

Holly C. Wells
Mara E. Michaletz
William D. Falsey
Birch Horton Bittner & Cherot
510 L Street, Suite 700
Anchorage, Alaska 99501
hwells@bhb.com
mmichaletz@bhb.com
wfalsey@bhb.com
Telephone 907.276.1550

Attorneys for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

FELISA WILSON, GEORGE MARTINEZ, and)
YARROW SILVERS)

Plaintiffs,)

v.)

ALASKA REDISTRICTING BOARD,)

Defendant.)

Case No. 3AN-21-08869CI

**SECOND AMENDED APPLICATION TO COMPEL THE
ALASKA REDISTRICTING BOARD
TO CORRECT ITS SENATE DISTRICT PAIRINGS IN ANCHORAGE**

Shielded from public scrutiny by unlawful process and procedures, the Alaska Redistricting Board (“Board”) adopted arbitrary and egregiously irrational senate districts, pairing Eagle River house districts with fragments of East Anchorage communities of interest despite the starkly different and even contradictory legislative needs of these communities. Critically, the pairings inexplicably ignored the demographic, economic, and geographic characteristics of these communities and the lack of meaningful contiguity or legislative mutuality between the Eagle River house districts and the specific

Anchorage districts with which they were paired. As aptly acknowledged by Board Member Melanie Bahnke, the East Anchorage/Eagle River pairings adopted by the Board had the effect of “muffling the[] voices” of voters in “the lowest income, most racially diverse parts of our community and our state.” The Board’s process and actions magnified the political influence of Eagle River in the Alaska Senate while diluting the influence of voters in Anchorage’s most diverse, yet unified communities of interest in violation of the Alaska Constitution, Alaska Statutes, and basic tenets of equity and fairness.

Plaintiffs Felisa Wilson, George Martinez, and Yarrow Silvers (collectively, the “Plaintiffs”), by and through their attorneys, Birch Horton Bittner and Cherot, claim and allege the following violations of the Alaska Constitution and Statutes by the Board, requiring an order to compel the correction of certain Alaska state senate district pairings adopted by the Board and memorialized in the Proclamation of Redistricting on November 10, 2021 (the “Final Redistricting Map”):

I. PARTIES

1. Plaintiff Major Felisa Wilson is a resident of House District (“HD”) 23-Government Hill/JBER/Northeast Anchorage¹ and Senate District L as designated by the Final Redistricting Map and a qualified voter under the constitution and laws of the State of Alaska.

¹ In the interest of clarity, only the promulgated house district numbers are used throughout this Application. To the extent former house district numbers were referenced during the November 8 or 9, 2021 meetings, those references have been converted to the promulgated house district numbers throughout this pleading.

2. Plaintiff George Martinez is a resident of HD 21- S. Muldoon and Senate District K as designated by the Final Redistricting Map and a qualified voter under the constitution and laws of the State of Alaska.

3. Plaintiff Yarrow Silvers is a resident of HD 21- S. Muldoon and Senate District K as designated by the Final Redistricting Map and a qualified voter under the constitution and laws of the State of Alaska.

4. Defendant, the Board, was constituted under Art. VI, § 8 of the Alaska Constitution to adopt a legislative redistricting plan for the State of Alaska following the decennial census of the United States for 2020.

II. JURISDICTION, VENUE, AND STANDING

5. The Court has jurisdiction over the subject matter of this litigation under Art. VI, § 11 of the Alaska Constitution and AS 22.10.020(b).

6. As the Plaintiffs reside in Anchorage and the Board's mailing and physical addresses are located in Anchorage, venue lies properly in Anchorage in the Third Judicial District under Civil Rule 3.

7. As qualified voters, the Plaintiffs have standing to bring this action under Art. VI, § 11 of the Alaska Constitution.

III. BOARD ACTION

8. Following the receipt of redistricting data from the United States Census Bureau based on the results of the 2020 decennial census, the Board convened to redraw boundaries of the state house and senate districts.

9. The Board members are as follows:

A. John Binkley, appointed by former Alaska Senate President Cathy Giessel and serving as Board Chair;

- B. Budd Simpson, appointed by Governor Mike Dunleavy;
- C. Bethany Marcum, appointed by Governor Mike Dunleavy;
- D. Nicole Borromeo, appointed by former Speaker of the Alaska House of Representatives Bryce Edgmon; and
- E. Melanie Bahnke, appointed by former Chief Justice of the Alaska Supreme Court, Joel Bolger.

10. Subsequently, on September 20, 2021, the Board adopted several proposed house redistricting plans for public consideration and comment. The Board then held in-person meetings throughout the State of Alaska. While the Board held additional meetings which permitted the public to appear via videoconference or telephone, remote participation was not permitted at the local meetings.

11. On November 2, 2021, the Board met in Anchorage to take statewide public testimony, receive a Voting Rights Act compliance report from experts, and deliberate on the testimony and information presented to the Board at previously held meetings.

12. On November 3, 4, and 5, 2021, the Board held a work session open to the public both in-person and virtually.

13. On Friday, November 5, 2021, the Board adopted the final map of the house districts. The map designated house districts in Anchorage and Eagle River that were consistent with proposed plans the Board had published and circulated to the public prior to its meetings. The Board placed the Eagle River community in two house districts later designated by the Final Redistricting Map as HD 22-Eagle River Valley and HD 24-N. Eagle River/Chugiak (collectively the “Eagle River Districts” or “Eagle River”). The Board did not present proposed senate pairings at the November 5 meeting.

14. The following Monday, November 8, 2021, the Board convened a public meeting in executive session without properly identifying the purpose of the executive session or its scope.

15. The Board exited its November 8, 2021 executive session and entered into a work session on senate pairings. During its work session, the public could see Binkley, Simpson, and Marcum deliberating on senate pairings but could not see or hear these deliberations through the Board's virtual platform or, upon information and belief, in-person. Board members sporadically appeared to enter and exit the meeting space and while Binkley stated that members may work in groups, no such groups were identified.

16. After confirming with Bahnke that the Board was coming to a consensus on pairings, the Board members returned to their seats and the Board members discussed proposed pairings in a manner that the public could both observe and hear.

17. The Board's Anchorage senate pairings discussion began with a proposal submitted by Bahnke. Bahnke's proposal paired the Eagle River Districts together, consistent with previous senate districting. It also kept the Muldoon area intact, pairing HD 20- N. Muldoon with HD 21- S. Muldoon. Borromeo, Simpson, and Binkley made no comments or statements substantively opposing the "Bahnke East Anchorage/Eagle River Pairings."²

² The Bahnke East Anchorage/Eagle River Pairings paired:

1. HD 17-Downtown Anchorage with HD 23-Government Hill/JBER/Northeast Anchorage
2. HD 18-Mt. View/Airport Heights with HD 19-UMED
3. HD 20- N. Muldoon with HD 21- S. Muldoon
4. HD 22-Eagle River Valley with HD 24-North Eagle River/Chugiak.

18. Marcum then presented portions of four separate pairing proposals for the Municipality of Anchorage, each of which split the Eagle River Districts and paired them with East Anchorage community house districts. While the details regarding each of the four proposals was not clear, Marcum appeared to propose pairing HD 23-Government Hill/JBER/Northeast Anchorage with HD 24-N. Eagle River/Chugiak and pairing HD 21-S. Muldoon with HD 22-Eagle River Valley. She also proposed pairing HD 18-Mt. View/Airport Heights with HD 20-N. Muldoon. Except for Marcum herself, no Board member publicly expressed substantive support for the pairings she presented at the November 8, 2021 meeting.

19. Marcum repeatedly referenced testimony by Plaintiff Major Felisa Wilson in support of the pairings she presented. However, Major Wilson's written and verbal testimony adamantly opposed, rather than supported, splitting the Eagle River Districts and emphasized the common interests and sense of community between JBER and the connected East Anchorage districts.

20. Marcum's misrepresentation of Major Wilson's testimony was not corrected.

21. Bahnke and Borromeo vehemently objected to splitting the Eagle River Districts and the Muldoon Districts. Among their concerns, Bahnke and Borromeo argued that Marcum's plan would fragment the East Anchorage communities and disenfranchise voters in those districts.

22. Marcum indicated that her plan "actually gives Eagle River the opportunity to have more representation."

23. Despite the lack of comments supporting the pairings proposed by Marcum on November 8, 2021, Chair Binkley inexplicably declared that these pairings had majority support, causing confusion among the public and the Board members themselves.

24. Bahnke requested an executive session with legal counsel to discuss the legal vulnerabilities of Marcum's pairings that had, according to Chair Binkley, "majority support."

25. The Board's executive session on November 8, 2021 lasted nearly 1.5 hours. The Board returned to public session only to announce that it would continue in executive session for up to an additional 1.5 hours upon reconvening the next day.

26. The Board's November 9, 2021 public session began with an abrupt motion from Marcum to adopt new senate pairings for Anchorage that changed all but three of the senate pairings Marcum proposed the day before. The Eagle River pairings were among these unchanged pairings.³

27. Marcum's new pairings were adopted by a rollcall vote of 3-2 with Binkley, Simpson, and Marcum voting in favor of these pairings and Bahnke and Borromeo vehemently objecting.

28. No member provided an on-the-record justification for the new pairings. Nor did any member provide any on-the-record comment to permit the public to ascertain why, or even how, the adopted pairings differed from the pairings presented in open session

³ For purposes of this action, the "East Anchorage/Eagle River Pairings" refer to the pairing of HD 23-Government Hill/JBER/Northeast Anchorage with HD 24-N. Eagle River/Chugiak and HD 21-S. Muldoon with HD 22-Eagle River Valley as well as the other pairings adopted by the Board impacting House Districts 17 through 24 that resulted from those pairings.

on the previous day, or why the prior day's unanimous support for certain pairings had been abandoned.

29. Borrromeo thereafter moved to reconsider the Board's approval of the pairings proposed by Marcum for the first time on November 9, 2021. She indicated that she strongly opposed pairing HD 21– S. Muldoon with HD 22–Eagle River Valley. She warned that the adopted East Anchorage/Eagle River Pairings exposed the Board to “an unfortunate and very easily winnable argument for partisan gerrymandering.” She indicated her belief that neither comments put on the record, nor the “sound, sound legal advice that the board received in executive session” supported the pairing. She stated that it “defies logic” that the Board would “do a minority reach-in to South Muldoon and pair it with a very white district, 8 miles away on [the] highway, that crosses one mountain range, and expect the court to believe, with any satisfaction, that we have satisfied the public trust in the process.” She indicated that the weight of the “mounds, and mounds, and mounds” of public testimony did not support pairing HD 21– S. Muldoon with HD 22– Eagle River Valley. She indicated that Marcum had opened up the Board to “a ton of legal liability.”

30. After Borrromeo's motion to reconsider failed, Bahnke stated that the adopted pairings had come as a “complete surprise.”

31. The Board adopted its Final Redistricting Map on November 10, 2021, despite continued objections by Bahnke and Borrromeo arising from the East Anchorage/Eagle River Pairings.

32. In her final comments, Borrromeo noted that the Board had provided “no compelling reason” for “not pairing” the two Eagle River Districts or the two Muldoon

Districts. She noted, with reference to the East Anchorage/Eagle River Pairings, there is “no populated area – or military gate even” connecting HD 23–Government Hill/JBER/Northeast Anchorage with HD 24–N. Eagle River/Chugiak and one cannot travel from South Muldoon to the Eagle River Valley district without leaving the senate district they share, or crossing a mountain range. She concluded by stating that the “federal vote dilution and numerous violations of Alaska’s Constitution that have occurred in Eagle River and Muldoon over the last two days prevent me from signing today’s Proclamation,” and that she “look[s] forward to being deposed by opposing counsel and pray[s] that litigation is swift and just.”

IV. CLAIMS FOR RELIEF

A. VIOLATIONS IN PROCESS

33. The Board’s numerous violations of constitutional and statutory law governing the redistricting process and procedures and its ultimate adoption of unconstitutional senate pairings that were egregiously irrational, arbitrary, and discriminatory constitutes an error in the East Anchorage/Eagle River Pairings that requires correction.

34. The Board failed to take the “hard look” at the senate pairings in question that is required of it, resulting in an arbitrary and irrational decision splitting Eagle River and fragmenting East Anchorage communities and the voting power of their residents.

35. The Board is subject to AS 44.62.310-320 (the “Open Meetings Act”). Under the Open Meetings Act and the Board’s policies and procedures, any discussions by a majority of Board members on matters on which they are entitled to act must be noticed and conducted in public unless the discussion qualifies for an executive session.

36. The Board violated the Open Meetings Act during its November 8 and 9, 2021 work sessions and executive sessions by excluding the public from non-privileged presentations by the Board's legal counsel regarding the laws governing redistricting and the senate pairing process.

37. Upon information and belief, the Board unlawfully used executive sessions to permit a majority of its members to reach an agreement regarding pairings without public notice or observation. This misuse of executive sessions constitutes a blatant and egregious violation of the Open Meetings Act, the Alaska Constitution, as well as the Board's own policies and procedures.

ART. VI, § 10 OF THE ALASKA CONSTITUTION

38. Article VI, § 10 of the Alaska Constitution provides that the "[B]oard shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the [B]oard."

39. While the Board plan complied with this provision with regard to the house districts, no proposed plan including the East Anchorage/Eagle River Pairings was properly and timely presented to the public before its adoption, which resulted in a violation of this constitutional provision.

40. Instead, the Board exited executive session and, without discussion, adopted new pairings proposed by Marcum that changed every one of the pairings in Marcum's previous proposal but three. In other words, five of the eight Anchorage pairings were changed without public input, notice or discussion.

41. The failure to comply with this constitutional mandate precluded the public from effectively or meaningfully informing or challenging the Board's proposed pairings

before they were adopted, and the Board from curing the violations of procedural and process requirements that occurred during the meetings and work sessions held by the Board on senate pairings.

ART. I, § 7 OF THE ALASKA CONSTITUTION

42. Article I, § 7 of the Alaska Constitution guarantees to each citizen due process of the law.

43. The Board's senate pairings were egregiously irrational and arbitrary, resulting in a violation of the Due Process Clause of the Alaska Constitution.

44. The Board adopted the challenged senate pairings without consideration or discussion of the overwhelming public testimony objecting to splitting up the Eagle River community and attesting to the substantial differences in community needs, priorities, and political representation between Eagle River and the East Anchorage communities of interest fragmented by the Board's pairings.

45. The Board's adoption of the challenged senate pairings appeared to rely upon the mischaracterization of testimony by Plaintiff Major Wilson to support the split of the Eagle River Districts, despite Major Wilson's adamant opposition to such a split.

46. The Board's unconstitutional abuse of process, including but not limited to its: A) failure to consider public testimony; B) presumed reliance on mischaracterization of public testimony by its members; C) overly-broad application of the attorney-client privilege to evade public scrutiny; and D) misuse of work sessions and executive sessions to conceal the rationale for its pairings, or lack thereof, all of which enabled Board members to unconstitutionally reach majority "consensus" outside the public's purview

and take arbitrary and irrational action without public input or deliberation by the Board as a whole.

B. VIOLATIONS IN SUBSTANCE

ART. VI, § 6 OF THE ALASKA CONSTITUTION

47. Article VI, § 6 of the Alaska Constitution provides 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.”

48. The Eagle River Districts and the East Anchorage communities with which they were paired are not “contiguous” as that term is defined and interpreted under Alaska law. The Board’s failure to consider alternative senate pairings that were reasonably, constitutionally, and far more practicably contiguous, namely those proposed by Bahnke, demonstrate a violation of Article VI, § 6.

ART. I, § 1 OF THE ALASKA CONSTITUTION

49. Article I, § 1 of the Alaska Constitution guarantees to each citizen the equal protection of the law.

50. The Board’s decision to create two senate seats for Eagle River by fragmenting East Anchorage communities violated the Equal Protection Clause of the Alaska Constitution as the adopted senate districts intentionally and effectively dilute the vote and community voices of Anchorage residents in HD 21–S. Muldoon and HD 23–Government Hill/JBER/Northeast Anchorage in order to amplify the vote and voice of Eagle River voters in the Alaska Senate.

51. The Board's Anchorage senate pairings deny East Anchorage voters their right to an equally powerful and geographically effective vote and ignore the demographic, economic, and geographic differences between the Eagle River and East Anchorage communities.

52. The Board considered race data outside the purview of the public when adopting the East Anchorage/Eagle River Pairings outside the purview of the public and ultimately improperly and irrationally adopted pairings that fragmented HD 20-N. Muldoon and HD 21-S. Muldoon and destroyed the majority-minority district created by a unified Muldoon district pairing.

53. The Board's secretive consideration of race data, failure to verify this data before relying upon it, and its arbitrary decisions regarding the Eagle River/Anchorage Pairings led to dilution of the votes and voices of East Anchorage voters on a racial basis by fragmenting the majority-minority unified Muldoon district to create pairings with Eagle River that diluted the voting power of the minority voters in HD 21-S. Muldoon. If the two Eagle River house districts were paired together, it would be possible to create majority-minority senate districts in East Anchorage which accurately reflect the diverse composition of this community of interest.

54. The Board's creation of two separate Eagle River senate districts constitutes unlawful political and racial gerrymandering, intentionally increasing majority senate districts while systematically circumscribing the voting power and influence of Anchorage residents in HD 21-S. Muldoon, HD 23-Government Hill/JBER/Northeast Anchorage, and the East Anchorage districts with which these districts would have been paired but for irrational decision-making and the resulting unlawful gerrymandering.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. An order declaring the Board erred and violated both statutory and constitutional law by excluding the public from its decision-making process during its meetings, including its work sessions and its executive sessions;
2. An order declaring the Eagle River senate districts and the resulting East Anchorage/Eagle River Pairings unconstitutional;
3. An order enjoining the State of Alaska from conducting any State election using the East Anchorage/Eagle River Pairings;
4. An order declaring the Board's adoption of the Anchorage pairings void and directing it to adopt the Bahnke East Anchorage/Eagle River Pairings or, alternatively, lawful pairings that place both Eagle River house districts in a single senate district and pair East Anchorage house districts with contiguous communities of interest;
5. An award of costs and fees in accordance with Plaintiffs' status as constitutional litigants; and
6. The grant of such other and further relief as it deems just and equitable.

DATED this 25th day of January, 2022.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Plaintiffs

By: /s/ Holly C. Wells
Holly C. Wells, ABA #0511113
Mara E. Michaletz, ABA #0803007
William D. Falsey, ABA #0511099

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th of January, 2022, a true and correct copy of the foregoing document was served electronically on the following:

Matthew Singer
Lee C. Baxter
Kayla J.F. Tanner
Schwabe Williamson & Wyatt
msinger@schwabe.com
lbaxter@schwabe.com
ktanner@schwabe.com

Thomas Flynn
Cheryl Burghart
State of Alaska
thomas.flynn@alaska.gov
cheryl.burghart@alaska.gov

Nathaniel Amdur-Clark
Whitney A. Leonard
Sonosky, Chambers, Sachse, Miller &
Monkman, LLP
nathaniel@sonosky.net
whitney@sonosky.net

Stacey C. Stone
Gregory Stein
Holmes Weddle & Barcott, P.C.
sstone@hwb-law.com
gstein@hwb-law.com

Michael A. Grisham
Dorsey & Whitney, LLP
grisham.michael@dorsey.com

Robin Brena
Laura S. Gould
Jake W. Staser
Jon S. Wakeland
Brena, Bell & Walker, P.C.
rbrena@brenalaw.com
lgould@brenalaw.com
jstaser@brenalaw.com
jwakeland@brenalaw.com

Eva Gardner
Michael Schechter
Benjamin J. Farkash
Ashburn & Mason, P.C.
eva@anchorlaw.com
mike@anchorlaw.com
ben@anchorlaw.com

BIRCH HORTON BITTNER & CHEROT

By: /s/ Martha K. Marshall
Believed to be transmitted without error from
tmarshall@bhb.com at approx. 9:30 p.m.