districts 25-30).
[590] *In re 2011 Redistricting Cases*, 2013 WL 6074059, at *11 (citing *Kenai Peninsula Borough*, 743 P.2d at 1372).
[591] *Hickel*, 846 P.2d at 49 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973)).
[592] *Kenai*, 743 P.2d at 1372.
[593] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002).
[594] *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1370-73 (Alaska 1987) (holding that the Board

violation of Alaska's Equal Protection Clause for the Board to give unequal weight to voters because they reside within an incorporated area.[595] Similarly, in the context of reapportionment, the Supreme court has held that "upon a showing that the Board acted intentionally to discriminate against the voters of geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation."[596]

In this case, the question is whether the placement of Valdez in District 29 deprives the citizens of Valdez of fair and effective representation – that is the right to an equally powerful vote.[597] Stated differently, has Valdez been unconstitutionally denied its chance to effectively influence the political process?[598] Valdez points to the fact that citizens of the Mat-Su Borough dominate District 29 and constitute 78.5 percent of the population in District 29. It is true the population of District 29 is concentrated in the Palmer and Wasilla areas. Population from Palmer and Wasilla suburbs accounts for 14,306 of the total 18,773 or 76.2 percent of District 29's population.[599] Valdez accounts for 3,985 of District 29's population or 21.3 percent of the total population.[600]

It is certainly true the Board cannot intentionally discriminate against Valdez,[601] or give unequal weight to particular voters simply because they reside in an incorporated area.[602] Valdez argues that it should have been paired with its neighbors to the north along the Richardson Highway, or with Prince William Sound communities with which Valdez is *more* socioeconomically integrated. While such a pairing would have been preferred by Valdez, and perhaps been a better fit all things being equal, such a preferred fit does not mean Valdez's placement in District 29 equates to an Equal Protection problem.

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may not intentionally dilute the voting power of Anchorage voters to retain the current balance between regional and Anchorage senate representation).

[595] *See id.*; *see also In re 2001 Redistricting Cases*, 2002 WL 34119573, *29 (Alaska Super. Feb. 1, 2002).

[596] *Hickel*, 846 P.2d at 49 (citing *Kenai*, 743 P.2d at 1372).

[597] *Hickel*, 846 P.2d at 47 (quoting, *Kenai*, 743 P.2d at 1363).

[598] *Kenai*, 743 P.2d at 1368.

[599] Ex. VDZ-3003 at 31, ¶ 101 (Brace).

[600] Ex. VDZ-3003 at 1221-22.

[601] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002).

[602] *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1370-73 (Alaska 1987); *see also In re 2001 Redistricting Cases*, 2002 WL 34119573, at *29 (Alaska Super. Feb. 1, 2002).

Valdez's equal protection claim is that its voters will be effectively drowned out by voters in the Mat-Su Borough. But no matter what district Valdez is placed in, nothing changes the fact that Valdez has only 4,000 residents; as such, it will be a minority voice in *any* district.[603] Valdez's City Clerk acknowledged as much at trial, testifying that Valdez's population of "[a] little under 4,000" is "not enough people" to make a house district; Valdez must necessarily be paired with approximately 14,335 other people.[604] "[G]roups of voters are not constitutionally entitled to proportional representation absent invidious discrimination."[605] Here, there is no evidence demonstrating that Valdez's representation is disproportionate within its district. Nor, in the absence of disproportionality, is there any evidence that Valdez's placement is the result of discrimination.

The only inference of discriminatory intent that might be drawn from the evidence in this case is due to readjustment of District 36 to place the excess Fairbanks population there. Valdez points to the Chairman's refusal to split the FNSB until the last minute as evidence of preferential treatment of other voters. Mathematically, there is little question the final adjustment of the FNSB districts to put an additional 4,000 voters into District 36 resulted in the need to move Valdez to District 29 with Mat-Su. But the evidence does not show the FNSB decision was made with invidious intent. Instead, the need to break the FNSB was recognized by at least some members of the Board early in the process, and they advocated for such a change in order ensure the voters in Fairbanks had a legitimate "one person / one vote" opportunity.[606]

Instead, the record demonstrates that the pairing of Valdez with the Mat-Su Borough in District 29 resulted from the need to balance the competing demands of the § 6 factors across interconnected areas of the state.[607] The ultimate decision to maintain

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[603] *See* ARB004355 (2020 census population for Valdez No. 1 (1,511), Valdez No. 2 (987), and Valdez No. 3 (1,532)).
[604] Jan. 28 Trial Tr. 1249:15–1250:2.
[605] *In re 2001 Redistricting Cases*, 44 P.3d at 146.
[606] *See e.g.*, Deposition of Melanie Bahnke at p167, L12-21 ("I was an advocate for breaking the borough boundary. Because of the one vote/one person, the deviation, it was a factor.")
[607] *See e.g.*, Deposition of Melanie Bahnke at p79, L12 – p80, L3 ("the whole map is interrelated. If you talk about one part of the state, it will have an effect on the whole rest of the state. When I talked about Fairbanks, . . . you do one thing to one part of the map, it ripples throughout the whole rest of the state.")

the configuration of Valdez and the eastern Mat-Su Borough together in the same district was a direct result of these competing needs, not invidious discrimination. As the Board recognized, the placement of Valdez has been a perpetual challenge because it is in many ways a community with unique interests, and it is large enough to have significant population impacts on any district it is placed in, yet not large enough to control its own district.[608] The Mayor of Valdez specifically testified that Valdez is "very unique" and somewhat geographically isolated, "a distance from everyone."[609] Faced with this challenge, the Board chose a rational and constitutionally satisfactory option that does not impermissibly dilute Valdez residents' votes.

The Court concludes that Valdez's placement in House District 29 does not violate Alaska's Equal Protection Clause.

B. Calista's Redistricting Challenge

1. Background - Redistricting Process for the Calista Region

The Calista region was split among three districts in the 2013 Proclamation map: District 39 included Chevak, Hooper Bay, and Scammon Bay with Nome; District 38 centered on Bethel and the lower Kuskokwim River; and District 37 picked up several Calista villages to the northeast.[610] The 2020 Census data indicated that the Calista region had a population of 27,034, or approximately 1.47 ideal house districts.[611] But none of the maps from the Board's roadshow managed to keep the Calista region within two districts. The AFFER map districted Chevak, Hooper Bay, and Scammon Bay with Bethel, which was accomplished by shifting Kongiganak, Kwigillingok, and Quinhagak into a district with the Aleutians, and by districting some villages in the Northwest Arctic Borough with Nome.[612] The AFFR map likewise managed to district Chevak, Hooper Bay, and

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[608] Binkley Aff. ¶¶ 23-24; *see also In re 2011 Redistricting Cases*, 2013 WL 6074059, at *16 ("The Board admits they struggled with whether to adopt a Valdez-Anchorage-Richardson Highway District or to split the Mat-Su Borough twice" to create a Valdez-Mat-Su district, the eventual District 9 in the 2013 Proclamation.).
[609] Jan. 24 Trial Tr. 275:19 (Scheidt Cross).
[610] ARB001618-20.
[611] ARB002046; Guy Aff. 3.
[612] ARB001290-92

Scammon Bay with Bethel by populating the Nome district with interior villages.[613] The Senate Minority map only districted Chevak and Hooper Bay with Bethel.[614] Whereas the Board v.3 and v.4 maps, as well as the Doyon Coalition map, all separated Chevak, Hooper Bay, and Scammon Bay from Bethel in similar fashion.[615]

The Alaska Native Corporation ("ANC") representing the Bethel and Kusilvak census areas, Calista Corporation ("Calista"),[616] involved itself in the redistricting process early on by working with AFFER and Randy Ruedrich.[617] The Board also requested to hear testimony directly from a Calista representative.[618] In response, Thom Leonard submitted comments on behalf of Calista, citing District 40 overpopulation as justification for shifting District 38 north.[619] In public testimony, Leonard noted that Calista had received comments 55 villages in the Bethel area and had scheduled a call with the Association of Village Council Presidents.[620] And throughout the process, Ruedrich continued to engage with the Board to seek possible ways to achieve Calista's requests.[621]

Individuals from the affected Calista villages also participated. As early as July 20, 2021, the Village Chief of Chevak sent a letter to the Board identifying the village's socio-economic ties to Bethel.[622] On August 13, Hooper Bay officials also submitted a letter requesting placement in the same district as Bethel.[623] And in late August, Hooper Bay resident William Naneng testified before the Board in favor of redistricting with Bethel.[624] Myron Naneng Sr. from Bethel likewise gave verbal testimony in October on the strong ties between Hooper Bay, Scammon Bay, and Bethel.[625]

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[613] ARB001338-39.
[614] ARB001526.
[615] ARB001385, 1432, 1479
[616] Guy Aff. 1-3
[617] ARB010067 Tr. 76:8-11.
[618] *Id.* Tr. 12-19.
[619] ARB003079.
[620] ARB000182.
[621] ARB001723, 1733-34.
[622] ARB002092.
[623] ARB000501; 1788.
[624] ARB000154.
[625] ARB003296.

On November 3, the Board engaged in a lengthy discussion regarding Calista's request.[626] Member Bahnke, removing her "redistricting board hat [to] speak as a regional tribal leader," opposed Calista's request on the basis of socioeconomic integration.[627] Member Borromeo also expressed concern at the notion "that one ANC's voice is more important than another at the regional level."[628] But Chair Binkley stated his belief that Calista has "been just as invested" in the process as the Doyon Coalition, so "there is an opportunity not to exclude them from being recognized and listened to and accommodated."[629]

On November 5, Calista Corporation President and CEO Andrew Guy submitted written testimony seeking the inclusion of Chevak, Hooper Bay, and Scammon Bay in District 38.[630] Guy also testified before the Board regarding the Calista region's history of being fractured into multiple districts.[631] Chair Binkley noted that the Board had tried to accommodate Calista's request but "couldn't achieve consensus."[632] He stated that the Board would "take your testimony into account as we look at the final product," and expressed his appreciation and empathy "in terms of not being able to keep the region intact."[633] Randy Ruedrich with AFFER likewise asked the Board to consider at least partially accommodating Calista's request "because they are severely diluted" in terms of senate representation, so moving some Calista villages into District 37 would allow Calista to "at least start to build a small positive majority in that district."[634] Upon a second attempt, the Board agreed to move Chevak alone into District 38 and shifted the Kenai Peninsula communities of Port Graham and Nanwalek into District 37.[635]

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[626] ARB007273-7294.
[627] ARB007278 Tr. 167:25-169:1.
[628] ARB007282 Tr. 182:2-4.
[629] *Id.* Tr. 182:18-20.
[630] ARB002046-47.
[631] ARB007765 Tr. 87:22-89:19.
[632] ARB007766 Tr. 91:16-20
[633] *Id.* Tr. 91:20-24.
[634] ARB007783 Tr. 158:24-159:10.
[635] ARB007792-7798.

2. *Evidence Presented at Trial*

At trial, Calista presented the affidavit testimony from several individuals from the Calista region, as well as testimony from Ruedrich as an expert witness. Each of the lay witnesses testified regarding socio-economic ties between Bethel and the three villages of Chevak, Hooper Bay, and Scammon Bay.[636] Bethel serves as the Calista region's hub community, so most villages in the Calista region rely on Bethel for everything from transportation to health care.[637] There are also strong cultural traditions that connect the whole region, such as the Cama-i Festival in Bethel.[638] The first language for many people in the Calista region is Yu'pik, whereas in Nome that language is Inupiaq.[639] The three villages maintain few connections to Nome, other than a barge that passes through in summer and some radio stations.[640]

Calista President/CEO Guy referred to Chevak, Hooper Bay, and Scammon Bay as a "sub-region" within the Calista region.[641] The Yukon-Kuskokwim Health Corporation maintains a sub-regional clinic in Hooper Bay.[642] There is frequent travel between the three villages, as well as intermarriage, but locations outside the sub-region are primarily only reachable by air.[643] The three villages share a common food source and deal with similar problems, such as outdated sewer systems and education.[644] While Hooper Bay and Scammon Bay are in the Yukon School District, Chevak is in its own school district.[645] One last, poignant sentiment expressed in testimony was that "Hooper Bay should not be used as numbers to meet the requirements of District 39—the Board should have looked at who actually lives in Hooper Bay, and who we are."[646]

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[636] Guy Aff. 5; Leonard Aff. 3-5, 10; M. Naneng Aff. 4, 8; W. Naneng Aff. 6; Sundown Aff. 6-8.
[637] Guy Aff. 5; M. Naneng Aff. 4-5; W. Naneng Aff. 6; Sundown Aff. 6.
[638] M. Naneng Aff. 8; Sundown Aff. 7.
[639] M. Naneng Aff. 9; W. Naneng Aff. 6.
[640] W. Naneng Aff. 6-7.
[641] Trial Day 6 Tr. 169:14-19 (Jan. 28, 2022 at 14:38:45 Guy Redirect).
[642] M. Naneng Aff. 5.
[643] Leonard Aff. 10; M. Naneng Aff. 8; Sundown Aff. 8.
[644] M. Naneng Aff. 7; W. Naneng Aff. 3-4; Sundown Aff. 8.
[645] Trial Day 6 Tr. 150:15-16 (Jan. 28, 2022 at 14:03:11 Guy Cross); *id.* Tr. 156:25-167:2 (14:11:57) Sundown Aff. 2.
[646] W. Naneng Aff. 7.

Calista's expert testimony from Ruedrich outlined AFFER's involvement in the redistricting process and its work for Calista.[647] Ruedrich explained that the purpose of Calista's request to the Board was "to increase the District 37 Calista Region population, which increases the Senate District S Calista Region population."[648] This could be accomplished by replacing Tyonek, Nanwalek, and Port Graham with other Calista villages.[649] He opined that including these villages from the Kenai Peninsula Borough in District 37 also violates compactness and socio-economic integration.[650] Ruedrich also observed that "other than the Calista Region, the Board respected every other ANC's population that it feasibly could."[651]

Member Bahnke agreed that Hooper Bay and Scammon Bay share strong socio-economic ties with their hub community of Bethel.[652] Member Binkley noted that the Board followed the Lower Yukon School District boundary line to divide Districts 37 and 38, reasoning that Hooper Bay and Scammon Bay are socio-economically integrated with other villages in the same school district.[653] The Board also attempted to accommodate part of Calista's request by moving Chevak into District 38, but Board Members testified that they did what they could for Calista within the allowable population deviations.[654]

3. Analysis

a) First Claim: (Article V1, Section 6) There Is Sufficient Evidence Of Socio-Economic Integration In The Record To Justify Placing Hooper Bay And Scammon Bay In District 39.

Calista first argues that the Board's inclusion of Hooper Bay and Scammon Bay in District 39 violated Article VI, Section 6 of the Alaska Constitution.[655] This claim is

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[647] Ruedrich Aff. 1-6.
[648] Ruedrich Aff. 13.
[649] Ruedrich Aff. 18-19.
[650] Ruedrich Aff. 12. Ruedrich was not offered as an expert to testify on regional socio-economic integration, nor does he assert any personal knowledge of non-Calista villages.
[651] Ruedrich Aff. 16.
[652] Bahnke Aff. 14.
[653] Binkley Aff. 17.
[654] Binkley Aff. 17-18; Bahnke Aff. 13; Torkelson Aff. 38.
[655] Calista Tr. Br. 2. Calista also briefly raises the argument that it was error to include Tyonek in District 37, but this issue is not pursued any further. The Board did receive testimony requesting that Tyonek be kept with the Kenai Peninsula. ARB002358. Calista also has not introduced any evidence regarding how the inclusion of Nanwalek and Port Graham violate socio-economic integration or compactness.

grounded in the constitutional criteria requiring districts to "contain[] as nearly as practicable a relatively integrated socio-economic area."[656] Courts have looked to geographic proximity, cultural and historical ties, transportation connections, and common recreational and commercial areas as relevant factors.[657] While ANC boundaries may be considered when drawing districts,[658] unorganized areas have "no constitutional right to be placed in a single house district . . . so long as each portion is integrated, as nearly as practicable, with the district in which it is placed."[659] "A district will be held invalid if '[t]he record is simply devoid of significant social and economic interaction' among the communities within an election district."[660] The term "relatively" then requires a comparison with "other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient."[661]

At trial, Calista produced several lay witnesses to "address the strong socio-economic integration of the Calista Region with particular emphasis on Hooper Bay, Scammon Bay, Chevak, and Bethel."[662] These witnesses all testified that the three villages share much stronger ties with their hub community of Bethel than with Nome.[663] Calista therefore asserts that Hooper Bay and Scammon Bay should both be included in District 38 with their sister village of Chevak and their hub community of Bethel.[664]

In response, the Board asserts that Districts 37, 38, and 39 are all sufficiently socio-economically integrated.[665] The Board points out that even Calista's preferred plan leaves a number of Calista villages in District 39 while moving others into District 37.[666] Calista's socio-economic integration argument thus applies equally to the Lower Kuskokwim villages that Calista proposes moving into District 37.[667] The Board also points out that

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[656] Alaska Const. art. VI, § 6.
[657] *Hickel v. Se. Conf.*, 846 P.2d 38, 46-47 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).
[658] *See id.* at 48 ("[W]e implied that adherence to Native corporation boundaries might also provide justification [for population deviations], as long as the boundaries were adhered to consistently.").
[659] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144-45 (Alaska 2002).
[660] *Hickel*, 846 P.2d at 46 (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983)).
[661] *Id.* at 47.
[662] Calista Tr. Br. 7.
[663] M. Naneng Aff. 8; Sundown Aff. 6-8; W. Naneng Aff. 7.
[664] Calista Tr. Br. 7.
[665] Board Tr. Br. 59-60.
[666] Board Tr. Br. 61.
[667] Board Tr. Br. 62.

Hooper Bay and Scammon Bay, as well as Chevak, have all been grouped with Nome in previous redistricting cycles.[668]

Although Calista has legitimate reasons for wanting to shift Hooper Bay and Scammon Bay into District 38, those reasons do not amount to a constitutional violation. Whereas "respecting local government boundaries is discretionary" under Article VI, Section 6,[669] there is no constitutional right for unorganized areas to be grouped in the same district. The Calista region has not organized into a borough. Thus, so long as there are sufficient socio-economic ties on the record between Hooper Bay, Scammon Bay, and the other areas in District 39, this court must uphold the Board's decision. In this case, all of the Calista villages in District 39 are part of the same school district and thus share significant ties.[670] While there is less evidence of meaningful ties to Nome, there are some connections—including a barge that travels up the coast in summer[671]—and the fact that both Hooper Bay and Scammon Bay were previously in the same district as Nome also weighs in the Board's favor.[672] All of the communities in District 39 are also connected by virtue of their proximity to the Bering Sea and Norton Sound.[673]

b) Second Claim: Calista Has Presented No Evidence Of Intentional Discrimination And Thus Cannot Establish An Equal Protection Violation Under Article I, Section 1.

Calista next argues that the Board's final plan impermissibly dilutes the Calista's region's right to an equally effective vote and thus violates Article I, Section 1 of the Alaska Constitution.[674] To establish an equal protection violation in this context, the challenger must make "a showing that the Board acted intentionally to discriminate against the voters of a geographic area," after which "the Board must demonstrate that its plan will lead to greater proportionality of representation."[675] Aside from intentional discrimination, "the

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[668] Trial Day 6 Tr. 159:24-160:12 (Jan. 28, 2022 at 14:16:12 Guy Cross).
[669] *In re 2001 Redistricting Cases* (*2001 Appeal II*), 47 P.3d 1089, 1091 (Alaska 2002).
[670] Binkley Aff. 17.
[671] W. Naneng Aff. 6.
[672] ARB001619; W. Naneng Aff. 5.
[673] Calista Ex. 5002; *see also Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983) (noting that location within "a common geographic region" also supports socio-economic integration).
[674] Calista Tr. Br. 2-3.
[675] *Hickel v. Se. Conf.*, 846 P.2d 38, 49 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993); *accord Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987).

division of a borough which otherwise has enough population to support an election district will be an indication of gerrymandering," which would then require the Board to provide "some legitimate justification for not preserving the government boundaries."[676]

Calista argues that "the house and senate districts created by the Board dilute the voting power of the Calista Region and deprive residents of the Calista Region of their right to an equally effective vote."[677] Calista asserts that the Board acted to preserve ANC boundaries elsewhere, and yet only Calista has been fractured into three house districts and two senate districts.[678] As a result, Calista argues this unequal treatment effectively diluted the Calista region's voting power, and thus violates the Equal Protection Clause.[679]

The Board responds that Calista, as "a for-profit company," is not entitled to control any senate seats.[680] The Board argues that Calista has not shown any intent to discriminate, nor has it explained how its vote has been diluted to the benefit of any urban areas.[681] The Board notes that Calista is the only ANC that has full control over a single house district, and that the final plan already gives Calista a majority in a senate district.[682] Finally, the Board argues that whereas fracturing a borough with sufficient population to control a senate seat may give rise to an inference of discrimination, no case has extended that reasoning to unincorporated areas or ANC regions.[683]

Although Calista is correct on the facts, the Board is correct on the law. To establish an equal protection claim, Calista must either prove intentional discrimination or raise an inference thereof.[684] It has not accomplished either. Instead, Calista has shown

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[676] *Hickel*, 846 P.2d at 51 n.20; *see also In re 2011 Redistricting Cases* (*2011 Appeal I*), 274 P.3d 466, 469 (Alaska 2012) (acknowledging voter dilution claim for "voters making up only 51 percent of an ideal senate district").
[677] Calista Tr. Br. 2-3.
[678] Calista Tr. Br. 1-2.
[679] Calista Tr. Br. 1-3.
[680] Board Tr. Br. 63. The Board also argues that the Calista region is not a "politically salient class," unlike boroughs and municipalities, and thus has right to fair and effective representation. Trial Day 12 Tr. 190:17-22 (Board closing argument). But the Board subsequently concedes that the Calista region would be protected as "members of a politically salient class, Alaska Natives." Trial Day 12 Tr. 190:22-191:8 (Board closing argument). This court will assume without deciding that Calista can bring an equal protection dilution claim.
[681] Board Tr. Br. 63.
[682] Board Tr. Br. 81; Borromeo Aff. 22.
[683] Board Tr. Br. 81.
[684] *Hickel v. Se. Conf.*, 846 P.2d 38, 49-51 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).

that the Board did intentionally act to preserve other ANC boundaries, but it was unable to preserve the Calista region.[685] This failure to keep the Calista region intact is relevant to the question whether an inconsistent application of ANC boundaries can justify deviations from other Section 6 criteria elsewhere,[686] but it does not raise an inference of discriminatory intent where District 38 is comprised entirely of the Calista region, thus giving Calista majority representation in Senate District S.[687] Calista has also shown a history of diluted representation.[688] Whereas this is a necessary precursor to a voter dilution claim under federal equal protection jurisprudence, it is not actually relevant to the state equal protection analysis under Article I, Section 1.[689]

Although the end result may appear unfair to Calista, the Board's preservation of ANC boundaries elsewhere was informed by traditional redistricting principles. Many ANC regions also have overlapping borders with boroughs, such as NANA and the Northwest Arctic Borough, or Bristol Bay Native Corporation and the Lake and Peninsula Borough.[690] Others, such as Doyon Limited, are bordered by organized boroughs, such as the North Slope Borough. But the Calista region is unique in the respect that it shares very few borough boundaries. Only the sparsely populated northeastern panhandle of the Calista region touches any neighboring boroughs.[691] Where the Board accommodated "local government boundaries" to draw districts, it was simply complying with the language of Article VI, Section 6. That other ANC regions closely follow borough boundaries and thus remained substantially intact in the Board's final plan is largely circumstantial. The Calista

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[685] *See, e.g.*, Binkley Aff. 13. While this court believes it was highly inappropriate for Member Bahnke to remove her "redistricting board hat" and advocate against Calista, because the Board ultimately made a good-faith attempt to accommodate Calista's request and moved Chevak into District 38, any harm is de minimis. *But cf. Hickel*, 846 P.2d at 49 (noting that under Alaska Constitution's equal protection clause, courts will "not consider any effect of disproportionality de minimis when determining the legitimacy of the Board's purpose"). This result would be different if the Board adopted Member Bahnke's position.
[686] Using ANC "boundaries in districting might constitute justification for some population deviation," but when that criterion is not consistently applied, such boundaries "cannot justify the discrepancy." *Groh v. Egan*, 526 P.2d 863, 877 (Alaska 1974).
[687] Ruedrich Aff. 11-12. And because the Calista region only had enough population for 1.47 ideal house districts (as opposed to 1.51), Calista cannot raise an inference of discrimination as a result of splitting that remainder between Districts 39 and 37.
[688] *See* Guy Aff. 3; Binkley Depo. Tr. 231:1-234:10.
[689] *See Hickel*, 846 P.2d at 49 (noting that Alaska's "more strict standard" requires no "showing of a pattern of discrimination").
[690] ARB000012; Calista Ex. 5002.
[691] ARB000055; Calista Ex. 5000-02.

region has more than enough population for a single house district, so not every Calista village can be grouped with Bethel without excessive population deviations. Given the size of the Calista region population, its geographical location, and the lack of surrounding local government boundaries, it was reasonable for the Board to assign certain groupings of villages into Districts 37 and 39 as necessary to populate those districts.

4. Summary of Calista Claims

Calista's first claim that Districts 37, 38, and 39 violate Article VI, Section 6 is therefore rejected. Calista's second claim asserting an equal protection violation is also rejected.

C. Skagway's Redistricting Challenge

1. Redistricting Process for Skagway and Juneau

For previous election cycles, the 2013 Proclamation map districted Skagway and Downtown Juneau together in District 33, while Mendenhall Valley and northern Juneau formed District 34.[692] Of the maps the Board took on its roadshow, two mirrored the existing districts while adjusting the dividing line northward: the Doyon Coalition and Senate Minority Caucus maps.[693] The Board v.4 map also districted Skagway with Downtown Juneau while attempting to keep Mendenhall Valley intact in a donut hole.[694] The AFFR map joined Skagway in a district with Yakutat and Sitka, then it divided Juneau near the airport to separate Mendenhall Valley from Downtown.[695] Only the Board v.3 and AFFER maps placed Skagway with Auke Bay and part of Mendenhall Valley.[696]

The Board held the first public hearing of its roadshow in Juneau on September 27.[697] The Board specifically sought to elicit comment on "where Haines and Skagway belong" and whether Juneau residents believed the Board has "broken up your region

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[692] ARB001614.
[693] ARB001397, 1445.
[694] ARB001521.
[695] ARB001302-03.
[696] ARB001257, 1351.
[697] ARB001699.

appropriately."[698] Of the public testimony regarding Skagway's placement, many expressed support for keeping it districted with Downtown Juneau.[699] And in regard to where the dividing line for Juneau should be, an overwhelming majority favored keeping the Mendenhall Valley intact by drawing the boundary at Lemon Creek, Sunny Point, or Fred Meyer.[700] Residents also expressed support for the Doyon Coalition, AFFR, and Senate Minority maps.[701] The only specific comment received on Board v.3 was negative.[702]

Although one was not initially scheduled, Skagway also requested a public hearing, so the Board held a conference over Zoom.[703] The Board heard near-unanimous testimony that Skagway residents preferred to remain districted with Downtown Juneau.[704] This testimony included Members of the Skagway Borough Assembly, as well as the Mayor.[705] Only one individual testified for districting Skagway with "the north part of Juneau."[706] Written comments received by the Board likewise reflected a clear desire to both keep Skagway with Downtown Juneau, and keep Mendenhall Valley intact.[707]

On November 2, the Board began debate on which map to adopt for Southeast Alaska. Member Simpson, arguing in favor of Board v.3, noted that he "never understood" why the "existing structure has a Juneau doughnut hole," discounting the importance of tourism because "every place in Southeast has cruise ships going to it."[708] Member Simpson dismissed the testimony from Skagway: "So I just—I feel strongly that the north end from the Lynn Canal community connects better with Haines and Skagway. I know what Skagway said about it. I don't know why they said that."[709] Member Simpson rejected

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[698] Skagway Ex. 2004 Tr. 11:18-25 (Sept. 27, 2021).
[699] Skagway Ex. 2004 Tr. 21:1-6, 37:25-38:6; 44:11-19; 46:20-22 (Sept. 27, 2021).
[700] Skagway Ex. 2004 Tr. 23:24-25, 25:25-26:12, 38:3-6, 41:18-20, 43:1-4, 47:1-4, 48:20-23 (Sept. 27, 2021).
[701] Skagway Ex. 2004 Tr. 24:14-17, 32:8-14, 33:9-13, 38:9-11 (Sept. 27, 2021).
[702] Skagway Ex. 2004 Tr. 28:21-25 (Sept. 27, 2021).
[703] Cremata Aff. 15.
[704] Skagway Ex. 2005 Tr. 12:13-22, 18:25-19:3 (Oct. 27, 2021).
[705] Skagway Ex. 2005 Tr. 12:1-2, 13:21-22, 18:24-25 (Oct. 27, 2021); Walsh Aff. 16.
[706] Skagway Ex. 2005 Tr. 31:1-9 (Oct. 27, 2021). This same individual submitted written comments raising the same arguments. ARB002630.
[707] ARB001823, 1947, 2124, 2126, 2145, 2393, 2569, 2936-37, 3002, 3018, 3073, 3120, 3195, 3211, 3276, 3422, 3476, 3924, 4009, 4263. *But see* ARB001924, 2206, 2243, 2998, 3189, 3268.
[708] ARB008656 Tr. 90:25-91:6.
[709] *Id.* Tr. 91:15-18.

the Doyon Coalition proposal out-of-hand, saying that he "know[s] more about Juneau, Haines, and Skagway than Doyon does," and accordingly was "not giving them as much deference for that."[710] And Member Marcum stated that she would "defer" to Member Simpson on the Southeast Alaska districts.[711]

Member Borromeo countered that Skagway "request[ed] a special meeting" and the Board "heard testimony from Skagway" where "they reiterated their desire as a borough to remain with Downtown Juneau."[712] Member Borromeo also summarized the Juneau testimony, "which was keep Haines and Skagway with Downtown Juneau versus the Valley."[713] In that respect, Member Borromeo noted that the comments from both Skagway and Juneau differed from "Budd's point of view and how he's drawn the map."[714] While not raising an "objection" to Member Simpson's map, Member Borromeo sought more time to consider the Southeast.[715]

At the November 4 meeting, the Board took one final look Southeast Alaska. Referring to "the doughnut hole version," Member Simpson reiterated that the Board v.4 map, which connected Skagway and Downtown Juneau, "doesn't make socioeconomic sense to me, as a resident of those districts."[716] He also noted "that Sealaska, the regional corporation, said that they were fine with this approach."[717] Member Borromeo responded:

> So this—this part of the region does still give me pause, because we heard from actually Doyon Coalition early on that included Sealaska that the boroughs of Skagway and Haines would remain with downtown. So maybe they've changed their mind, or at least Sealaska has. I haven't seen anything there, so I'll have to go back and look.
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> But I do know from being in the region a couple of times and talking to the residents of Juneau when we held public hearing, the sentiment that I got from the community was that they really did want to be redistricted with

[710] ARB008665 Tr. 128:14-17.
[711] ARB008664 Tr. 123:14; ARB008665 Tr. 129:9.
[712] ARB008656 Tr. 92:4-10.
[713] ARB008660 Tr. 108:20-22.
[714] ARB008663 Tr. 120:12-15.
[715] ARB008664 Tr. 124:19-24.
[716] ARB009081 Tr. 18:1-7.
[717] *Id.* Tr. 18:10-12.

> Haines and Skagway downtown. Skagway requested a special meeting after we had been to the region twice, reaffirmed its position that they would like to remain districted with downtown versus Juneau—versus the Valley, excuse me.
>
> And the weight of the testimony, in my mind, weighs in favor of keeping Haines and Skagway, who are currently districted with downtown Juneau, in the downtown Juneau district.[718]

Member Borromeo noted that she had adjusted Board v.4 and "moved the boundary line to Sunny Point, like the residents had requested in Juneau," so that it was "at Fred Meyer."[719] Member Borromeo reiterated that "this is just a hard one . . . because we had such good input from the folks in the region," but she was "prepared to accept Budd's recommendation here" and "just want[ed] all of those concerns noted on the record."[720] The Board then proceeded to adopt Member Simpson's Board v.3 map as amended for Southeast Alaska with no objections.[721]

2. *Evidence Presented at Trial*

Skagway presented testimony from a number of lay witnesses regarding strong socio-economic ties to Downtown Juneau, as well as expert testimony from Kimball Brace. The lay witnesses all testified that Skagway's reliance on the tourism industry creates a logical connection with Downtown Juneau.[722] The witnesses likewise recounted overwhelming public testimony contrary to the Board's final plan.[723] Skagway also offered evidence that Mendenhall Valley residents might actually favor policies contrary to Skagway's interests.[724] Skagway's expert witness then provided two alternative maps that would satisfy the constitutional criteria while at the same time respecting the wishes of the majority of Skagway and Juneau residents.[725] Both could be accomplished without affecting the boundaries for any other districts.[726]

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[718] *Id.* Tr. 18:15-19:10; JRDB-20211105-0900_2 at 22:00-24:00.
[719] ARB009081 Tr. 20:11-16.
[720] *Id.* Tr. 20:20-21:6.
[721] ARB009082 Tr. 22:15-18.
[722] Cremata Aff. 6-11; Ryan Aff. 5-9; Walsh Aff. 6-11; Wrentmore Aff. 8-13.
[723] Cremata Aff. 15-16; Walsh Aff. 15-16; Trial Tr. 1871:11-1872:14 (Feb. 3, 2022).
[724] Cremata Aff. 4 (cruise control efforts).
[725] Brace Corrected Aff. 42-44.
[726] Trial Tr. 1944:15-23, 1956:7-12 (Feb. 4, 2022).

Member Simpson testified that due to his "residence in Juneau and familiarity with the geography and communities of Southeast Alaska," he "took the lead for the Board in drawing the new house districts for this region,"[727] and that other Members deferred to his opinions.[728] In drawing Districts 3 and 4, Member Simpson stated that he began at the southern border of the City and Borough of Juneau, then "drew the northern line by gathering census blocks moving outward from downtown Juneau, stopping when [he] had sufficiently populated the district."[729] He described the 2013 map connecting Skagway with Downtown Juneau as a "Pac-Man," opining that it "never made sense to me,"[730] but eventually conceded that that configuration was also "highly defensible."[731] Instead, Member Simpson stated that the final map's Downtown Juneau district was "significantly more compact."[732] Although he "made a point of listening to the public testimony," Member Simpson "never felt that the public testimony was a vote or a scientific survey" and only "took that for what it was worth."[733] But Member Simpson agreed that "the preponderance of testimony" from both Skagway and Juneau was in favor of keeping Skagway with Downtown Juneau.[734] Neither he nor Member Borromeo could recall any public testimony in favor of dividing Mendenhall Valley.[735]

3. Analysis

a) First Claim: The Board Did Not Violate Article VI, Section 6 By Districting Skagway With Mendenhall Valley Instead Of Downtown Juneau Regardless Of Socio-Economic Evidence To The Contrary.

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[727] Simpson Aff. 2.
[728] Trial Tr. 1800:2-17 (Feb. 3, 2022).
[729] Simpson Aff. 8-9.
[730] Simpson Aff. 12; Trial Tr. 1851:4-12 (Feb. 3, 2022).
[731] Simpson Depo. Tr. 108:3-109:1.
[732] Simpson Depo. Tr. 111:1-2; Trial Tr. 1865:4-6 (Feb. 3, 2022).
[733] Simpson Depo. Tr. 153:19-154:6.
[734] Trial Tr. 1804:8-1805:16 (Feb. 3, 2022).
[735] Simpson Depo. Tr. 115:22-117:9; Borromeo Depo. Tr. 94:4-95:16.

Skagway's primary claim is that the Board violated the constitutional criteria for district borders by not including it with Downtown Juneau, with which it has greater socio-economic ties.[736] Article VI, Section 6 provides that districts must "contain[] as nearly as practicable a relatively integrated socio-economic area." Relevant factors for determining socio-economic integration include "ferry and daily air service, geographical similarities and historical economic links."[737] The qualifier "relatively" then requires a comparison with "other previously existing and proposed districts as well as principal alternative districts."[738] Areas within the same municipality or borough are "by definition socio-economically integrated" with each other.[739] As discussed earlier, in *Kenai Peninsula Borough v. State*, the Alaska Supreme Court considered whether sufficient socio-economic ties existed between North Kenai and South Anchorage.[740] Although the evidence established ample "links between the Cities of Kenai and Anchorage," the record contained "minimal" evidence of socio-economic integration between the two satellite communities.[741] But the Court reasoned that "both are linked to the hub of Anchorage,"[742] and any distinction between the sub-regions was "too insignificant to constitute a basis for invalidating the state's plan."[743]

Skagway argues that the cruise ship industry is a major economic driver in both Skagway and Downtown Juneau, meaning that those ports share more socio-economic integration than other parts of Juneau.[744] Because most government offices as well as professional and recreational services are located in Downtown, Skagway citizens visiting

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[736] Skagway Trial Br. 60-101. Although Skagway also attempts to make an equal protection argument, it is identical to Skagway's socio-economic integration claim and thus does not merit being addressed twice. *See* Skagway PFFCL 155-56.
[737] *Hickel v. Se. Conf.*, 846 P.2d 38, 47 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).
[738] *Id.*
[739] *In re 2001 Redistricting Cases* (*2001 Appeal I*), 44 P.3d 141, 146 (Alaska 2002); *see also Hickel*, 846 P.2d at 51 ("[A] borough must have a population which 'is interrelated and integrated as to its social, cultural, and economic activities.'" (quoting AS 29.05.031(a)(1)).
[740] 743 P.2d 1352, 1362 (Alaska 1987).
[741] *Id.*
[742] *Id.* at 1363.
[743] *Id.* at 1363 n.17; *accord Hickel*, 846 P.2d at 46 ("In areas where a common region is divided into several districts, significant socio-economic integration between communities within a district outside the region and the region in general 'demonstrates the requisite interconnectedness and interaction,' even though there may be little actual interaction between the areas joined in a district." (quoting *Kenai*, 743 P.2d at 1363)).
[744] Skagway Trial Br. 68-72.

Juneau on business primarily conduct their business there.[745] In contrast, the bedroom community of Mendenhall Valley shares few of those concerns, and may even hold conflicting priorities.[746] Skagway also observes that the Board ignored the fact that public testimony "was overwhelmingly against" splitting Mendenhall Valley and separating Skagway from Downtown.[747] The Board responds that Skagway is geographically closer to Auke Bay and Mendenhall Valley, and the ferry terminal in Auke Bay illustrates transportation links.[748] The Board also points to case law, arguing that Skagway's position is nearly identical to that foreclosed by *Kenai*.[749] And whether Mendenhall Valley is split is also irrelevant as "communities within a single borough are *by definition* socio-economically integrated."[750]

To the extent that Skagway asserts that the constitutional criteria of relative socio-economic integration commands its inclusion in a district with Downtown Juneau as opposed to Auke Bay and Mendenhall Valley, the Board is correct. If Skagway is socio-economically integrated with the City and Borough of Juneau,[751] then that holds true for all portions thereof.[752] Skagway's arguments are effectively foreclosed by *Kenai*, which addressed nearly identical claims.[753] Both District 3 and 4 are contiguous, compact, and relatively socio-economically integrated—Skagway does not argue otherwise. This court thus finds no violation of any criteria in Article VI, Section 6.

X. *HICKEL* PROCESS

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[745] Skagway Trial Br. 76-82.
[746] Skagway Trial Br. 72; Cremata Aff. 3-4.
[747] Skagway Trial Br. 66, 87-92.
[748] Board Trial Br. 48-50.
[749] Board Trial Br. 49.
[750] Board Trial Br. 50 (emphasis in original).
[751] In *Groh v. Egan*, the Court specifically held that Skagway and all of Juneau are socio-economically integrated. 526 P.2d 863, 879 (Alaska 1974). Skagway, of course, does not assert otherwise.
[752] Failing to keep Mendenhall Valley intact likewise has no constitutional ramifications. *See 2001 Appeal I*, 44 P.3d 141, 146 (Alaska 2002) (holding that preservation of "neighborhood boundaries" in densely populated areas is unnecessary when the municipality "is by definition socio-economically integrated").
[753] However, *Kenai* predates the 1998 amendments to Article VI by over ten years. In other words, at the time that Kenai was decided, "public hearings" were not a constitutional requirement but simply a matter of executive fiat. Therefore, Skagway's argument that the Board wholly ignored public testimony on Skagway's socio-economic links to Downtown Juneau is cognizable not under Section 6 but under Section 10. This is addressed in a separate section.

The challengers raise procedural claims based on the *Hickel* process. In *Hickel v. Southeast Conference*, the Alaska Supreme Court cautioned against elevating the Voting Rights Act "so that the requirements of the Alaska Constitution are unnecessarily compromised."[754] The Court explained how the Board must harmonize competing interests under the Alaska Constitution and the Voting Rights Act ("VRA"):

> The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.[755]

This hierarchy became what is known as the "*Hickel* process."[756] The Court reasoned that focusing on VRA considerations "limit[s] the Board's ability to consider a wide range of plans to achieve maximum constitutional compliance."[757] Adhering to the *Hickel* process therefore "diminishes the potential for partisan gerrymandering and promotes trust in government."[758] In essence, the Board must "ensur[e] that traditional redistricting principles are not 'subordinated to race.'"[759] But if deviations from the Alaska Constitution become necessary to comply with the VRA, then "the Board must endeavor to adopt a redistricting plan that includes the least deviation reasonably necessary to satisfy the Act, thereby preserving the mandates of the Alaska Constitution to the greatest extent possible."[760]

But subsequent decisions have done relatively little to clarify what types of actions or inactions violate the *Hickel* process. In 2012 the Court held that the Board violated *Hickel* when it began drawing districts by proactively "focusing on complying with the Voting Rights Act."[761] The Board thus intentionally set out to "create[] five effective Native

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[754] *Hickel v. Se. Conf.*, 846 P.2d 38, 52 n.22 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).
[755] *Id.*
[756] *In re 2011 Redistricting Cases* (*2011 Appeal III*), 294 P.3d 1032, 1034 (Alaska 2012).
[757] *Id.* at 1038.
[758] *In re 2011 Redistricting Cases* (*2011 Appeal I*), 274 P.3d 466, 468 (Alaska 2012).
[759] *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996)).
[760] *Id.*
[761] *Id.* at 467.

house districts, one 'influence' house district, and three effective Native senate districts."[762] The Court remanded to the Board with instructions:

> The Board must first design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socioeconomic integration; it may consider local government boundaries and should use drainage and other geographic features in describing boundaries wherever possible. Once such a plan is drawn, the Board must determine whether it complies with the Voting Rights Act and, to the extent it is noncompliant, make revisions that deviate from the Alaska Constitution when deviation is "the only means available to satisfy Voting Rights Act requirements."[763]

The Court also ordered the Board to make findings "that the initially designed plan complies with the requirements of the Alaska Constitution" before making findings on VRA compliance in order to "expedite judicial review."[764] On the Board's second attempt, the Court remanded again "because the Board assumed that its unchallenged districts were constitutional" and thus left the majority of its prior redistricting plan intact.[765] This time the Court clarified "that the initial map drawn by the Board should not be affected by VRA considerations in any way."[766] The Court explained that *Hickel* required the Board to use "the Alaska Constitution's requirements of compactness, contiguity, and socio-economic integration . . . as the primary consideration."[767]

The parties cite a number of instances suggesting that the Board inappropriately considered race and the VRA in a manner that violated the *Hickel* process. On August 24, while the Board was in a mapping work session, the Board's districting software was configured to display racial data at the request of Member Bahnke, including the percentage of Alaska Natives in any given district.[768] Member Bahnke then proceeded to draw what would become Districts 36, 38, 39, and 40, beginning on the North Slope

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[762] *Id.*
[763] *Id.* at 467-68 (quoting *Hickel v. Se. Conf.*, 846 P.2d 38, 52 n.22 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993)).
[764] *Id.* at 468 n.15.
[765] *2011 Appeal III*, 294 P.3d 1032, 1036 (Alaska 2012).
[766] *Id.* at 1037.
[767] *Id.* at 1038.
[768] Board Ex. 1021 Tr. 204:4-10 (Aug. 24, 2021); JRDB-20210824-0900_0 at 4:48:00-30 (Aug. 24, 2021).

Borough and working down the western coast.[769] At several points she asked questions about why certain rural regions did not have a higher percentage of Alaska Natives,[770] or to what extent race factors into socio-economic integration.[771] The Board was also informed that in the previous redistricting cycle the VRA required a threshold percentage of 45.2% Alaska Native voting age population.[772] The parties contend that the districts drawn in the August 24 work session were "substantially similar to those adopted in the Final Plan,"[773] and were thus "locked in" at a very early stage.[774]

The parties also note that during the last few days before finalizing house districts, the Board had begun referring to Districts 37, 38, 39, and 40 as the "VRA districts."[775] The decision to include Tyonek, Nanwalek, and Port Graham in District 37 on November 4 was likewise based on "VRA considerations."[776] The parties assert that even before then "the Board was fully aware of the historic VRA Districts."[777] And Board Members expressed a desire to engage its VRA consultants "as soon as practicable" early in the process.[778]

If the *Hickel* process means that the Board can never consider VRA implications prior to adoption of the final house plan, then the Board is clearly in violation. The Board heard from its consultants regarding VRA compliance of the proposed plans on November 2,[779] three days before the Board adopted the final plan on November 5.[780] The Board made very few changes to the so-called VRA districts throughout the entire process.[781] Indeed, all of the Board's proposed plans contain identical VRA districts.[782] Not only was the Board made aware of past VRA districts and requirements,[783] it was capable of

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[769] *See* JRDB-20210824-0900_0 at 4:40:45-6:45:00 (Aug. 24, 2021).
[770] Board Ex. 1021 Tr. 204:11-15; 287:20-23 (Aug. 24, 2021).
[771] Board Ex. 1021 Tr. 331:7-10, 333:20-24 (Aug. 24, 2021).
[772] Board Ex. 1021 Tr. 337:16-23 (Aug. 24, 2021).
[773] Valdez PFFCL 115.
[774] Mat-Su PFFCL 114.
[775] Mat-Su PFFCL 114; ARB008647-49 Tr. 55:12, 57:19, 64:15 (Nov. 2, 2021).
[776] Calista PFFCL 71; ARB009099 Tr. 90:16-91:13 (Nov. 4, 2021); Borromeo Depo. Tr. 258:8-17.
[777] Valdez PFFCL 116; Torkelson Depo. Tr. 124:13-125:5.
[778] Valdez PFFCL 116; ARB 009932 Tr. 108:9-16 (Sept. 9, 2021).
[779] ARB000196-97.
[780] ARB000208-09.
[781] *Compare* ARB000012 (final plan), *with* ARB010765 (Board v.1).
[782] *See* ARB001342, 1389, 10765, 10821.
[783] Board Ex. 1021 Tr. 331:7-10, 333:20-24 (Aug. 24, 2021); Torkelson Depo. Tr. 124:13-125:5.

viewing and had racial data displayed during several public work sessions in August and September.[784] And if anything, *Shelby County v. Holder*[785] heightens the necessity for strict adherence to the *Hickel* process. Because VRA preclearance is no longer a looming threat to the validity of redistricting plans in Alaska,[786] there is very little need to even conduct a VRA analysis post-*Shelby County*.

However, if the *Hickel* process simply means that the Board should not run any VRA analysis until after it has first adopted an "initial map," then the Board has fully complied. Although the concept of "initial map" is not defined,[787] at most this term would encompass any proposed plans prior to the collection of extensive public comment. In this case, the relevant plans governed by the *Hickel* process would be Board v.3 and v.4. The Board adopted those proposed plans, thereby replacing Board v.1 and v.2, on September 20.[788] Thus, under an extremely lenient interpretation of the *Hickel* process, the Board was free to consider VRA implications past that date,[789] although any changes that otherwise violate Article VI, Section 6 criteria must be supported by findings that such changes are required by the VRA.

The Board's understanding on the *Hickel* process also evolved over time. On August 24, the Board was informed that *Hickel* required the Board to adopt a final plan before any VRA analysis could occur.[790] But by early September, the Board was requesting its VRA consultants to analyze the proposed plans "as soon as practicable."[791] Member Bankhe's statements throughout the redistricting process evidence a strong preoccupation with both VRA requirements and the percentage of Alaska Natives in rural

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[784] These were the August 23-24 and September 7-9 meetings. JRDB-20210823_1000_0 at 05:40:00 (Aug. 23, 2021); JRDB-20210824-0900_0 at 04:50:00 (Aug. 24, 2021); JRDB-20210907-0900_0 at 03:10:00 (Sept. 7, 2021); JRDB-20210908-0900_0 at 00:40:00 (Sept. 8, 2021); JRDB-20210909-0900_0 at 04:30:00 (Sept. 9, 2021)).
[785] 570 U.S. 529, 557 (2013) (striking down the VRA's preclearance coverage formula).
[786] The Department of Justice even confirmed to the Board that it was no longer accepting preclearance review requests from previously covered states such as Alaska. ARB000093-94.
[787] *2011 Appeal III*, 294 P.3d at 1038; *accord 2011 Appeal I*, 274 P.3d at 468 n.15 ("initially designed plan"); *Hickel v. Se. Conf.*, 846 P.2d 38, 52 n.22 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993) ("first design").
[788] ARB000186-90.
[789] The Board's Voting Rights Act consultants presented their analysis on the six adopted plans to the Board on November 2. ARB000196.
[790] Board Ex. 1021 Tr. 336:14-339:21 (Aug. 24, 2021).
[791] ARB009932 Tr. 108:9-12 (Sept. 9, 2021).

areas.[792] She was also in charge of drawing the so-called VRA districts.[793] The transcripts and videos of public Board meetings make it abundantly clear that Board Members were actively considering VRA-related issues since the beginning of the process. And the fact that all four of the Board's proposed plans contained identical versions of Districts 37, 38, 39, and 40 also creates a strong inference that the Board never truly considered available alternatives. Accordingly, this court cannot definitively state that the Board scrupulously adhered to the *Hickel* process.

Yet this court finds neither extreme convincing. No Alaska Supreme Court decision identifies a precise cutoff date after which the Board is free to consider VRA compliance in its decisions. When remanding final plans for *Hickel* process violations, the Court has provided only two vague guideposts: "initial map" and "primary consideration." Viewing the record as a whole, this court is confident that the minimum requirements of *Hickel* are satisfied. Although the Board had knowledge of the VRA and considered some data potentially relevant to the VRA, there is no indication that its initial maps, *i.e.*, Board v.1-4, were crafted with the VRA as the "primary consideration." The Board properly remained focused on the constitutional criteria. There is always some overlap between race and socio-economic integration, so that by itself is not enough to create an inference of improper purpose. And it should come as no surprise that the populations of rural Alaska villages are primarily comprised of Alaska Natives.

Although the Board consulted with its VRA experts on November 2 before adopting the final house districts, this was after collecting extensive public comment on the Board's proposed plans.[794] Even though the VRA analysis revealed that no alterations were required for compliance, the Board still adjusted the borders of Districts 37, 38, and 39 in response to public testimony from Calista's arguments on socio-economic integration. Accordingly, the VRA districts were never completely "locked in" until November 5. Board actions to move certain communities around to help with "VRA considerations" when not

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[792] *See, e.g.*, Board Ex. 1021 Tr. 204:11-15, 287:20-23, 331:7-10, 333:20-24 (Aug. 24, 2021); ARB009923-32 Tr. 99:14-108:12 (Sept. 9, 2021).
[793] Bahnke Aff. 3.
[794] *See* ARB001015-24 (roadshow summary).

actually required by the VRA,[795] as well as advice from counsel suggesting the Board avoid "drastic changes from . . . [the] six board-adopted plans," particularly in the districts "labeled 37 through 40 and potentially districts in Anchorage,"[796] may have unnecessarily limited the Board's options. But because those discussions occurred during the final process and only a few days before the Board finalized its house districts, this court is convinced that VRA compliance was not a "primary consideration" in the final house district map either.

This Court believes that some flexibility near the end of the 90-day timeframe will inevitably be necessary. It is impractical to require the Board to remain blind as to VRA implications until the last second. For instance, if the VRA analysis did indicate that drastic changes were required for compliance with only a few days remaining, inadequately considered last-second revisions with potentially wide-ranging ripple effects would be inevitable. This would defeat the *Hickel* process's whole purpose of "diminish[ing] the potential for partisan gerrymandering and promot[ing] trust in government."[797] This is especially true if the Board must leave sufficient time for public hearings on senate pairings. As a result, the *Hickel* process, as delineated by the Alaska Supreme Court, does not explicitly forbid the Board from taking VRA requirements into account during the final stretch of the redistricting process. This court declines to draw an arbitrary line where none currently exists. It is enough that the Board made a good-faith effort to comply with *Hickel* and postponed receipt of the VRA analysis until the roadshow's conclusion.

Returning now to the August 24 mapping session, it appears that the primary purpose of that meeting was to learn the basics of the redistricting process and how to use the districting software.[798] The video also confirms key differences from the final VRA districts,[799] and any similarities appear to be the result of relying on the existing districts

[795] ARB009099 Tr. 90:16-91:13 (Nov. 4, 2021).
[796] ARB009078 Tr. 7:14-8:1 (Nov. 4, 2021).
[797] *2011 Appeal I*, 274 P.3d at 468.
[798] ARB000153-58, 496-536. The Board elsewhere asserts that it began drawing maps on August 24 and that individual Board Members used the software to draw maps between August 24 and September 7. Board PFFCL 55-56.
[799] *Compare* JRDB-20210824-0900_0 at 7:08:00, *with* ARB000012. In particular, there is no District 37 mapped at this point, and future Districts 38 and 39 both stretch into the interior.

as a base.[800] Although Executive Director Torkelson did inform the Board of the VRA requirements for the last redistricting cycle, this occurred near the end of the meeting, after mapping had concluded, and he pointed out that the number would be different for this cycle.[801] This discussion concluded with a reiteration that the *Hickel* process required the Board to complete "a final product before we make any consideration for the VRA."[802] Then on September 8, the Board rejected an invitation from the Native American Rights Fund to explicitly consider racial data when drawing maps, and the Board decided to disable the display of all racial data in its districting software.[803]

Thus, although Board Members initially may not have understood exactly what the *Hickel* process requires, the Board made a good-faith attempt and took steps to further ensure compliance. This court therefore finds that the Board sufficiently followed the *Hickel* process and declines to grant relief on the basis of any *de minimis* deviations therefrom.

XI. PROCEDURAL CHALLENGES – Due Process and Article VI, Section 10

The parties collectively raise a number of procedural challenges. They allege violations of procedural and substantive due process rights under Article I, section 7, and also the separate procedural protections outlined in Article VI, section 10 of the Alaska Constitution. The parties also raise arguments under the Open Meetings Act which are intertwined with the Due Process arguments.

A. Applicable Legal Standard

The parties raise a number of claims under the Due Process Clause and the "public hearings" requirement in Article VI, Section 10. The concept of procedural due process requires "notice and an opportunity to be heard."[804] Substantive due process, on the other hand, "guard[s] against unfair, irrational, or arbitrary state conduct."[805] In the context of

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[800] Board Ex. 1021 Tr. 194:21-23 (Aug. 24, 2021).
[801] Board Ex. 1021 Tr. 337:16-338:5 (Aug. 24, 2021); JRDB-20210824-0900_0 at 7:07:50-08:35.
[802] Board Ex. 1021 Tr. 336:14-15 (Aug. 24, 2021).
[803] ARB010422-24 Tr. 4:20-13:9 (Sept. 8, 2021).south
[804] *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008).
[805] *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 125 (Alaska 2019).

redistricting process, Article VI, Section 10 mandates "public hearings . . . on all plans proposed by the board." Courts then review redistricting plans to determine whether they are "reasonable and not arbitrary."[806] This standard of review is similar to that applied to agency decisions, which "consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making."[807]

Although the parties' due process arguments are varied,[808] this court cannot help but notice obvious similarities between these standards. For instance, because the Board must already hold "public hearings," complying with Section 10 also would appear to satisfy procedural due process. And if the court finds that the final plan is "reasonable," then substantive due process is satisfied as well. But because the standard of review equally applies to the Section 10 mandate, a final plan's reasonableness is also dependent upon the sufficiency of public hearings. This court therefore adopts a blended approach to the questions the parties raise here.

As Judge Rindner previously pointed out: "The Alaska Supreme Court has never struck down an otherwise constitutional legislative district on the grounds that such a district is 'unreasonable.' Nor has the court discussed the legal standards by which the concept of 'unreasonableness' should be measured."[809] This appears to be an issue of first impression. But given the importance of these procedural issues to the parties' challenges, this court must endeavor to articulate legal standards where none currently exist. Thus, to determine what it means for an otherwise constitutional district to be "unreasonable," this court begins by "adopt[ing] the rule of law that is most persuasive in light of precedent, reason, and policy."[810] Both the proceedings of the Alaska

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[806] *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012) (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1357 (Alaska 1987)).
[807] *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 (Alaska 2002) (quoting *Interior Alaska Airboat Ass'n v. State, Bd. of Game*, 18 P.3d 686, 690 (Alaska 2001)).
[808] To the extent that parties raise due process challenges cognizable under the Open Meetings Act, those claims are addressed in a separate section..
[809] *2001 Cases I*, No. 3AN-01-08914CI at 25-26.
[810] *Guin v. Ha*, 591 P.2d 1281, 1284 (Alaska 1979).

Constitutional Convention and a constitutional amendment's legislative history provide guidance on questions of constitutional interpretation.[811]

B. This Court looks to the debates from the Alaska Constitutional Convention to ascertain the goals of redistricting.

Addressing the appropriate method of drawing districts, the framers believed that the redistricting criteria of compactness, contiguity, and socio-economic integration were necessary to prevent gerrymandering.[812] The purpose of utilizing watershed boundaries was to keep communities intact, whereas roads cutting through communities should not serve as boundaries.[813] Addressing the hypothetical question of splitting an existing district to create two new districts, Delegate Hellenthal reasoned that:

> it would be impossible to arbitrarily cut a line down through any election district, because it would violate the very clear principle that the new election districts must each be compact. It would violate compactness; secondly, it would violate the principle that they should be socioeconomic areas. It would be only the most remote sort of interplanetary coincidence that would permit an exact line to be drawn down through the heart to coincide with socioeconomic boundaries. It just doesn't happen.[814]

Instead, Delegate Hellenthal clarified that "no priority is assigned to any one factor" and the redistricting board must weigh each of the criteria equally; thus, "it was not the intent to assign priorities to the methods, but to balance."[815]

The framers also considered the purposes of redistricting and how much deference courts should ascribe to the redistricting board's decisions. Delegate Hellenthal described redistricting as "a difficult problem" where those drawing the lines must seek to rise above any "selfish desires":

> You have on the one hand the people of the greater whole; on the other hand you have the people—your neighbors, your friends who always urge

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[811] *See Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020), *reh'g denied* (Feb. 5, 2021).
[812] Proceedings of the Alaska Constitutional Convention (PACC) 1846 (Jan. 11, 1956) (statement of Del. Hellenthal). Delegate John S. Hellenthal served as Chairman of the Committee on Suffrage, Elections, and Apportionment.
[813] PACC 1836 (Jan. 11, 1956) (statement of Del. Hellenthal) ("[G]enerally a traveled route such as a steamship route was not a boundary, but it was a route piercing a valley, like a highway more.").
[814] PACC 1862 (Jan. 11, 1956) (statement of Del. Hellenthal).
[815] PACC 1890 (Jan. 12, 1956) (statement of Del. Hellenthal).

> you to help them to the greatest extent possible. And the problem generally is, "What can I do to help the greater good of the State?" And someone is going to be hurt. . . . I don't think . . . that you could please all of the occupants, but you just have to try.[816]

Because "a conflict of ideas" would be inevitable, the framers reasoned that the proper solution should be "to represent the people" and determine "which method is the fairest concerned to those people involved."[817] In light of this focus, the constitutional criteria existed to ensure that "the governor and the board will not run away and will be acting within the limits—within clear limits—and are not given wide discretion."[818] In addition to the constitutional limits imposed on district boundaries, the framers also believed that "the check of public opinion, and the check of recall and re-election" were necessary components.[819]

Incorporating these pieces, in this court's view the Board is required to seek a balance among constitutional criteria rather than assigning any one factor predominate weight. The Board must resolve redistricting conflicts by determining what is the "fairest" resolution for the people. The Board is "not given wide discretion" and its decisions must be informed by "public opinion." Rather than drawing districts based on individual prerogatives, the Board must make a good-faith effort to harmonize both "the greater good of the State" and the desires of each community "to the greatest extent possible."

C. Legislative history from the 1998 amendments likewise informs this Court's view of the Board's intended role and the purpose of public hearings.

Legislative history pertaining to the composition of the Board confirms that the legislature did not intend for Members to be appointed for their substantive knowledge. In proposing House Joint Resolution ("HJR") 44,[820] one of the legislature's primary concerns

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816 PACC 1836 (Jan. 11, 1956) (statement of Del. Hellenthal).
817 PACC 1890 (Jan. 12, 1956) (statement of Del. Gray). Delegate Douglas Gray served as Secretary for the Committee on Suffrage, Elections, and Apportionment.
818 PACC 1839 (Jan. 11, 1956) (statement of Del. Hellenthal).
819 PACC 1848 (Jan. 11, 1956) (statement of Del. Hellenthal); *see also* PACC 1863-64 (Jan. 11, 1956) (statement of Del. Hellenthal) (noting that "the governor does have discretion" but with "mandamus as a check; public opinion as a check; recall, and so on").
820 *See* House Joint Resolution (H.J.R.) 44, 20th Leg., 2d Sess. (1998), http://www.akleg.gov/PDF/20/Bills/HJR044A.PDF.

was removing partisan politics from the redistricting process.[821] Although the precise text changed many times, the legislature eventually settled on language requiring Board Members to be appointed "without regard to political affiliation."[822] Other minor amendments added a one-year state-residency requirement.[823] And the condition "that at least one person should be appointed from each of the judicial districts" was intended simply "to guarantee geographical representation."[824]

The legislative history is likewise relatively sparse on the intended purpose of "public hearings,"[825] but the historical background provides important context. The other main impetus behind HJR 44 was that the Alaska Supreme Court ordered the superior court to draft the 1993 interim plan in *Hickel v. Southeast Conference*,[826] and the legislature believed this was not "an appropriate function for the court system."[827] At the same time, the *Hickel* Court affirmed that the Open Meetings Act applied to the Board but otherwise "decline[d] to determine whether an independent constitutional basis exists for ensuring public access to the Board's meetings."[828] Because HJR 44 was in all other respects a direct response to *Hickel*, what the legislature had in mind by "public hearings" is thus informed by the procedures employed in *Hickel*.

The Board in *Hickel* began its redistricting process by adopting policies to "[c]onsider public testimony, which will be incorporated into the record."[829] The Board then "held a number of public hearings and reviewed alternative redistricting plans submitted by various interest groups."[830] When the Court remanded to the superior court to

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[821] Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-15 Side B No. 0016 (Feb. 11, 1998) (statement of Rep. Brian Porter, Joint-Sponsor).
[822] *See* Alaska Const. art. VI, § 8(a); Minutes, S. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-45 Side A No. 0182 (Apr. 29, 1998) (statement of Rep. Brian Porter, Joint-Sponsor).
[823] *See* Alaska Const. art. VI, § 8(a); Minutes, H. Fin. Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape HFC 98-50 Side 1 (Mar. 3, 1998) (statement of Rep. Gene Therriault, Co-Chair, H. Fin. Comm.).
[824] Minutes, S. Fin. Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape HFC 98-49 Side 2 (Mar. 3, 1998 (statement of Rep. Porter, Joint-Sponsor); *see also* Alaska Const. art. VI, § 8(b).
[825] Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-11 Side A No. 0491 (Feb. 6, 1998) (statement of Jim Sourant, Legislative Assistant to Rep. Brian Porter) (explaining only that once a plan is proposed, "over the next 60 days . . . there are public hearings around the state").
[826] 846 P.2d 38, 44 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).
[827] Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-11 Side A No. 1973 (Feb. 6, 1998) (statement of Rep. Brian Porter, Joint-Sponsor).
[828] *Hickel*, 846 P.2d at 57.
[829] *Id.* at 42.
[830] *Id.* at 43.

formulate an interim plan, the superior court appointed three masters, and in light of time constraints, permitted only two days for the public to provide comment on the masters' recommended plan.[831] Despite the time frame, the superior court observed:

> The public—as individuals, organizations, public bodies and public officials—produced an outpouring of comment on the masters' proposed plan. It was a gratifying response to the court's efforts to obtain public input and it dramatically demonstrates the importance of producing a tentative plan, with an invitation for specific comments about how that tentative proposal would work. The masters encouraged just this sort of participation and the court commends this procedure to future boards.[832]

The superior court found the received comments "thoughtful and valuable," and in many instances adjusted the interim plan to accommodate "the socio-economic ties cited unanimously in this public outpouring."[833] Although the superior court could not accommodate all public comments, it offered explanations detailing the constitutional reasons why doing so was not possible.[834] The superior court also contrasted this public process with what had transpired before the Board, particularly in Fairbanks:

> [T]his court is unwilling to give any deference to the political process that led to the original reapportionment board decision relating to Fairbanks. That process was the most suspect of all the Board's efforts. The chair of the reapportionment board sent hand drawn scenarios to the executive director and these drawings became the basis for the eventual alternatives. Neither these scenarios nor the correspondence were part of the public record nor was it made known that the communication was occurring. There was little discussion of the Fairbanks alternatives in hearing transcripts. The chair has now announced his candidacy for the legislature from one of those Board-created Fairbanks districts with no incumbent.[835]

The Alaska Supreme Court in *Hickel* likewise afforded public testimony great weight, declaring a violation of the socio-economic integration criteria where public comment was near unanimous in objecting to the split of Saxman from Ketchikan.[836]

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[831] *Id.* at 64.
[832] *Id.* at 77.
[833] *Id.* (including Cordova and Eyak with the Prince William Sound district).
[834] *Id.* at 77-78.
[835] *Id.* at 72.
[836] *Id.* at 51 n.21.

In light of this legislative history, this court concludes that the 1998 amendments were not intended to grant the Board more discretion than it previously enjoyed. Because appointees are only limited by a one-year residency requirement, the legislature did not intend for Board members appointed from each region to be experts in their respective regions. The legislature's understanding of "public hearings" was also informed by the procedures employed by both the Board and the superior court in formulating redistricting plans. And the legislature likely intended to adopt the judiciary's view that public testimony favoring one map over another be given greater weight in the redistricting process.

D. Federal case law applying the Administrative Procedure Act to formal agency rulemaking is instructive on the question of what it means for an agency to take a "hard look" when public hearings are required.

The parties invite this court to consider federal case law to evaluate whether the Board engaged in "reasoned decision-making."[837] In *Groh v. Egan*, the Alaska Supreme Court likened review of a redistricting plan to that of an agency regulation, noting that such review is limited to "the constitutionality of the action taken" and "to determine whether the regulation is reasonable and not arbitrary."[838] The Court continued to apply the administrative agency review standard after the 1998 amendments, remanding the 2001 plan for the Board to "take a hard look at alternatives" it ignored.[839] This standard "consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making" to determine reasonableness.[840] Alaska's "hard look" standard is traceable back to federal case law.[841] Thus, federal case law applying the "hard look" standard of review to agency actions

[837] Skagway PFFCL 17-19.
[838] 526 P.2d 863, 866 (Alaska 1974).
[839] *2001 Appeal I*, 44 P.3d 141, 145 (Alaska 2002).
[840] *Id.* at 143 n.5 (quoting *Interior Alaska Airboat Ass'n v. State, Bd. of Game*, 18 P.3d 686, 690 (Alaska 2001).
[841] *See Se. Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983) (quoting Harold Leventhal, *Environmental Decision Making and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974) (discussing *Greater Bos. Television Corp. v. F.C.C.*, 444 F.2d 841, 858 (D.C. Cir. 1970))).

requiring public comment, such as notice-and-comment rulemaking under the federal Administrative Procedure Act ("APA"),[842] may provide some guidance on this question.[843]

The U.S. Supreme Court has explained that in the context of "notice-and-comment rulemaking," the "agency must consider and respond to significant comments received during the period for public comment."[844] In a variety of contexts, the D.C. Circuit has clarified that an agency must "respond to 'significant points' and consider 'all relevant factors' raised by the public comments" to satisfy the "hard look" standard.[845]

Accordingly, an agency must respond to comments "that can be thought to challenge a fundamental premise" underlying the proposed agency decision. An agency need not "discuss every item of fact or opinion included in the submissions made to it." An agency's response to public comments, however, must be sufficient to enable the courts "to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did." Even when an agency "has significant discretion in deciding how much weight to accord each statutory factor," that does not mean it is "free to ignore any individual factor entirely."[846]

Although an agency need not respond to all public comments, at the very least it is "required to respond to significant comments that cast doubt on the reasonableness of the rule the agency adopts."[847] Examining this standard, commentators have argued that an agency may act unreasonably "by virtually ignoring the mass of public comments that

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[842] *See* 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").
[843] The Alaska Supreme Court has likewise looked to federal decisions applying the APA in the context of determining "the sufficiency of notice and comment in the analogous context of promulgation of agency regulations." *Trustees for Alaska v. State, Dep't of Nat. Res.*, 795 P.2d 805, 808 (Alaska 1990) (discussing *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).
[844] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96, 135 S. Ct. 1199, 1203, 191 L. Ed. 2d 186 (2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); *cf. Moore v. State*, 553 P.2d 8, 35 n.19 (Alaska 1976) (adopting *Overton Park*).
[845] *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)).
[846] *Id.* (citations omitted) (first quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000); then quoting *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 17 (D.C. Cir. 2015); and then quoting *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998)).
[847] *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 116 (D.C. Cir. 1987).

it received," particularly when weighed against "the number of public commenters, the seeming universality of their opinions, and the [agency's] statutory relationship with the public interest."[848]

In this respect, federal case law applying the "hard look" standard of review to notice-and-comment agency rulemaking may not go far enough. The policy rationale behind requiring an agency to respond to public comment is to ensure that the final rule is "based on a consideration of the relevant factors."[849] Agencies are typically afforded "an extreme degree of deference" when they are "evaluating scientific data within [their] technical expertise."[850] But redistricting is not a science and Board appointees are not experts.[851] The Board consists of five (supposedly non-partisan) appointees from different judicial districts with only a one-year residency requirement. Where the whole purpose of the Board is to elicit and incorporate public comment into the final plan, the policy rationale for limiting the types of comments to which the board must respond effectively crumbles.

E. Precedent, reason, and policy considerations for interpreting "reasonableness" in light of the Article VI, Section 10 "public hearings" requirement and other changes from the 1998 amendments.

Alaska Supreme Court precedent supports adopting a broad interpretation of Article VI to effectuate the peoples' will as expressed by the 1998 amendments. In *In re 2001 Redistricting Cases*, the Court confronted population deviations of 9.5% between districts in Anchorage.[852] The Court began by noting that the federal Equal Protection Clause already requires the Board to "make an 'honest and good faith effort to construct

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[848] Note, Mary M. Underwood, *On Media Consolidation, the Public Interest, and Notice and Agency Consideration of Comments*, 60 ADMIN. L. REV. 185, 204-05 (2008).
[849] *Baltimore*, 817 F.2d at 116 (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C.Cir.1984)).
[850] *Huls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) (quoting *Int'l Fabricare Inst. v. USEPA*, 972 F.2d 384, 389 (D.C.Cir.1992).
[851] In prior cases the Alaska Supreme Court reasoned that "determining population is an inexact science, with agency expertise implicated at each step of the determination process," and thus deferred to related agency decisions. *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986) (citing *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972)). But the Board no longer plays any role in determining the state's population. Alaska Const. art. VI, § 3 ("Reapportionment shall be based upon the population within each house and senate district as reported by the official decennial census of the United States.").
[852] *2001 Appeal I*, 44 P.3d 141, 145 (Alaska 2002)

districts . . . as nearly of equal population as is practicable.'"[853] The Court then addressed how the 1998 amendments altered the standard for evaluating equal population:

> Before article VI, section 6, was amended in 1998, maximum deviations below ten percent were insufficient, without more, to make out a prima facie case that a plan or part thereof was unconstitutional. Section 6 was amended in 1998 and the present constitutional standard is equality of population "as near as practicable." Newly available technological advances will often make it practicable to achieve deviations substantially below the ten percent federal threshold, particularly in urban areas. Accordingly, article VI, section 6 will in many cases be stricter than the federal threshold. Here the board believed that deviations within ten percent in Anchorage automatically satisfied constitutional requirements; plaintiffs established that the board failed to make any attempt to further minimize the Anchorage deviations.
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> Because, as the board's counsel conceded at oral argument, the board made no effort to reduce deviations in Anchorage below ten percent, the burden shifted to the board to demonstrate that further minimizing the deviations would have been impracticable in light of competing requirements imposed under either federal or state law. We conclude that the board failed to offer an acceptable justification for the Anchorage deviations.
>
> . . . Accordingly, the Anchorage deviations are unconstitutional, and require the board on remand to make a good faith effort to further reduce the deviations.[854]

In other words, the Court interpreted the added language in Section 6 as imposing a "good faith effort" standard beyond what previously existed, even though the language itself did not clearly mandate such a result.[855] Rather, the Court's holding implies that the act of amending the constitution itself holds significance. The Court's reliance on "technological advances" when determining how much leeway to grant the Board is also relevant.

This interpretative approach is equally applicable here. When the legislature added the "public hearings" requirement in Section 10, and the people subsequently ratified that language, it cannot be said that the intent was simply to maintain the status quo. The

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[853] *Id.* at 145 n.11 (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).
[854] *Id.* at 145-46.
[855] *See id.* at 151 (Carpenti, J., dissenting) (contrasting "at least equal" with "as near as practicable").

amendment itself holds import. Technological advances have also made it much easier for the Board to elicit public comment directly from affected communities, even without being physically present. If the Board must "make a good faith effort" regarding compliance with Section 6 criteria beyond what pre-1998 case law found acceptable, then that extends equally to compliance with Section 10.

Reason likewise appears to favor such an interpretation. Judge Rindner previously opined that "the choice among alternative plans that are otherwise constitutional is for the Board."[856] But no court has attempted to factor in the relevance of the 1998 amendments to the standard of review. In this court's view, those amendments effectively altered the applicable standard of review in two respects. On one hand, the Board is no longer a purely advisory one answerable to the governor; appointment power is now vested in each branch of government,[857] and the governor cannot alter any aspects of the final plan after adoption.[858] As a result, many of the previous "checks" on redistricting the framers contemplated are no longer in force,[859] aside from bringing a judicial challenge.[860] On the other hand, by mandating "public hearings" for all proposed plans,[861] the 1998 amendments greatly elevated the public's role in the redistricting process. The legislature adopted HJR 44 to make redistricting a less partisan process,[862] but at no point did the legislature contemplate disrupting the framers' delicate checks and balances.[863] Quite to the contrary, Section 10 not only codifies but expands the framers' "check of public

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[856] *2001 Cases I*, No. 3AN-01-08914CI, at 26 (Alaska Super., Feb. 01, 2002); *accord In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012) ("We may not substitute our judgment as to the sagacity of a redistricting plan for that of the Board, as the wisdom of the plan is not a subject for review.").
[857] Alaska Const. art. VI, § 8 (providing the governor with two appointments, the presiding officers of the house and senate with one each, and the final with the Chief Justice).
[858] Alaska Const. art. VI, § 10.
[859] *See* PACC 1848 (Jan. 11, 1956) (statement of Del. Hellenthal) (noting checks such as "public opinion" and the threat of "recall").
[860] Alaska Const. art. VI, § 11.
[861] Alaska Const. art. VI, § 10.
[862] *See* Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-15 Side B No. 0475 (Feb. 11, 1998) (statement of Rep. Green, Vice Chairman, H. Judiciary Comm.) (summarizing the committee's intent to make redistricting "more neutral and fair").
[863] *See id.* at No. 0016 (statement of Rep. Porter, Joint-Sponsor) (acknowledging that "the weight of this constitutional amendment is substantial, because the change from one system to another affects many sections of the constitution," while reiterating his belief that HJR 44 would not upend the structure beyond "the shift from the governor appointing the board to a bipartisan representation of the legislature").

opinion" in the form of mandatory "public hearings." In other words, the Board is no longer the ultimate arbiter of reasonableness; that power is shared with the people.

Because the Board is no longer directly answerable to any elected official, there is nobody for the people to hold accountable for a skewed redistricting process. An apt comparison is the municipal rezoning process: both involve the drawing of maps that may adversely affect important individual rights, and both are reviewed under the deferential "arbitrary and capricious" standard.[864] As a result of this deference, one oft-stated truism about unpopular rezoning decisions is that "the remedy is the ballot box, not the courts."[865] To rephrase, if citizens disagree with their elected representatives' voting patterns, they can vote them out. That remedy is unavailable here.[866] But because the 1998 amendments had to be ratified by a majority of the people,[867] it is incomprehensible that the people—without clear notice—agreed to waive their constitutional check on the redistricting process. Accordingly, the public must have other means of checking redistricting abuses.

And because the Board's constitutional role is to hold public hearings, and thus elicit public testimony, only the public can truly determine whether that process was arbitrary and capricious. To be sure, the courts have always had a role, and must always determine constitutional compliance. But the courts can also enforce the public's determination. The legislature appears to have implicitly understood this balance.[868] And yet the Board asserts that it satisfied Section 10 by adopting two proposed "draft" maps within the 30-day deadline—Board v.1 and v.2—and then by holding two public hearings

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[864] *See Griswold v. City of Homer*, 925 P.2d 1015, 1019-20 (Alaska 1996); 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 3:15, Westlaw (database updated Nov. 2021).
[865] *Robinson v. City of Bloomfield Hills*, 86 N.W.2d 166, 169 (Mich. 1957); *see also Griswold*, 925 P.2d at 1019 ("[I]t is the role of elected representatives rather than the courts to decide whether a particular statute or ordinance is a wise one.").
[866] Only the governor is directly elected by the people—the presiding officers of the house and senate are chosen by the respective legislative body, and the chief justice is appointed by the governor (presumably not the same governor). In debating HJR 44, the legislature expressed concern that "judges could be put in the position of standing against a recall election if reapportionment does not satisfy everyone." Minutes, H. Fin. Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape HFC 98-50 Side 1 (Mar. 3, 1998) (statement of Rep. Davies, Member, H. Fin. Comm.).
[867] *See* Alaska Const. art. 13, § 1.
[868] *See* Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-15 Side B No. 0241 (Feb. 11, 1998) (statement of Rep. Bunde, Vice Chairman, H. Judiciary Comm.) ("[T]he check and balance here is that if [the plan] is skewed, people will be standing in line to file suit, and the court will act.").

on September 17 and 20, 2021.[869] The Board conveniently ignores that it "replaced" both Board v.1 and v.2 on September 20.[870] The Board's preferred interpretation would thus effectively render the "public hearings" requirement superfluous.[871] If the Board could hold public hearings but with no intent to ever listen to or incorporate public comments in the first place, then what purpose would those public hearings serve?

Finally, the policy goals of Article VI, Section 10 are better served by a rule that requires the Board to make a good-faith attempt to accommodate the will of the people. As noted above, the primary purpose of HJR 44 was "to get partisan politics out of the process."[872] This policy is clearly expressed in Section 8, which states that appointments to the Board "shall be made without regard to political affiliation."[873] But the specter of a "partisan gerrymander" always looms in the background where Board Members appointed by the political branches make decisions contrary to the will of the people or fail to offer adequate explanation.[874] Instead, whether the clear weight of public comment favors one concept over another is an objective standard that can easily be measured.

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[869] Board PFFCL 170. In the Board's view, apparently, everything beyond that date was gratuitous. But the Board offers no cogent rationale for such a narrow interpretation. Although the Board cites Judge Rindner's 2002 opinion in support, this comparison lacks critical context. The issue there was whether the Board violated Section 10 by adopting late-filed maps that were never discussed over the course of 21 public hearings, of which one became the basis for the Board's final plan. *2001 Cases I*, No. 3AN-01-08914CI, at 32-34 (Alaska Super., Feb. 01, 2002). Judge Rindner found no constitutional violation because the final plan "was an evolution of various other plans," as opposed to "a radical departure from plans that had been the subject of public comment." *Id.* at 86 n.40. In other words, the Board satisfied its constitutional mandate because it "made a good faith effort to adopt a constitutional plan" and to "encourage[] public participation," *id.* at 42, despite "technological problems" and other limitations. *Id.* at 38. As Judge Rindner observed, Section 10 does not impose any numerical requirement on public hearings, but whether the Board actually made a good-faith effort is evaluated on a case-by-case basis.

[870] ARB000190; *see also* Simpson Depo. Tr. 41:17-24 ("I did not know if [Board v.1] was formally replaced or if it was just supplemented with the later version. . . . [I] t was basically obsolete, as far as we were concerned . . . .").

[871] *See Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999) (noting that courts must presume "that no words or provisions are superfluous" when interpreting a statute).

[872] Minutes, H. Fin. Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape HFC 98-49 Side 2 (Mar. 3, 1998) (statement of Rep. Porter, Joint-Sponsor).

[873] Alaska Const. art. VI, § 8(a). But as this redistricting cycle has shown, it may be impossible to expect the political branches to ever disregard "political affiliation" with their appointments. *See* Binkley Depo. Tr. 24:19-26:4 (former Republican gubernatorial candidate); Marcum Depo. Tr. 179:13-15 (Republican party officer); Simpson Depo. Tr. 209:5-210:12 (lifelong Republican).

[874] *See, e.g.*, *In re 2001 Redistricting Cases* (*2001 Appeal II*), 47 P.3d 1089, 1094 (Alaska 2002) (addressing allegation that final plan favored Democrats over Republicans). Many of the challenges in this redistricting cycle likewise have spawned from the appearance of partisanship.

By requiring the Board to either accommodate the clear weight of public opinion or explain why it cannot, the danger of hidden partisan agendas is removed.

In light of the aforementioned legislative history and debates from the Constitutional Convention, as well as a consideration of precedent, reason, and policy, this court believes that a "good-faith effort" standard ensures constitutional compliance to the greatest extent practicable. In other words, the spirit of Article VI, Section 10, if not the plain text, compels the Board to present the public with a number of equally constitutional redistricting plans and then let the people have a say about which plan they prefer.[875] While the Board need not respond to every single comment received, the Board must make a good-faith effort to consider and incorporate the clear weight of public comment, unless state or federal law requires otherwise. Board Members are public servants, not regional experts, so beyond the initial map-drawing phase the Board must give some deference to the public's judgment. If the Board adopts a final plan contrary to the preponderance of public testimony, it must state on the record legitimate reasons for its decision. Due process likewise requires the Board to make a good-faith attempt to comply with the procedures it has adopted for itself, as long as those procedures are not preempted by applicable state or federal law.

F. Regional Applications

1. Skagway: The Board made no good-faith attempt to incorporate or respond to public testimony from Skagway and Juneau but instead allowed one Board Member to draw the boundary lines for Districts 3 and 4 based on a narrow view of compactness.

Skagway raises both due process and Article VI, Section 10 claims.[876] Skagway argues that "the Board failed to adequately consider the views and preferences it did receive" related to Skagway, and thus the resulting final plan is "arbitrary and irrational."[877] Skagway also asserts that "the overwhelming public comment support[ed] continuing to

[875] Individual Board Members, at least in theory, appear to have been aware of their role. Jan. 27, 2022 Trial Tr. 1032:12-1033:11 (Simpson Cross) ("The purpose of adopting [multiple plans] was to encourage a variety of public comment and to provide a number of options that people could look at and sort of pick and choose their way through what they liked or didn't like about any of them.").
[876] Skagway Trial Br. 15-25.
[877] Skagway Am. Compl. 4-6.

district Skagway and Haines with downtown Juneau," and yet the Board drew "an arbitrary line through the middle of the Mendenhall Valley community" due to "the strong personal and unsupported opinion of Board Member Simpson."[878]

In the Board's final plan, Member Simpson "took the lead" for drawing districts in Southeast Alaska.[879] Member Simpson testified that the existing house districts in Juneau are "much-less compact," and that based on his "experience and knowledge of Southeast Alaska, pairing Skagway with downtown Juneau never made sense."[880] Member Simpson stated that he started drawing District 4 at the southern borough boundary for Juneau,[881] then he "drew the northern line by gathering census blocks moving outward from downtown Juneau, stopping when [he] had sufficiently populated the district" while trying "to make the line as straight as possible in light of the population and compactness goals."[882] Despite his dislike for the existing districts, which paired Skagway with Downtown Juneau,[883] Member Simpson acknowledged that both his version and the 2013 districts are "highly defensible."[884] He also recalled public testimony:

> The question of splitting the Valley in half wasn't brought up one way or the other. Most people in the downtown area preferred keeping the existing arrangement. They did not talk about where the Valley would be split.
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> Some people did weigh in that splitting, like around Fred Meyer or something, made sense to them. I recall some of that. But I don't think anybody ever split the Valley in half, only because it just didn't come up in that context.[885]

Member Simpson could recall only one individual from Skagway who testified in favor of being districted with Auke Bay[886]—all others preferred Downtown Juneau.[887]

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[878] Skagway Trial Br. 61.
[879] Simpson Aff. 2.
[880] Simpson Aff. 12
[881] Simpson Depo. 103:2-7.
[882] Simpson Aff. 8-9.
[883] ARB001614.
[884] Simpson Depo. 109:8-10.
[885] Simpson Depo. 116:7-18.
[886] Simpson Depo. 119:17-19.
[887] Simpson Depo. 117:21-120:12; *see also* Skagway Ex. 2005 Tr. 12:3-30:11 (Oct. 27, 2021).

Member Simpson's testimony before this court also reflects a misunderstanding of the role of the Board and public hearings. He opines that he was entitled to use his own judgment based on his own experience of living in Southeast Alaska.[888] But Member Simpson acknowledges that any substantive knowledge was not why he was chosen; instead, "they were looking for a Republican from Southeast," which he described as a "short list."[889] Nor was he appointed for his knowledge of redistricting, as Member Simpson made a few attempts to use the software, but quickly determined it was easiest to let staff draw the maps.[890] Although the Board's decisions are ultimately reviewed with the deference afforded an administrative agency, Member Simpson's personal views and opinions are entitled to no additional constitutional deference.

When the Board adopted the maps for Districts 3 and 4, districting Skagway with Mendenhall Valley and Auke Bay, it provided no clear basis for ignoring public testimony from Skagway and Juneau on the issue. Member Simpson opined that his District 3 was "more compact and more socioeconomically connected," whereas Member Borromeo's version "doesn't make socioeconomic sense to me, as a resident of those districts."[891] Based on her statements at that time and her later testimony, Member Borromeo appeared to harbor doubts about the reasonableness of Member Simpson's process. And yet, despite awareness of the lack of any good-faith attempt to incorporate public testimony, the Board ultimately deferred to Member Simpson's personal opinions.[892]

This Court is somewhat troubled by this practice of assigning each member a region and ultimately deferring to those Members' judgment on their assigned regions.[893] This regional or individual division of responsibility for drafting maps was even addressed

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[888] Trial Tr. 1848:14-18; 1864:16-19 (Feb. 3, 2022); Simpson Aff. 3, 12.
[889] Trial Tr. 1725:15-1727:16 (Feb. 3, 2022); Simpson Depo. 210:9-12. The challengers have not raised any claims under the "political affiliation" clause. Alaska Const. art. VI, § 8.
[890] Trial Tr. 1813:3-12 (Feb. 3, 2022).
[891] ARB009080 Tr. 17:16; ARB009081 Tr. 18:5-7.
[892] ARB009081-82 Tr. 18:15-22:18; Trial Day 10 Tr. 83:1-9 (11:31:41) (Simpson Cross).
[893] It appears that the Board adopted this practice both as a matter of expedience and as a show of respect to the other Board Members. Despite good intentions, this practice resulted in a loss of focus on what should have been the Board's priorities. Although the Board must produce a final plan that satisfies the constitutional requirements, it must also ensure that the process it employs along the way is ultimately reasonable. This includes the manner by which Board Members listen and respond to public testimony.

and discouraged early in the Board's mapping process.[894] No such mandate exists as a matter of statutory or constitutional law. And as noted above, the legislature never intended for Board members to be experts for their regions. The whole purpose of public hearings is to find out what the people prefer—it should not be a meaningless exercise.

The Board effectively concedes that Member Simpson made no attempt to accommodate the clear weight of public testimony.[895] Instead, the Board points to just four comments that supported Member Simpson's version of Districts 3 and 4.[896] The Board also boasts that several of the Members "are life-long Alaskans, and the Board brings over 200 collective years of experience in and throughout Alaska."[897] Testimony before this court revealed a number of instances where the process worked as intended, and the Board adjusted its proposed maps in response to public testimony.[898] Where that process was not followed, however, appears to be where individual Board Members had a personal stake in the decision-making process and believed that they knew better than the people.

In light of the whole record, Skagway has shown that the Board ignored the clear weight of public testimony from Skagway and Juneau when it adopted Districts 3 and 4. Neither Member Borromeo's deference to the personal preferences of Member Simpson, nor Member Simpson's myopic focus on the single criteria of compactness constitute reasonable explanations for ignoring public testimony. The Board had multiple options available that would have satisfied both Skagway's and Juneau's reasonable requests, and Skagway has shown at trial that those requests can still be accommodated without affecting the boundaries of any other districts. More than anything, the Board's closing argument does little to instill confidence. To each of Skagway's points, the Board replied: "So what?"[899] This is not the response the people should expect to receive from the public entity in charge of redistricting and constitutionally required to hold public hearings. Nor

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[894] ARB000156-58.
[895] Board PFFCL at 21-26.
[896] Board PFFCL at 85-86 n. 559. The Board does not state that it relied on these specific comments in adopting Districts 3 and 4, nor does the Board explain how these comments are more persuasive.
[897] Board PFFCL at 3. But as explained above, that is not the Board's role.
[898] *See, e.g.*, Day 10 Trial Tr. 120:16-131:17 (13:50:32) (Simpson Redirect) (describing the Board's incorporation of public feedback from Homer).
[899] Trial Day 12 Tr. 225:1-13 (Feb. 11, 2022 16:05:15:20) (Board closing argument).

is this response indicative of a rational decision-making process. Skagway's unsuccessful trial arguments aside, the Board is nonetheless obligated to make a good-faith attempt to incorporate the public testimony of Alaska citizens. It simply did not. The Board therefore failed to take a hard look at Districts 3 and 4.

2. Mat-Su/Valdez

As for Mat-Su/Valdez, as discussed earlier, the Board did take a "hard look" at the issue of where to put Valdez and certainly did not ignore public testimony. The Board essentially began and ended the house districting with Valdez. Instead, the Board was simply unable to find a way to fulfill those requests while still meeting constitutional requirements elsewhere. Although this may have been affected by the order in which it addressed certain regions on the map first, thus not keeping all of its options open, the Board acted reasonably in its ultimately doomed efforts to keep Mat-Su/Valdez separate.

3. Calista

Calista did not raise any procedural claims, but this court will proceed to analyze the districts Calista complains of for whether the Board's actions were reasonable. Calista wanted Chevak, Hooper Bay, and Scammon Bay to be districted with Bethel, resulting in the shift of several other Calista villages out of District 37.[900] Although the Board was hesitant at first, it ultimately attempted to move the Calista villages around in open meeting.[901] The Board found a compromise solution by moving Chevak into District 38, then shifting Platinum and Goodnews Bay into District 37, while leaving Hooper Bay and Scammon Bay in District 39.[902] The Board explained that moving any more villages created ripple effects in distant regions, thereby endangering constitutional criteria elsewhere.[903] The Board thus made a good-faith effort to accommodate Calista's request, even if the request was not based purely on constitutional criteria. But despite the Board's best efforts, it became impossible to district all three villages with Bethel while still meeting

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[900] Guy Aff. 4-5.
[901] ARB007282 Tr. 182:2-4 (Nov. 3, 2021); ARB007792-7798 (Nov. 5, 2021).
[902] Guy Aff. 6-7.
[903] Bahnke Aff. 11-14; Binkley Aff. 16-17; Borromeo Aff. 23-24; Torkelson Aff. 38.

constitutional criteria for other districts. The Board explained as much during the final process and at trial. This court therefore finds that the Board took a hard look at Districts 37, 38, and 39 in light of public testimony from Calista.

4. East Anchorage

Because so much of East Anchorage's Due Process challenge is intertwined with its allegation that the Board violated the Open Meetings Act, much of the discussion will be addressed under that section. For East Anchorage, the Board obviously violated the "hard look" standard by ignoring public comment on the senate pairings. The Board left itself almost no time for comment devoted to senate pairings. Despite that abbreviated time period, the support for keeping Muldoon and Eagle River separate was loud and clear. And yet the Board ignored it to accommodate the wishes of a single Member, even though it was constitutionally possible to keep those communities together. Having fgailed to take an appropriate "hard look" at the Senate pairings, the Board violated the constitutional rights of East Anchorage Plaintiffs under Article I,§ 7 of the Alaska Constitution.

5. Conclusion

This Court finds that the Board's refusal to consider and make a good-faith effort to incorporate public feedback relating to the placement of Skagway and the dividing line in Juneau was arbitrary and capricious, and thus unreasonable. The same holds true for the East Anchorage senate pairings. If the Board could simply ignore the preponderance of public testimony and make decisions based on a single Member's personal views, then Section 10 would be rendered superfluous.

This Court therefore orders a remand of the final plan to the Board with instructions to take a "hard look" at House Districts 3 and 4 and Senate Districts K in light of public testimony. On remand, the Board must either redraw these districts to incorporate the reasonable requests supported by the clear weight of public testimony, or the Board must offer an explanation as to why it believes the constitution, federal law, or other traditional redistricting criteria make it impossible to achieve those results.

G. Constitutional Deadlines In Article VI, Section 10

1. Proposed Plan 30-Day Deadline

Some Plaintiffs argue that the Board violated Article VI, Section 10 by not strictly adhering to the constitutional deadlines. In relevant part, Section 10 states:

> Within thirty days after the official reporting of the decennial census of the United States . . . the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings . . . on all plans proposed by the board. No later than ninety days after . . . the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. . . .[904]

Judge Rindner's 2002 order construed this provision as "requir[ing] that public hearings be held only on the plan or plans adopted by the Board within thirty days of the reporting of the census," as opposed to the final plan.[905] The superior court approved of the Board's process for accepting third-party plans, including those submitted after most of the public hearings had concluded,[906] as long as the Board was not "adopting an entirely new plan that has never been the subject of public hearings and which was a radical departure from plans that had been the subject of public comment."[907] Although the Alaska Supreme Court summarily affirmed that portion of Judge Rindner's order, the Court's opinion said nothing about Section 10.[908]

The United States Bureau of the Census released the 2020 census data on August 12, 2021.[909] The Board proposed two plans, Board v.1 and v.2, on September 9.[910] At that time, the Board permitted third parties to submit their own drafts with a submission deadline of September 15.[911] The Board heard presentations regarding the third-party plans on September 17.[912] On September 20, the Board evaluated and adopted four

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[904] Alaska Const. art. VI, § 10(a).
[905] *In re 2001 Redistricting Cases*, No. 3AN-01-08914CI, at *33 (Alaska Super., Feb. 01, 2002).
[906] *Id.* at 34.
[907] *Id.* at 85 n.40 (finding no constitutional violation where the final plan "was an evolution of various other plans" that had been subject to public hearings).
[908] *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 (Alaska 2002).
[909] ARB000002.
[910] ARB000164-65.
[911] ARB000165.
[912] ARB000170-73.

third-party plans to take on its public road show.[913] The Board also reviewed a number of improvements that it sought to incorporate into its proposed plans in light of the public testimony it had received.[914] The Board then moved to replace Board v.1 and v.2 with Board v.3 and v.4 respectively.[915] Of the six plans the Board took on its public roadshow, Board v.1 and v.2 were not included.[916] The Board met again in public hearings and work sessions starting November 2, until it finalized the house districts on November 5.[917]

The Plaintiffs thus contend that the Board violated Article VI, Section 10 by not holding a full 60 days of public comment on the only proposed plans adopted within the 30-day constitutional deadline,[918] i.e., Board v.1 and v.2.[919] But the plain text of Section 10 includes no such command—the Board is simply required to "hold public hearings . . . on all plans proposed by the board." Nor does legislative history support such an inference. In one of the few exchanges regarding "public hearings," staff explained that "over the next 60 days after the first 30 days, there are public hearings around the state," so that "by the end of that 60-day period," the Board "should agree upon its reapportionment plan and proclamation."[920] In other words, those 60 days are not just for holding public hearings but also for the Board to discuss and reach *agreement* on a final plan.[921] The Plaintiffs' interpretation also fails as a matter of logic, as it would require the Board to forego *any* attempts to incorporate public comment until the very last second. This is contrary to arguments elsewhere faulting the Board for *not* incorporating public testimony from their communities.[922] And as a result of plans remaining static throughout the public hearing process, any final plan incorporating 60-days' worth of public testimony all at once would inevitably be a "radical departure" from the original proposed plan. The Board is not constitutionally forbidden from updating its proposed plans with public

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[913] ARB000176-86, 190-92.
[914] ARB000186-90.
[915] ARB000190.
[916] Simpson Depo. Tr. 40:17-43:6; Torkelson Depo. Tr. 109:20-110:13.
[917] ARB000193-209.
[918] Mat-Su PFFCL 126; Skagway PFFCL 46-49; Valdez 48-51.
[919] ARB000164.
[920] Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-11 Side A No. 0491 (Feb. 6, 1998) (statement of Jim Sourant, Legislative Assistant to Rep. Brian Porter).
[921] *See id.* at No. 1065 (statement of Rep. James, Member, H. Judiciary Comm.) (paraphrasing the timeline as permitting "60 days to hold hearings and agree on a final plan").
[922] Mat-Su PFFCL 74; Skagway PFFCL 80; Valdez PFFCL 110.

testimony after the first 30 days, as long as the Board does so in good faith and provides adequate reasons.

The Plaintiffs recognize such inconsistencies and pivot to the argument that modifications are acceptable, but the Board cannot "replace plans it adopted within the 30-day period with radically new plans outside the 30-day period."[923] Thus, in their view, Board v.3 and v.4 are "radically different" from Board v.1 and v.2 and were never subjected to public comment prior to adoption.[924] Although this argument is based on the language of Judge Rindner's order, it overlooks the logic. In the 2001 cases, the superior court faced a scenario where the Board accepted a third-party plan that was filed the day before the conclusion of the Board's road show.[925] Both plans that the parties complain of—Board v.3 and v.4—were adopted at the same time as the third-party plans, and all six of those plans received extensive public comment on the Board's roadshow. This argument also confuses the constitutional significance of public hearings: The Board must elicit public testimony on plans *after* it adopts them, not before. Whether the Board held any public hearings on Board v.3 and v.4 prior to adopting them is irrelevant, especially where the Board made those revisions to *incorporate* public testimony. Board Members explained in detail what changes they were making to Board v.1 and v.2, including what public testimony or legal advice had led to those conclusions.[926] This is not a situation where the Board has switched out its proposed plans at the last minute for something "radically different" in bad faith. That the Board updated its earlier proposed plans in response to public testimony is not a due process violation—it is evidence that the system

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[923] Skagway PFFCL 48.
[924] Skagway PFFCL 14, 50
[925] *In re 2001 Redistricting Cases*, No. 3AN-01-08914CI, at 33 (Alaska Super., Feb. 01, 2002). There, the Board received the census data on March 19, 2001, and had adopted four plans by April 18. *Id.* at 3, 10. The Board held 21 public hearings between May 4 and May 19. *Id.* at 33. But the Board continued to accept late-filed plans, including a revision of one of the third-party plans adopted earlier, which then became the basis for the Board's final plan. *Id.* That revised plan was submitted on May 18. *Id.*
[926] ARB000186-90. To the extent that the parties complain about Board Members drawing maps with staff or working individually prior to the adoption of Board v.3, and v.4, neither are improper Article VI, Section 10. *Cf.* Alaska Const. art. VI, § 9 ("Concurrence of three members of the Redistricting Board is required for actions of the board, but a lesser number may conduct hearings."). If a single Board Member can conduct a hearing, then Board Members can certainly draft maps individually or in groups of two.

worked. The Board's decision to incorporate the public testimony it had already received on Board v.1 and v.2 prior to embarking on its five-week roadshow was a reasonable one.

Finally, some of the Plaintiffs generally assert that the Board's public outreach was inadequate, that it was required to hold public hearings on the final plan, or that it must provide for public comment after every districting decision.[927] Due process does indeed require at the very least notice and an opportunity to be heard.[928] But here, the Board provided much more than the constitutional bare minimum. The Board embarked on a five-week public roadshow from Ketchikan to Utqiagvik, eliciting 63 hours of public testimony.[929] The Board also held statewide teleconferences and virtual meetings, even accommodating requests for Zoom meetings from smaller communities.[930] And throughout the entire process the Board elicited and received countless written submissions by mail, e-mail, and through the Board's website.[931]

As noted above, this court reads Section 10 to require a "good-faith effort" to elicit public testimony to the greatest extent practicable.[932] This standard incorporates technological advances that have made—and will continue to make—the redistricting process much more accessible to the public. This standard also incorporates practical considerations. Indeed, if the Board had to stop working and seek public testimony after every single decision, it would never finish before the 90-day deadline. Viewing the record as a whole, this court finds that the Board made a good-faith effort to provide the public with a meaningful opportunity to submit comments and testimony on the proposed house districts throughout the redistricting process.

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[927] Mat-Su 126; Skagway PFFCL 49; Valdez 51.
[928] *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008).
[929] ARB001698-705.
[930] ARB001699-703; Skagway Ex. 2005 (Oct. 27, 2021).
[931] ARB000005-6, 167, 501. The record contains over 2500 pages of verbal and written comments submitted to the Board. *See* ARB001709-4347.
[932] But as to argument that the Board must also hold public hearings on the final plan, the plain text limits the "public hearings" requirement to only "plans proposed by the board," i.e., "proposed plans" and not the "final plan." Alaska Const. art. VI, § 10.

H. Other Due Process Issues

The Plaintiffs also raise a number of ancillary issues under the banner of due process violations. First, Valdez and Skagway allege that the Board was unprepared for the census data and began the mapping process late.[933] Prior to receipt of the census data the Board certainly could have familiarized itself further with the districting software and the geographic data.[934] But the Board held its first public mapping session within two weeks of receiving the census data and used the software extensively before reconvening on September 7.[935] And in the end, the parties do not dispute that the Board proposed two statewide house district plans prior to the 30-day deadline. This court finds that if any alleged delay did occur, it was harmless, at least as far as the house districts are concerned.

Second, Valdez and Skagway allege data abnormalities and "persistent confusion" as a result of inconsistent map numbering.[936] The only alleged data abnormalities occurred after the Board adopted the final plan and published the corresponding population deviation table on its website.[937] The Board erroneously used the district numbering from an earlier version of the house district map, but the deviation table was updated as soon as staff noticed this error.[938] No party argues that the final plan's total population deviation of 7.48%[939] is factually incorrect or that the Board's oversight was in any way prejudicial. And despite any alleged confusion regarding district numbering between the maps, this court's review of public testimony reveals very little. This is because members of the public primarily testified regarding what other communities they wished to be districted with and what socio-economic factors supported their conclusions.[940] Some testified that they preferred how certain maps treated their

[933] Skagway PFFCL 42-45; Valdez PFFCL 44-47.
[934] Brace Corrected Aff. 10
[935] Torkelson Supp. Aff. 3-6.
[936] Skagway PFFCL 62-63; Valdez PFFCL 65-66.
[937] Brace Corrected Aff. 11-14.
[938] Torkelson Supp. Aff. 6.
[939] ARB000117.
[940] *See, e.g.*, ARB001712 (requesting that smaller communities on the Kenai Peninsula reliant on Homer as a hub be included in the same district).

communities over others,[941] but the parties have produced no affidavits from any individuals who were effectively precluded from testifying because they were confused about the precise district numbers. There are always honest mistakes and inevitable hiccups that reveal ways that future Boards can improve upon their predecessors. But none of these minor issues violate due process.

Finally, the Plaintiffs raise general claims asserting that Board Members allocated disparate weight to certain public testimony and constitutional criteria to advance their own individual priorities.[942] This court has already addressed these issues as they pertain to the districts the parties have specifically challenged. But as a more general matter and as to districts *not* specifically challenged, this court has not heard adequate argument or testimony to determine whether the Board's inconsistent application of redistricting criteria rise to such a level as to violate due process.[943] Moreover, as described more thoroughly above, the constitutional criteria are *intended* to be balanced against one another in light of public testimony and practicability. Depending on the circumstances, mechanically applying the same criteria in a uniform manner would be entirely unreasonable and—due to Alaska's geography—likely impossible. This Court therefore declines to grant relief on any of the various generalized inconsistencies the parties have alleged.

Finally, some Plaintiffs argue that the Board violated Section 10 by failing to hold a full 60 days of public comment on the only proposed plans adopted within the 30-day constitutional deadline, *i.e.*, Board v.1 and v.2.[944] But this Court believes the parties draw too fine a distinction. This Court sees no reason why the "good-faith effort" standard is not equally applicable to compliance with constitutional deadlines. It is simply not

[941] *See, e.g.*, ARB001711 (objecting to the Board's failure to preserve existing district boundaries around Lake Otis and stating a preference for the AFFR map).
[942] Mat-Su PFFCL 126-27; Skagway PFFCL 63-107; Valdez PFFCL 66-113.
[943] For example, Skagway alleges that Member Borromeo improperly coordinated with outside parties to advance the Doyon Coalition's priorities. Skagway PFFCL 70. But the Doyon Coalition's map actually would have accommodated Skagway's request to remain in a district with Downtown Juneau. ARB001445. Such non sequiturs in the briefings are legion.
[944] The East Anchorage Plaintiffs also assert a Section 10 violation by failing to include proposed senate pairings in any of the Board's proposed plans. This claim is addressed separately.

practicable to limit the public comment period to only those plans formally adopted as v.1 and v.2.

XII. OPEN MEETINGS ACT

A. The Open Meetings Act

This Court has previously ruled that the Redistricting Board is subject to the Open Meetings Act.[945] The Open Meetings Act provides that "[a]ll meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law."[946] A "meeting" is subject to the Act when a majority of the members are present and "a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decision for a public entity."[947]

One exception to the Open Meetings Act is that an entity subject to the Act may enter an "executive session" for specific purposes. These purposes are limited to "(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity; (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion; (3) matters which by law, municipal charter, or ordinance are required to be confidential; and (4) matters involving consideration of government records that by law are not subject to public disclosure."[948]

In order to properly enter an executive session, the Board must first be in a public meeting, and a motion must be made to convene an executive session consistent with one of the elements under section (c) of the Open Meetings Act.[949] "The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in

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[945] Order Re Motion for Rule of Law – Attorney Client Privilege at 12 (Jan. 18, 2022).
[946] AS 44.62.310(a).
[947] AS 44.62.310(h)(2)(A).
[948] AS 44.62.310(c)(1)-(4).
[949] AS 44.62.310(b).

private."[950] Nothing beyond the subjects mentioned in the motion may be considered during an executive session "unless auxiliary to the main question."[951] No action may be taken during an executive session other than to direct an attorney regarding the handling of a particular legal matter.[952]

Where a meeting subject to the Open Meetings Act violates the statute, any action taken during that meeting is voidable.[953] However, a violation can be cured by holding another meeting that adheres the notice requirements and conducts "a substantial and public reconsideration of the matters considered at the original meeting."[954] A court may only hold an action taken at a meeting in violation of the Open Meetings Act void if it finds that, "considering all of the circumstances, the public interest in compliance with [AS 44.62.310] outweighs the harm that would be caused to the public interest and to the public entity by voiding the action."[955] The court is instructed to consider the following in determining whether to void an action:

> (1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;
>
> (2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;
>
> (3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;
>
> (4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;
>
> (5) the amount of time that has passed since the action was taken;
>
> (6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;

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[950] AS 44.62.310(b)
[951] AS 44.62.310(b).
[952] AS 44.62.310(b).
[953] AS 44.62.310(f).
[954] AS 44.62.310(f).
[955] AS 42.62.310(f).

(7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;

(8) the degree to which violations of this section were willful, flagrant, or obvious;

(9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).[956]

The Open Meetings Act includes a section the clarifies the policy of the state and the intent of the Open Meetings Act. Alaska Statute section 44.62.312 states:

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

B. The Redistricting Board's Use of Executive Sessions

Several Plaintiffs challenge the Board's use of executive sessions claiming they were improperly noticed or used for improper purposes. The Court is limited in its ability to analyze whether a particular executive session was held in accordance with the law, as the Court pull back the curtain entirely and understand exactly what happened during

[956] Alaska Statute 44.62.310(f)(1)-(9).

these sessions. However, the Court does acknowledge, based on the transcripts, that Board members typically moved for executive session only by identifying the specific section of the Open Meetings Act which the meeting purportedly fell under.

On September 7, 2021, Board Member Bahnke moved for executive session under AS 44.62.310(c)(4) in order to "receive legal advice from Mr. Singer to inform the process and direction moving forward."[957]

On September 17, 2021, Board Member Marcum requested an executive session be added to the schedule for September 20, 2021, as Member Binkley articulated, to receive "guidance from the Board's legal counsel on some areas that we have to be cautious about."[958] However, an executive session did not occur on September 20, 2021.[959]

On November 2, 2021, Board Member Bahnke made a motion to enter executive session under AS 44.62.310(c)(3) and (4) and quoted the statute.[960] The November 2, 2021 session lasted roughly two and a half hours.[961]

On November 5, 2021, at the beginning of the proceeding, Board Member Simpson requested the Board enter executive session to receive advice from counsel regarding a Voting Rights issue and evaluate where the Board stood on that question.[962] Board Member Simpson then moved the Board to enter Executive Session "for the purpose of receiving legal advice" under AS 44.62.310(c)(3), quoting the statute.[963] Upon exiting this session, Board Member Marcum explained that she applied the "legal parameters" to map v.3.[964]

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[957] Board Meeting Transcript 29:17-22 (Sept. 7, 2021).
[958] Board Meeting Transcript 277:8-20 (Sept. 17, 2021).
[959] Board Meeting Minutes at 1 (Sept 20, 2021), ARB 175.
[960] Board Meeting Transcript 68:23-25, 69:1-4 (Nov. 2, 2021).
[961] Board Meeting Minutes at 4 (November 2-4, 2021), ARB 196.
[962] Board Meeting Transcript 2:17-22 (November 5, 2021).
[963] Board Meeting Transcript 3:2-8 (Nov. 5, 2021).
[964] Board Meeting Transcript 6:1-10 (Nov. 5, 2021).

Also on November 5, 2021, Board Member Bahnke initially requested the Board enter executive session before considering the final map.[965] What followed was a heated discussion between Board Members Marcum and Borromeo, where Board Member Marcum states that she believes it is inappropriate to criticize another's map during public session, and felt such deliberative discussions were only appropriate during "private" sessions.[966] At the end of this discussion, Board Member Borromeo moved the Board to enter executive session under Alaska Statute 44.62.310(c), quoting the statute.[967]

On November 8, 2021, Chairman Binkley articulated that the Voting Rights Act Consultant was waiting online and as such, asked for someone to make a motion that that Board should enter Executive Session in order to speak with the VRA consultant "on some of the issues that are before [the Board] with this process."[968] Board Member Borromeo subsequently moved the Board to enter Executive Session "for purposes related to receiving legal counsel for the Redistricting Board."[969]

On November 8, 2021, following a suggestion by Board Member Marcum that there may be questions regarding a "race issue" Mr. Singer suggested such questions should be discussed in executive session.[970] Following other discussion regarding Fairbanks pairings and district numbering,[971] the Board entered an executive session for legal advice regarding the proposed Senate parings in Anchorage.[972] The Board exited Executive Session and entered recess at 6:25 p.m., and explained that the Board would reenter Executive Session immediately the following morning at 9:00 a.m.[973]

On November 9, 2021, the Board entered Executive Session at 9:00 a.m. without a motion being made during public session.[974] The Board reentered public session explaining that it was confronted with many legal issues as it approached finalizing the

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[965] Board Meeting Transcript 171:19-25, 172:1-3 (Nov. 5, 2021).
[966] Board Meeting Transcript 172:20 – 184:8 (Nov. 5, 2021).
[967] Board Meeting Transcript 184:25, 185:1-8 (Nov. 5 2021).
[968] Board Meeting Transcript 104:24-25, 105:1-7 (Nov. 8, 2021).
[969] Board Meeting Transcript 105:8-11 (Nov. 8, 2021).
[970] Board Meeting Transcript 199:2-25, 200:1-25, 201:1 (Nov. 8, 2021).
[971] Board Meeting Transcript 206:3–214:14 (Nov. 8, 2021).
[972] Board Meeting Transcript 215:18-25, 216:1-13 (Nov. 8, 2021).
[973] Board Meeting Transcript 217:3-25, 218:1-12 (Nov. 8, 2021).
[974] Board Meeting Minutes at 6 (Nov. 8-10, 2021), ARB 215.

Senate pairings.[975] As Chairman Binkey was providing this explanation to the public, Board Member Marcum interrupted and immediately moved to accept senate pairings.[976] The motion passed with pushback from Board Members Borromeo and Bahnke.[977] Board Member Borromeo expressed very strong opposition to pairing then-numbered districts 18 and 24.[978] Motions to reconsider the vote failed.[979]

C. Vague Motions Relating to Executive Sessions

The Plaintiffs, particularly East Anchorage, allege that the Board was vague in specifying the purpose of executive sessions in violation of AS 44.62.310(b), which specifies that a motion to convene Executive Session should be made "clearly and with specificity" and the subject of the session should be described to the extent possible without defeating the purpose of discussing in executive session.[980] Plaintiffs also allege that the Board adopted final senate pairings without considering public testimony and misrepresenting public testimony.

The Board at times entered Executive Session on a motion that only stated the relevant section of AS 44.62.310 under which the Executive Session was to be convened and did not state the subject of the meeting or provide any further information as required by statute. This was done on September 7, November 2, twice on November 5, and November 9. There were also times when the reasoning for the executive session was expressed with some level of specificity at some other time in the Board Meeting. However, the statute is clear. The motion to convene an executive session itself must "clearly and with specificity describe the subject of the proposed executive session."[981] Only specifying the relevant section of the Open Meetings Act is inconsistent with the statutory mandate that the motion identify the subject of the session and made "clearly and with specificity."

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[975] Board Meeting Transcript 2:1-7 (Nov. 9, 2021).
[976] Board Meeting Transcript 2:1-25, 3:1-3 (Nov. 9, 2021).
[977] Board Meeting Transcript 3:12-25, 4:1-9, 8:12–15:14 (Nov. 9, 2021).
[978] Board Meeting Transcript 8:20–11:5 (Nov. 9, 2021).
[979] Board Meeting Transcript 8:12–14:16 (Nov. 9, 2021).
[980] Alaska Statute 44.62.310(b).
[981] Alaska Statute 44.62.310(b).

When the Board motions for executive sessions without the required specificity, it leads to significant ramifications for the public. When the subject of the session is not made clear to the public, that lack of information erodes the public trust and leads to implications that the Board misused executive sessions. Such erosion of the public trust is contrary to the spirit and the express purpose of the Open Meetings Act. The statute makes clear that the Board has a responsibility to protect the public's "right to remain informed."[982] The public expects the Board will conduct its business openly, and when it cannot discern why the Board is entering into an Executive session, it allows for the inference that the executive session is being improperly convened.

Where executive sessions were convened following a vague motion which did not specify the meeting's subject, those executive sessions were in violation of the Open Meetings Act. These sessions occurred on September 7, November 2, November 5, and November 9. However, the Court declines to specifically hold senate parings void on this conclusion. That the Board entered into Executive Sessions improperly as a procedural matter does not on its own indicate that the substance of the Executive Sessions was not otherwise proper. The Board's failure to comply with the procedural mandates in AS 44.62.310(a) harms the public confidence in public entities generally and more importantly in the highly visible and consequential redistricting process.

Despite these harms, on balance, the public interest in this procedural requirement does not outweigh the harm that would be caused were the Court to void the Senate pairings on that basis alone. The Court considers the public expense and that would be incurred were the Board to reconvene to select new Senate pairings. Further, in what is already an exceptionally expedited process, requiring the Board to reconvene would disrupt the already short timelines and jeopardize the ability to resolve all disputes in time for the coming election cycle. The Court also considers that new Senate pairing may themselves invite legal challenge despite every executive session being properly convened.

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[982] AS 44.62.312.

Further, the Court does not take the procedural missteps by the Board related to convening executive session to be willful or flagrant. In utilizing the exact language of the statute, it appeared the Board was attempting to comply with the Open Meetings Act, and likely following the advice of counsel despite misunderstanding its requirements. Finally, the Board did, at times, properly convene executive session. The Court notes that in advance of the second executive session on November 8, 2021, Chairman Binkley suggested the motion include "a little more context in terms of why [the Board was] taking an executive Session."[983] The Court takes this to demonstrate a good faith attempt on the part of the Board to comply with the procedural requirements of the Open Meetings Act. While the Court does find a violation, it declines to void any specific action on that basis alone, recognizing that is the remedy permitted by the Act.

D. Due Process/OMA Challenge by East Anchorage

East Anchorage Plaintiffs allege that the Board violated their right to Due Process when it violated the Open Meetings Act to such a degree that the Court should require the Board to redraw the East Anchorage Senate Districts, particularly Senate District K. East Anchorage alleges that the Board held executive sessions that are not permitted by the Open Meetings Act and adopted senate pairings that were improperly developed during executive session, were not presented to the public allowing for meaningful public comment, and were made disregarding and/or misrepresenting public testimony. The Court addressed the executive session notice problem above.

The Alaska Supreme Court adopted a balancing test to determine what process is due.[984] "This involves the consideration of three district factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail."[985] The Superior Court has determined that due process in the context of

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[983] Board Meeting Transcript 215:25, 216:1-2 (November 8, 2021).
[984] *Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991).
[985] *Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991) (citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96

redistricting is analogous to the framework of administrative law.[986] Thus, due process requires the Board to give notice and an opportunity to comment to residents potentially affected by the Board's decisions.[987] Further, the Board is not "afforded unfettered discretion during the redistricting process."[988]

The Court recognizes that meetings where two or fewer Board Members are present do not constitute meetings of a public entity subject to the Open Meetings Act. To be sure, the Board was aware of this and appeared to avoid meeting in groups of more than two unless in an OMA compliant public meeting. However, deliberative discussions, especially in the face of the Open Meetings Act, are not appropriate for executive, or otherwise private sessions, and it appears based on these exchanges that there were Board Members who did not understand the spirit or the purpose of the Open Meetings Act. The law is clear that when a public entity engages in deliberations, it is required that "their deliberations be conducted openly."[989]

To the extent that Board Members felt uncomfortable undertaking deliberative discussions in accordance with the law, that should have been considered before accepting a position on the Board. The Open Meetings Act is clear that "all meetings" are open to the public, and all deliberations likewise be conducted openly. This makes clear that the Board undergoes a process intended to be transparent, and does not allow for the Board to subvert the Open Meetings Act in order to keep certain uncomfortable discussions out of the public eye. This is contrary to the Open Meetings Act, and entirely inappropriate. Members of the Board are appointed to serve the public and create a redistricting map that conforms to the constitution, and the processes by which the map is created are subject to the Open Meetings Act.

The Court struggles to find a specific action of the Board that violates of the Open Meeting Act because the Court is not able to view the activity and discussion that occurred

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S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)).

[986] *In re 2001 Redistricting Cases*, 2002 WL 34119573 at *20 (Alaska Super. Ct. Feb. 1, 2002).

[987] *In re 2001 Redistricting Cases*, 2002 WL 34119573 at *20 (Alaska Super. Ct. Feb. 1, 2002)(citing *State of Alaska v. Hebert,* 743 P.2d 392 (Alaska Ct. App. 1987), *aff'd,* 803 P.2d 863 (Alaska 1990)).

[988] *In re 2001 Redistricting Cases*, 2002 WL 34119573 at *20 (Alaska Super. Ct. Feb. 1, 2002).

[989] Alaska Statute 44.62.312(a)(2).

during Executive Sessions. Earlier in the litigation parties have requested this Court pull back the curtain to allow a more complete look at the Board's communication with counsel to determine whether executive sessions were improperly used for discussion that should have been had in public. To be sure, the Court has serious concerns about the possibility the Board engaged in discussions in executive session that should have been held in public. The Court's concerns are elevated by discussion on the record that make clear that certain Board Members felt it was appropriate to discern for themselves what sort of discussions were appropriate to hold before public for their own comfort.

The Court cannot discern what happened in that executive session, but it does seem apparent that at least three Board members reached a "consensus" outside of the public view, which prompted Member Marcum to hold a vote immediately upon exiting session. The Court also notes that requiring the Board to change a handful of the Senate pairings is not as disruptive or expensive as requiring it to redraw the House Districts. The Court considers the lesser burden in determining whether to void the Senate pairings.

However, the actual "action" at issue – the senate pairing motion – was not taken during executive session. An action in violation of the Open Meetings Act is voidable. While the Court understands that a "consensus" appears to have been reached during Executive Session, the "action" that Plaintiffs ask the Court to void occurred during public session: the motion and vote to adopt particular Senate pairings. There is certainly an implication that some level of deliberative discussion happened out of the public view. But, even if the Court were to conclude there was an outright violation, the Court does not see an action to void that would permit the remedy Plaintiffs seek. The specific action to be voided – the vote on senate pairings - did not occur during Executive Session. Thus, the Court declines to void that action because it may have violated the Open Meetings Act.

E. Open Meetings and Attorney-Client Privilege

As noted previously, several Plaintiffs argue the Board's actions in the redistricting cycle violate the Open Meetings Act. This Court previously ruled the Open Meetings Act

applies to the Board,[990] and in this Order has determined the Board violated the OMA. The Court now turns to the interplay of the OMA and the attorney-client privilege.

Throughout the discovery phase of this litigation, the Court heard several challenges to the Board's assertion of privilege. The Board asserted the privilege protected more than 2,000 documents representing communications between the Board, or its staff and counsel, and its VRA consultants. In response to motion practice, this Court conducted *in camera* review of approximately 500 documents asserted to be privileged. Most were determined to be privileged, but a few were ordered to be produced over the Board's objection.

During the motion practice addressed to the Rule of Law Motion brought by the Plaintiffs, the Board argued the Plaintiffs were effectively asking this court to order that violation of the OMA should result in a waiver of the attorney-client privilege – a remedy never before recognized by the Courts, and not authorized by the plain language of the OMA. This Court agreed that such a remedy is not authorized by existing law, and therefore declined to rule that such a remedy would be appropriate in this case.

For purposes of appellate review, the Court now expands on its earlier ruling because this is an issue of first impression. More importantly, this is an area of the law which would benefit from clear guidance from the Supreme Court (or legislative action).

The Alaska Supreme Court addressed the scope of the attorney-client privilege in an OMA case in *Cool Homes*.[991] There, the Court began by describing the question as "whether the Open Meetings Act and the lawyer-client privilege can coexist."[992] The Court noted the attorney-client privilege exists for an entity subject to the OMA and "operates concurrently with the Open Meetings Act."[993] But the Court also noted the principles of confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential. Accordingly, in this context, the applicability of the attorney-client relationship

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[990] *Order re Motion for Rule of Law re Attorney-Client Privilege* at p12 (January 18, 2022).
[991] *Cool Homes, Inc. v Fairbanks North Star Borough*, 860 P.2d 1248, 1260 (Alaska 1993).
[992] *Id.*
[993] *Id.*

must be narrow, and the privilege should not be applied blindly.[994] "Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies."[995] "[O]nly when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential" should the privilege apply.[996]

The Supreme Court returned to the issue again in *Griswold.*[997] The case involved the Public Records Act,[998] rather than the OMA. The Court was faced with a public records request for all communications between the Homer Board of Adjustment, city employees and city attorneys leading up to that Board's decision in a case involving Mr. Griswold.[999] Griswold also requested copies of the attorney's invoices to the City. On appeal, the Supreme Court was faced with deciding whether the attorney-client privilege and the attorney-work product doctrine should be recognized as state law exceptions to the Public Records Act. After reviewing the policy underlying the attorney-client privilege, and attorney-work product, the Court held these common law privileges should be recognized exceptions.[1000]

Although the Court expressly held that a public board should have the benefit of confidential communications with its counsel, it also noted the important public interest in balancing the interest of the citizens to know what the servants of government are doing.[1001] The Court also underscored the public policy expressed by the legislature as "*a bias in favor of public disclosure.*"[1002] The Court went on to note the legislative "findings that 'public access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen

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[994] *Cool Homes*, 860 P.2d at 1261-1262.
[995] *Cool Homes*, 860 P.2d at 1262.
[996] *Id.*
[997] *Griswold v Homer City Council*, 428 P.3d 180, 186-188 (Alaska 2018).
[998] Alaska Statute 40.25.120.
[999] *Griswold*, 428 P.3d at 183.
[1000] *Griswold*, 428 P.3d at 188.
[1001] *Griswold*, 428 P.3d at 187.
[1002] *Griswold*, 428 P.3d at 186 (emphasis added).

control of government.'"[1003] Because of these important policies involving the public right to know, the *Griswold* Court held that both "the attorney-client and work-product privileges should be 'construed narrowly to further the legislature's goal of broad public access.'"[1004]

This Court is unaware of any Alaska court decision addressing whether a public board's violation of the Open Meetings Act should result in a waiver of otherwise privileged communications. However, in a recent decision involving redistricting litigation, the Michigan Supreme Court was faced with a similar question. In *Detroit News*,[1005] the Court was faced with a request for a recording of a closed-session meeting of that state's redistricting commission. The Court first noted that Michigan voters had recently approved an initiative removing the responsibility for redistricting from the legislature, and instead placing it in the hands of an independent body. The Court noted "the voters chose to ring the body with transparency requirements, forcing much, if not all, of the Commission's work into the daylight."[1006] The Michigan Supreme Court recognized the continued need for privileged and confidential communications between the Commission and attorneys for the Commission, but ultimately held that adoption and development of redistricting plans is part of the "core business" of the redistricting commission. Consequently, legal advice regarding the development of such plans should not be protected by privilege.[1007] Because the lawyer's advice and communications during a confidential session about development of the redistricting plans was part of the core business of the commission, the Michigan court ordered disclosure of the attorney's legal memoranda discussed at the closed session. It also further ordered disclosure of the recording from the confidential session.[1008]

In effect, the Michigan Court threw open the doors to that Commission's executive session. In so doing, the Court also rejected the Commission's argument that litigation over its plans was inevitable, and therefore the meeting was properly confidential because

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[1003] *Griswold*, 428 P.3d at 186 (citing *Capital Info. Grp. v State, Office of the Governor*, 923 P.2d 29, 33 (Alaska 1996) (quoting ch.200, § 1, SLA 1990)).
[1004] *Griswold*, 428 P.3d at 188 (footnote and citations omitted).
[1005] Detroit News, Inc. v Independent Citizens redistricting Commission, __ N.W.2d ___, 2021 WL 6058031 (Michigan) (December 20, 2021).
[1006] *Detroit News,* 2021 WL 6058031, at *4.
[1007] *Detroit News,* 2021 WL 6058031 at *8.
[1008] *Detroit News,* 2021 WL 6058031 at *9.

it was held in anticipation of litigation. "Indeed, allowing the simple prospect of litigation to shield the Commission's discussions on how to make a map would threaten to swallow the open-meeting requirement altogether."[1009] In so doing, the Court noted that legal advice on how to draw a map is akin to expert advice on demographics. Since the Commission is charged with drawing legal maps, the Court concluded any such legal advice was part of the core business of the Commission and subject to the requirement that the Commission conduct its business at open meetings.[1010]

This Court agrees with the rationale of the Michigan Court in *Detroit News*. The Alaska Redistricting Board is charged with the constitutional duty to draw legal maps that meet the constitutional criteria. If the Board violates the Open Meetings Act by entering into executive session for the purpose of obtaining legal advice on map drawing, that appears to be contrary to the strong public policy in favor of open government. Accordingly, this Court would hold that an appropriate remedy for violation of the OMA would include opening the door to discussions held during executive session, regardless of the presence of an attorney.

As noted earlier, the Court cannot say the Board's assertion of privilege was unfounded based on the current state of the law, or appeared to be made in bad faith. Further, there is simply no question the Board (and its counsel) appears to have been operating under the good faith belief that its communications with counsel were privileged. To throw open the doors in the middle of this redistricting litigation and require production otherwise confidential communications when the Board as the client expected the communications would remain confidential is an extraordinary remedy. Indeed, that remedy is the antithesis of the policy underlying the attorney-client privilege. As the Court noted in *Mendel*, the privilege is designed to encourage those who may have committed a prior wrong to seek legal advice, and perhaps curtail such conduct in the future.[1011] For that reason, the Supreme Court distinguishes between past and ongoing or future wrongdoing even where the fraud or crime exception may apply.[1012] For these reasons,

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[1009] *Detroit News,* 2021 WL 6058031 at *8.
[1010] *Detroit News,* 2021 WL 6058031 at *8.
[1011] *In Re Mendel*, 897 P.2d at 74.
[1012] *Id.*

this Court did not order production of attorney-client materials, and does not determine that the Board waived its privilege with counsel. However, the Court strongly encourages the Supreme Court to address this issue on review to provide guidance for future redistricting cycles and other public entity litigation.

XIII. SUMMARY AND CONCLUSION

For all of the reasons discussed above, the Court makes the following conclusions of law:

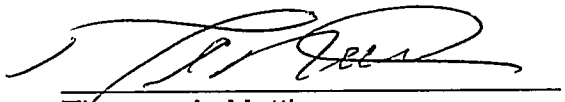
1. The Board violated the rights of the East Anchorage Plaintiffs under the Equal Protection Clause of the Alaska Constitution, Article I, Section 1, by pairing House District 21–South Muldoon with the geographically and demographically distinct House District 22–Eagle River Valley to create Senate District K.
2. The Board violated the rights of the East Anchorage and Skagway Plaintiffs under the Due Protection Clause of the Alaska Constitution, Article I, Section 7, by failing to take a "hard look" at House District 3 and Senate District K in light of the clear weight of public testimony.
3. The Board violated Article VI, Section 10 by failing to hold meaningful public hearings on proposed Senate Districts prior to adoption.
4. The Board violated Article VI, Section 10 by failing to include Senate District pairings in any proposed plan adopted before the 30-day constitutional deadline.
5. The Board violated Article VI, Section 10 by failing to make a good-faith effort to accommodate public testimony in regard to House District 3 and Senate District K.
6. The Board violated the Open Meetings Act, AS 44.62.310-320 in its improper use of executive session, but the violation does not, on balance, require the Court to void all actions taken by the Board in executive sessions.

7. In all other respects, the Board did not violate the Plaintiffs' rights under Article I, Sections 1 and 7, or Article VI, Sections 6 and 10.

This matter should be remanded to the Board to address the deficiencies in the Board plan consistent with this order.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 15th day of February, 2022.



Thomas A. Matthews
Superior Court Judge

I certify that 2/15/22 a copy of this Order
was sent to the following:

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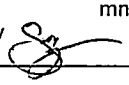

Judicial Assistant

Appendix A – Orders issued from 12-15-21 to 2-10-22

2.10.22

Order Granting Motion For Leave To Join Briefing As Amici Curiae

2.7.22

Order Following Further In Camera Review

2.7.22

Order Re Various Pre-Trial And Mid-Trial Motions

2.3.22

Order Granting Motion For Leave To Submit Briefing As Amici Curiae

2.2.22

Order Re East Anchorage Plaintiffs' Motion To Amend Application To Expand Equal Protections

1.27.22

Order Re Valdez's Motion For Clarification And Reconsideration Of Order On Oral Motion

1.25.22

Order Granting In Part Arb Motion To Reconsider Following Further In Camera Review

1.22.22

Order Following In Camera Review And For Production Of Additional Privileged Documents For In Camera Review

1.22.22

Order Re Valdez's Expedited Motion For Clarification And Reconsideration Of Order On Oral Motion

1.22.22

Order Re Arb Motion For Partial Reconsideration Of Order Following In Camera Review

1.20.22

Fifth PTO

1.19.22

Order Denying Stay

1.18.22

Order Re Motion For Rule Of Law – Attorney Client Privilege

1.17.22

Order Granting Calista Plaintiffs' Unopposed Motion For Extension Of Time To File Direct Testimony Of Expert Witness Randy Ruedrich

1.15.22

Order Denying Motion To Compel Discovery Responses

1.14.22

Order Regarding Arb Motion For Reconsideration Or Alternatively To Stay

1.13.22

Order For Production Of Privileged Documents For In Camera Review And Plaintiff Reply Briefs

1.13.22

Order Re In Camera Review Of Ms. Bahnke's Notes (Denying Production)

1.12.22

ORDER RE MOTION TO DISMISS

1.12.22

Order For Arb Response To Motions For Rule Of Law Re Scope Of Attorney-Client Privilege

1.10.22

Order Granting Motion Stipulated Protective Order

1.5.22

Order Canceling Oral Argument On Motion To Dismiss

1.4.22

Fourth PTO

12.28.21

Order Granting Motion To Intervene As Defendants Pursuant To Rule 24(A) And 24(B)

12.22.21

Third PTO

12.21.21

Order: Discovery Hearing And Submissions

12.21.21

Second PTO

12.15.21

Order Granting Unopposed Motion For Leave To Amend Application To Compel The Alaska Redistricting Board To Correct Its Senate District Pairings In Anchorage

12.15.21

PTO

Appendix B – Depositions

1.19.22

Deposition – Chase Hensel

1.15.22

Deposition – Peter Torkelson

1.12.22

Deposition – Randy Ruedrich

1.11.22

Deposition – John Binkley

1.10.22

Deposition – Nicole Borromeo

1.08.22

Deposition – Budd Simpson

1.06.22

Deposition – Melanie Bahnke

1.04.22

Deposition – Bethany Marcum

SECOND AMENDED
EXHIBIT LIST

Case No. 3AN-21-08869CI ☐ Pretrial Hearing ☒ Trial Date of Trial/Hearing: January 21, 2022

In the Matter of the 2021 Redistricting Plan vs. _____

Name of Party: Alaska Redistricting Board ☐ Pltf. ☒ Def.

(There must be a separate exhibit list for each party.)

Party's Attorney: Matt Singer

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY							
		ID by Wit.	Off.	Adm.	Denied	Withdrawn date	To Jury/ Judge	From Jury/ Judge	To Ex. Stor.
✓ 1000	AK Const. Article VI, Section 6	CH	✓	2/4/22					
✓ 1001	AK Const., Article VI, Section 10		✓	2/4/22					
✓ 1002	Valdez Sports Schedules	SS	✓	2/4/22					
1003	Census Maps								
1004	Valdez Maps	SS							
1005	Skagway Maps								
1006	AFFER Proposed District 38-S Map								
✓ 1007	Census Table		✓	2/4/22					
✓ 1008	SE Borough Boundaries Map		✓	2/4/22					
✓ 1009	Mat-Su Cities Map		✓	2/4/22					
1010	Mat-Su Valdez Income Charts					2/4/22			
✓ 1011	E. Anchorage Plaintiffs Discovery Resp.		✓	2/4/22					
✓ 1012	Illinois 4th Congressional District Map		✓	2/4/22					

I certify that identification markings on exhibits are accurate, and that the check boxes above accurately reflect the hearing/trial record. (☐ not required in this case per local court practice or court order)

Date _____ ☐ Atty/Party Sig. _____ ☐ Atty/Party certified orally on record

I certify that exhibits checked "To Jury/Judge" on this and all attached pages were given to the jury/judge for deliberation/advisement.

Date _____ In-Ct. Clerk _____

I certify that the exhibits checked "From Jury/Judge" on this and all attached pages were received after the verdict/decision.

Date _____ In-Ct. Clerk _____

I certify that all exhibits were ☐ placed in Interim Storage. ☐ returned to counsel/party per order of the court.

Date _____ In-Ct. Clerk _____ Date _____ Atty/Party Sig. _____

I certify that exhibits checked "To Exhibit Storage" on this and all attached pages have been placed in exhibit storage.

Date _____ Exhibit Clerk _____

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

EXHIBIT LIST CONTINUATION SHEET

Case No. 3AN-21-08869CI Name of Party: Alaska Redistricting Board

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY							
		ID by Wit.	Off.	Adm.	Denied	Withdrawn date	To Jury/ Judge	From Jury/ Judge	To Ex. Stor.
1013	Muldoon Pairing Alternative					2/4/22			
1014	2021 Adopted Senate Pairings					2/4/22			
✓ 1015	RUED 000261		✓	2/4/22					
✓ 1016	RUED 000525-000526		✓	2/4/22					
✓ 1017	RUED 000575-000577		✓	2/4/22					
✓ 1018	RUED 000632-000634		✓	2/4/22					
1019	Audio & Video Recordings of All ARB Meetings								
1020	August 23, 2021 Board Meeting Transcript								
1021	August 24, 2021 Board Meeting Transcript								
1022			✓	2/4/22					
1023	Duplicate					2/4/22			
1024			✓	2/4/22					

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

4TH AMENDED EXHIBIT LIST

(There must be a separate exhibit list for each party.)

Court Case No.: 3AN- 21-08869 CI ☐ Pretrial Hearing ☒ Trial

Om the Matter of the 2021 Redistricting Plan vs.

Name of Party: Municipality of Skagway Borough & Brad Ry ☒ Plaintiff ☐ Defendant

Party's Attorney: Robin O. Brena, Brena, Bell & Walker, P.C.

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY						
		I D by Wit.	Offered	Admitted	With-drawn date	To Jury/ Judge	From Jury/ Judge	To Exhbt Clerk
2000	Affidavit of Brad Ryan.2022-01-05			2/4/22				
2001	Affidavit of Andrew Cremata.2022-01-05							
2002	Affidavit of Janice Wrentmore.2022-01-05							
2003	Affidavit of John Walsh.2022-01-05							
2004	Affidavit of Expert Kimball Brace, Expert Testimony. 2022-01-15							
2005	Skagway Public Meeting Comments Transcript.2021-10-27							
2006	Juneau Public Meeting Comments.2021-09-27							
2007	Simpson Email 2021-10-31 ARB00128481	BS						
2008	NOAA Chart 17316							
2009	NOOA Chart 17315							
2010	NOOA Chart 17317							
2011	Excerpts from Simpson Handwritten Notes							
2012	2022.01.31 Baxter Letter to Wakeland							
2013	2000-10-03 Juneau Regular Election Archive							
2014	2003-04-17.Skagway Resolution 03-08R							

I certify that exhibits checked "To Jury / Judge" on all pages were given to the jury / judge for deliberation / advisement.

Date _____ In-Court Clerk _____

I certify that exhibits checked "From Jury / Judge" on all pages were received after the verdict / decision.

Date _____ In-Court Clerk _____

I certify that all exhibits were ☐ Placed in Interim Storage ☐ Returned to counsel per order of the court

Date _____ In-Court Clerk _____ Atty Sig. _____ Date _____

I certify that the exhibits checked "To Exhibit Clerk" on all pages have been placed in Exhibit Storage.

Date _____ Exhibits Clerk _____

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

EXHIBIT LIST CONTINUATION SHEET

Court Case No.: 21-08869 CI Name of Party

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY						
		I D by Wit.	Offered	Admitted	With-drawn date	To Jury/ Judge	From Jury/ Judge	To Exhbt Clerk
2015	2004-07-04.Skagway Election Results		2/4/22					
2016	2005-03-18.Mayor Boucry ltr		2/4/22					
2017	2016-12-15.Juneau Empire article		2/4/22					
2018	Mendenhall Bing Map Searches							
2019	Board emails ARB00158164		2/4/22					
2020	Skagway Alternative A - Statewide Data		2/4/22 -	partial				
2021	Skagway Alternative B - Statewide Data		2/4/22 -	partial				
2022	Aerial Map of Mendenhall Board District Line		2/4/22					
2023	Aerial Map of Mendenhall Board and Skagway Lines	BS	2/4/22					
2024	Aerial Map of Ferry Terminal to District Line		2/4/22					
2025	District Size Comparison		2/4/22					
	All Board Member Deposition Transcripts and Exhibits							
	All Board Meeting Transcripts							
	Cross-Exam Exhibits as needed							
	Exhibits as needed							
	Interactive V.1, V.2, V.3 and V.4 Final Plan Map							
	Interactive Valdez Plan Maps							

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

AMENDED

EXHIBIT LIST

(There must be a separate exhibit list for each party.)

Court Case No.: 3AN- 21-08869 CI ☐ Pretrial Hearing ☒ Trial

On the Matter of the 2021 Redistricting Plan vs. _____

Name of Party: City of Valdez and Mark Detter ☒ Plaintiff ☐ Defendant

Party's Attorney: Robin O. Brena; Brena, Bell & Walker, P.C.

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY						
		I D by Wit.	Offered	Admitted	With-drawn date	To Jury/ Judge	From Jury/ Judge	To Exhbt Clerk
3000	Affidavit of Nathan Duval.2022-01-05			2/4/22				
3001	Affidavit of Sheri Pierce.2022-01-05							
3002	Affidavit of Sharon Scheidt.2022-01-05							
3003	Affidavit of Kimball Brace, Expert Testimony.2022-01-15							
3004	Valdez Public Meeting Comment Transcripts. 2021-09-30 & E-Trans file							
3005	1994, 2002, 2013, 2021 Maps (ARB010411A, 412-413)							
3006	2013 Proclamation Population Data - District 9							
3007	Alaska Supreme Court Docket Excerpt							
3008	Census Data							
3009	Combined Public Comments Re Valdez (ARB Numbers)							
3010	Texts Messages Combined (ARB0155030-155159 & ARB0153012-0156033)							
3011	Valdez Resolution No. 21-41 w. Valdez Option 1 (ARB0155030-155159)							
3012	Valdez Resolution No. 21-42 w. Comments (ARB00135413-5420)							
3013	2002 Proclamation (ARB00135413-5420)							
3014	Emails Combined (ARB Numbers)							

I certify that exhibits checked "To Jury / Judge" on all pages were given to the jury / judge for deliberation / advisement.

Date _____ In-Court Clerk _____

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Date _____ In-Court Clerk _____

I certify that all exhibits were ☐ Placed in Interim Storage ☐ Returned to counsel per order of the court

Date _____ In-Court Clerk _____ Atty Sig. _____ Date _____

I certify that the exhibits checked "To Exhibit Clerk" on all pages have been placed in Exhibit Storage.

Date _____ Exhibits Clerk _____

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

EXHIBIT LIST CONTINUATION SHEET

Court Case No.: 3AN-21-08869CI Name of Party City of Valdez and Mark Detter

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY						
		I D by Wit.	Offered	Admitted	With-drawn date	To Jury/ Judge	From Jury/ Judge	To Exhbt Clerk
3015								
3016	(District 36 Demonstratives)							
3017	(Population by ANRC Within Districts)							
3018	(Population by Borough Within Districts)							
3019	(Population by City and CDP Within Districts)							
3020	2011 Proclamation Statewide Map							
3021	VDZ-3021.(Statewide Valdez Plan)							
3022	VDZ-3022.(Doyon Website Materials)							
3023	VDZ-3023.(Ciri Website Materials)							
3024	VDZ-3024.(ANCSA Enrollment 43 U.S.C. 1604)							
3025	VDZ-3025.(2013 & 2021 Map Comparisons)							
3026	Map 2013 & 2021 Proclamation							
3027	2021-12-22. Emergency Bycatch Petition							
3028	Fairbanks Resolution (ARB00075592-93)							
3029	MEMO DECISION & ORDER RE 2011 PROCLAMATION PLAN, 2012-02-03							
3030	Binkley-Torkelson Email (3-12-21) (ARB00158164-67)							
3031	Valdez Alt 3 Statewide map							
3032	" Alt 4 "			2/4/22				
	All Board Meeting Transcripts							
	All Board Member Depositions and Exhibits							
	Cross exam Exhibits as needed							
	Redirect Exhibits as needed							
	Interactive V.1, V.2, V.3 and V.4 Final Plan Maps							
	Interactive Valdez Plan Maps							

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

AMENDED
EXHIBIT LIST

(There must be a separate exhibit list for each party.)

FILED IN OPEN COURT
1/28/22

Court Case No.: 3AN- 21-08869CI ☐ Pretrial Hearing ☒ Trial

ITMO 2021 Redistricting Plan vs.

Name of Party: Matanuska-Susitna Borough & Michael Brown ☒ Plaintiff ☐ Defendant

Party's Attorney: Stacey C. Stone

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY						
		I D by Wit.	Offered	Admitted	With-drawn date	To Jury/ Judge	From Jury/ Judge	To Exhbt Clerk
4000	Direct Testimony Affidavit of Edna DeVries			2/4/22				
4001	Direct Testimony Affidavit of Michael Brown			2/4/22				
4002	Expert Testimony Affidavit of Steve Colligan			2/4/22				
4003	Corrected Exhibit E to Expert Testimony of Steve Colligan		✓	1/28/22				

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Date _____ In-Court Clerk _____

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Date _____ Exhibits Clerk _____

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

EXHIBIT LIST

Case No. 3AN-21-08869 CI ☐ Pretrial Hearing ☒ Trial Date of Trial/Hearing: Jan. 21, 2022

ITMO The 2021 Redistricting Plan vs. _____

Name of Party: Calista Corp., W. Naneng, H. Sundown ☒ Pltf. ☐ Def.

(There must be a separate exhibit list for each party.)

Party's Attorney: Ashburn & Mason

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY							
		ID by Wit.	Off.	Adm.	Denied	Withdrawn date	To Jury/ Judge	From Jury/ Judge	To Ex. Stor.
CAL-5000	Calista Region Map			2/4/22					
CAL-5001	Peoples and Languages Map [Dep. Ex. 26]			2/4/22					
CAL-5002	Calista Interactive Trial Map			2/4/22					
CAL-5003	Yukon Kuskokwim Transportation Plan			2/4/22					

I certify that identification markings on exhibits are accurate, and that the check boxes above accurately reflect the hearing/trial record. (☐ not required in this case per local court practice or court order)

Date _____ ☐ Atty/Party Sig. _____ ☐ Atty/Party certified orally on record

I certify that exhibits checked "To Jury/Judge" on this and all attached pages were given to the jury/judge for deliberation/advisement.

Date _____ In-Ct. Clerk _____

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Date _____ In-Ct. Clerk _____

I certify that all exhibits were ☐ placed in Interim Storage. ☐ returned to counsel/party per order of the court.

Date _____ In-Ct. Clerk _____ Date _____ Atty/Party Sig. _____

I certify that exhibits checked "To Exhibit Storage" on this and all attached pages have been placed in exhibit storage.

Date _____ Exhibit Clerk _____

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

THIRD AMENDED
EXHIBIT LIST

Case No. 3AN-21-08869CI ☐ Pretrial Hearing ☒ Trial Date of Trial/Hearing: 01/21/2021
ITMO: 2021 Redistricting Plan vs.
Name of Party: East Anchorage Plaintiffs ☒ Pltf. ☐ Def.
(There must be a separate exhibit list for each party.)
Party's Attorney: Holly C. Wells; Mara E. Michaletz; William D. Falsey

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY							
		ID by Wit.	Off.	Adm.	Denied	Withdrawn date	To Jury/ Judge	From Jury/ Judge	To Ex. Stor.
6000	Senate pairing testimony packet - PRR Rsp			2/4/22					
6001	11.4.21 Letter to ARB fr MOA, ARB00058383			2/4/22					
6002	10.1.21 Email regional public call in option			2/4/22					
6003	1.7.22 Email M. Singer				2/4/22				
6004	Demographics provided 12.30.21 by ARB		?	2/4/22					
6005	Email Ruedrich to Simpson with incumbents			2/4/22					
6006	Sandberg presentation with Borromeo notes				2/4/22				
6007	11.9.21 Marcum email re Bahnke			2/4/22 - partial					
6008	2013 Proclamation - Accompanying Findings								
6009	2002 proclamation of redistricting								
6010	3.2.21 email Torkelson - ARB adopted OMA								
6011	Email Torkelson and Binkley regarding RFI								
6012	9.16.21 Colligan email with Board								
6013	Allard letter of intent								

I certify that identification markings on exhibits are accurate, and that the check boxes above accurately reflect the hearing/trial record. (☐ not required in this case per local court practice or court order)
Date _____ ☐ Atty/Party Sig. _____ ☐ Atty/Party certified orally on record

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Date _____ In-Ct. Clerk _____

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Date _____ In-Ct. Clerk _____

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Date _____ In-Ct. Clerk _____ Date _____ Atty/Party Sig. _____

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Date _____ Exhibit Clerk _____

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

EXHIBIT LIST CONTINUATION SHEET

Case No. 3AN-21-08869 CI Name of Party: East Anchorage Plaintiffs

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY							
		ID by Wit.	Off.	Adm.	Denied	Withdrawn date	To Jury/ Judge	From Jury/ Judge	To Ex. Stor.
6014	Health mandate from DHSS			2/4/22					
6015	MOA Watershed Boundaries								
6016	Chugach State Park Map								
6017	Map of JBER Recreation Areas								
6018	2002 Maps, Division of Elections								
6019	Jamie Allard MOA memo w/map, detachment								
6020	Board policies								
6021	MOA Park Service Ordinance								
6022	MOA Road Service Areas Ordinance								
6023	MOA Street Lights Service Ordinance								
6024	MOA Land-Use Ordinance								
6025	MOA Chugiak-ER Advisory Board Ordinance								
6026	Allard comments to Save Anchorage				2/4/22				
6027	Anchorage Resolution 2020 - 29			2/4/22					
6028	Obituary Senator Bettye Davis				2/4/22				
6029	Demonstrative Exhibit No. 1 - Renumbering			2/4/22					
6030	Deposition Ex. 9 - AK POLICY FORUM								
6031	Deposition Ex. 27 - Simpson 11.7.21 Email								
6032	Deposition Ex. 28 - Simpson 12.4.21 Email								
6033	Deposition Ex. 29 - Simpson 12.6.21 Email								
6034	Deposition Exhibit 30 - Simpson 11.6.21 Email								
6035	Deposition Ex. 41 - Torkelson 10.16.21 Email								

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

EXHIBIT LIST CONTINUATION SHEET

Case No. 3AN-21-08869 CI Name of Party: East Anchorage Plaintiffs

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY							
		ID by Wit.	Off.	Adm.	Denied	Withdrawn date	To Jury/ Judge	From Jury/ Judge	To Ex. Stor.
6036	MICRC Measuring Partisan Fairness, Michigan				2/4/22				
6037	IPPSR Redistricting Report, Michigan				2/4/22				
6038	Demographic Services Statement of Work, California				2/4/22				
6039	1.19.22 Statement of Yarrow Silvers			2/4/22					
6040	Bahnke Twitter Statements, 1.21.22 – 1.22.22			2/4/22					
6041	Torkelson emails re MVAP Analysis			2/4/22					
6042	Chugiak-Eagle River Comprehensive Plan, 2006				2/4/22				
6043	East Anchorage District Plan, 2014				2/4/22				
6044	Chugiak-Eagle River Plan, 1993				2/4/22				

Civil Rule 43.1
Criminal Rule 26.1
Admin. Bulletin No. 9

FILED IN OPEN COURT
1/24/22

EXHIBIT LIST

Case No. 3AN-21-08869CI ☐ Pretrial Hearing ☒ Trial Date of Trial/Hearing: 1/21/2022

ITMO: 2021 Redistricting Plan vs.

Name of Party: Intervenor-Defendants Doyon et al. ☐ Pltf. ☒ Def.

(There must be a separate exhibit list for each party.)

Party's Attorney: Sonosky, Chambers, Sachse, Miller & Monkman, LLP

Exhibit No. Marked for ID	BRIEF DESCRIPTION OF EXHIBIT	FOR COURT USE ONLY							
		ID by Wit.	Off.	Adm.	Denied	Withdrawn date	To Jury/ Judge	From Jury/ Judge	To Ex. Stor.
7001	Affidavit of Michelle Anderson			2/4/22					
7002	Affidavit of Miranda Wright								
7003	Affidavit of Vicki Otte								
7004	ARB00082413 Email on Map Submisions	SS							

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Civil Rule 43.1
Criminal Rule 26.1
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Appendix D – Claims Raised

Wilson Amended Complaint

Claim I – Alaska Statute 44.62.310-20 (Open Meetings Act)

Claim II – Alaska Const. art. VI, § 10 (public hearings)

Claim III – Alaska Const. art. I, § 7 (due process, procedural & substantive)

Claim IV – Alaska Const. art. VI, § 6 (district boundaries)

Claim V – Alaska Const. art. I, § 1 (equal protection)

Calista Amended Complaint

Claim I – Alaska Const. art. VI, § 6 (district boundaries)

Claim II – Alaska Const. art. I, § 1 (equal protection)

Mat-Su Amended Complaint

Claim I – Alaska Const. art. I, § 1 (equal protection)

Claim II – Alaska Const. art. I, § 7 (due process, procedural)

Claim III – Alaska Const. art. VI, § 6 (district boundaries)

Valdez Amended Complaint

Claim I – Alaska Statute 44.62.310-20 (Open Meetings Act)

Claim II – Alaska Const. art. VI, § 6 (district boundaries)

Claim III – Alaska Const. art. VI, § 10 (public hearings)

Claim IV – Alaska Const. art. I, § 1 (equal protection)

Claim V – Alaska Const. art. I, § 7 (due process, procedural & substantive)

Skagway Amended Complaint

Claim I – Alaska Statute 44.62.310-20 (Open Meetings Act)

Claim II – Alaska Const. art. VI, § 6 (district boundaries)

Claim III – Alaska Const. art. VI, § 10 (public hearings)

Claim IV – Alaska Const. art. I, § 1 (equal protection)

Claim V – Alaska Const. art. I, § 7 (due process, procedural & substantive)