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## TABLE OF ABBREVIATIONS

Abbreviation	Description
2002 Plan	Amended Final Plan
AFFR	Alaskans for Fair Redistricting
AFFER	Alaska for Fair and Equitable Redistricting
ANCSA	Alaska Native Claims Settlement Act
AutoBound	Board’s redistricting program, AutoBound Edge
Board	Alaska Redistricting Board
Doyon Coalition	Doyon, Tanana Chiefs Conference, Fairbanks Native Association, Sealaska, and Ahtna
Final Plan	Final Redistricting Plan for 2021
FNSB	Fairbanks North Star Borough
HJR	House Joint Resolution
Mat-Su	Matanuska-Susitna
NCSL	National Conference of State Legislatures
OMA	Open Meetings Act
REAA	Regional Educational Attendance Area
TAPS	Trans-Alaska Pipeline System
TIGER	Topologically Intergraded Geographic Encoding and Reference
VRA	Voting Rights Act

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## I. INTRODUCTION

1. This case involves five consolidated complaints against the Alaska Redistricting Board (“Board”) with regard to its redistricting process and/or its Final Redistricting Plan (“Final Plan”) for 2021. The specific claims against the Board vary among the plaintiffs.

2. An amendment to article VI of the Alaska Constitution in 1998 created the Board and set forth the procedures and deadlines for the redistricting process as well as requirements for the Final Plan.<sup>1</sup> The legislative history of that amendment includes comments from an aide to one of the Resolution’s sponsors, who explained: “It’s not supposed to be an adversary system. It’s a system of cooperation.”<sup>2</sup>

3. Under article VI, section 8, the Board shall consist of five members, all of whom must be residents of the state for at least one year, and none of whom may be public employees or officials at the time of their appointment or during their tenure on the Board.<sup>3</sup> Appointments are to be made without regard to political affiliation.<sup>4</sup> The chair is selected

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<sup>1</sup> See 1998 Legis. Res. 74 (House Joint Resolution (“HJR”) 44) approved Nov. 3, 1998, eff. Jan. 3, 1999. See *In re 2001 Redistricting Cases*, 44 P.3d 141, 151 n.17 (Alaska 2002) (*2001 Redistricting Cases*).

<sup>2</sup> Minutes from House Judiciary Comm. Meeting on HJR 44 at 1:13 PM (Feb. 6, 1998). The speaker was Mr. Jim Sourant, Legislative Aide to Representative Brian Porter, the main sponsor of the Resolution.

<sup>3</sup> Alaska Const., art. VI, § 8.

<sup>4</sup> Alaska Const., art. VI, § 8.

by a majority of the other Board members and “is to be as politically neutral and independent as possible.”<sup>5</sup>

4. Under article VI, section 3, the Board is required to reapportion the state legislature every ten years following the official reporting of each decennial census.<sup>6</sup> The Board must create 40 house districts and 20 senate districts.<sup>7</sup> The ideal population for each house district is achieved by dividing the population of the entire state by 40.<sup>8</sup> Each senate district is composed “as near as practicable of two contiguous house districts.”<sup>9</sup>

5. The requirements for the redistricting process are set forth in article VI, section 10. The Board must adopt one or more proposed redistricting plans within 30 days of the reporting of the decennial census. The Board must then hold public hearings to obtain public comments on the proposed plans. Finally, the Board must adopt a final plan no later than 90 days after the reporting of the census.<sup>10</sup>

6. In addition, the Board is subject to the constitutional requirement of due process under article I, section 7.<sup>11</sup> The Board is also subject to the Open Meetings Act (“OMA”).<sup>12</sup>

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<sup>5</sup> Minutes from House Judiciary Comm. Meeting on HJR 44 at 1:13 PM (Feb. 6, 1998). This comment was by Mr. Sourant.

<sup>6</sup> Alaska Const., art. VI, § 3.

<sup>7</sup> *In re 2011 Redistricting Cases* at 3 (Alaska Super. Ct., Feb.3, 2012).

<sup>8</sup> *In re 2011 Redistricting Cases* at 3 (Alaska Super. Ct., Feb 3, 2012).

<sup>9</sup> Alaska Const., art. VI, § 6.

<sup>10</sup> Alaska Const., art VI, § 10.

<sup>11</sup> Alaska Const., art. 1, § 7.

<sup>12</sup> AS 44.62.310-.312. *See also Hickel v. Southeast Conference*, 846 P.2d 38, 57 (Alaska 1992).

7. The requirements for the Final Plan are set forth in article VI, section 6.

8. In 1992, the Alaska Supreme Court ruled as follows with respect to the redistricting process:

*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.*<sup>13</sup>

9. Twenty years later, the supreme court reiterated that “[t]he Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.”<sup>14</sup>

10. In addition to the constitutional requirements of article VI, section 10, the Board is subject to the constitutional requirement of equal protection under article I, section 1.<sup>15</sup>

11. With the Board’s Final Plan for 2021, the Municipality of Skagway Borough and Brad Ryan (“Plaintiffs”) maintain that the Board violated the constitutional requirements of article VI, section 6 and article I, section 1, violated article VI, section 7, violated article I, section 7, violated the OMA, and violated the *Hickel* process.

12. Under article VI, section 11, any qualified voter may apply to the superior court to compel the Board to correct any errors in redistricting. Original jurisdiction in these matters is vested in the superior court.

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<sup>13</sup> *Hickel*, 846 P.2d at 51, n.22 (emphasis added).

<sup>14</sup> *In re 2011 Redistricting Cases*, 274 P.3d 466, 467 (Alaska 2012) (citing *Hickel*, 846 P.2d at 51, n.22).

<sup>15</sup> Alaska Const., art. I, § 1.

## II. WORK OF THE BOARD

13. The five members of the Board were appointed as follows: Governor Mike Dunleavy appointed Budd Simpson of Juneau and Bethany Marcum of Anchorage on July 28, 2020; Senate President Cathy Giessel appointed John Binkley of Fairbanks on July 29, 2020; the Speaker of the House of Representatives, Bryce Edgmon, appointed Nicole Borromeo of Anchorage on July 30, 2020; and Chief Justice Joel Bolger appointed Melanie Bahnke of Nome on August 7, 2020.<sup>16</sup> Below is a summary of significant dates related to the work of the Board and this litigation.

14. **December 12, 2020.** Mr. Peter Torkelson was retained as Executive Director.<sup>17</sup>

15. **January 6-8, 2021.** Mr. Torkelson, Deputy Director TJ Presley, and Board members attend a virtual “Ready to Redistrict” seminar presented by the National Conference of State Legislatures (“NCSL”).<sup>18</sup>

16. **March 12, 2021.** Matthew Singer and Lee Baxter of Schwabe, Williamson, & Wyatt were retained as counsel for the Board.<sup>19</sup>

17. **June 21, 2021.** Voting Rights Act (“VRA”) consultants Bruce Adelson and Dr. Jonathon Katz are retained by the Board.<sup>20</sup>

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<sup>16</sup> Redistricting Process Report at 1 (Nov. 10, 2021) [ARB000005].

<sup>17</sup> Redistricting Process Report at 1 (Nov. 10, 2021) [ARB000005].

<sup>18</sup> Torkelson Aff. at 4, ¶ 12.

<sup>19</sup> ARB000006.

<sup>20</sup> ARB000006.



18. **July 14-16, 2021.** Mr. Torkelson attended “the final [NCSL] “Ready to Redistrict” training conference and learned at that time that while “legacy formatted data” would be published by August 16, 2021, “official” data delivery—the physical media—would be “no later than” September 30, 2021.”<sup>21</sup>

19. **August 5, 2021.** “[T]he U.S. Census issued a statement via Twitter that they were moving up the “legacy formatted” data delivery date from August 16 to August 12.”<sup>22</sup>

20. **August 12, 2021.** The Board received the census data. Article VI, section 10 requires the Board to adopt one or more proposed plans within 30 days of receiving the census data, making September 11, 2021, the deadline to adopt any proposed plan.<sup>23</sup>

21. **August 23, 2021.** The Board met for a total of six hours and thirty-eight minutes.<sup>24</sup> The Board adopted a revised travel and per diem policy and a public testimony policy. The Board received public comment from the Alaskans for Fair Redistricting (“AFFR”), the Doyon Coalition, Senator Tom Begich, Yarrow Silvers, Felicia Wilson, and other individuals.<sup>25</sup> Eric Sandberg<sup>26</sup> and Mr. Torkelson presented a census data overview.<sup>27</sup> The Board then entered executive session and spent one hour and twenty-two minutes in

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<sup>21</sup> Torkelson Aff. at 4, ¶ 15.

<sup>22</sup> Torkelson Aff. at 4, ¶ 16.

<sup>23</sup> Torkelson Aff. at 5, ¶ 18; ARB000007.

<sup>24</sup> ARB000153-000157.

<sup>25</sup> ARB000154-000155.

<sup>26</sup> Mr. Sandberg is the State Demographer with the Department of Labor and Workforce Development [ARB000005].

<sup>27</sup> ARB000155.

executive session.<sup>28</sup> After executive session, the Board discussed the timeline for redistricting and a schedule for adopting draft and final maps.<sup>29</sup> “Mr. Torkelson noted that a single final plan must be adopted by November 10<sup>th</sup> and recommended to the board that a draft plan be adopted by September 11<sup>th</sup> and to allow any third parties that may wish to bring plans an additional week to work on their plans, giving them a delivery date of September 17<sup>th</sup>.”<sup>30</sup> Mr. Sandberg and Mr. Torkelson proposed that the Board engage in a regionalization process, and the Board discussed various regionalization configurations.<sup>31</sup> Ms. Borromeo expressed her preference that the Board draft a redistricting plan together.<sup>32</sup>

22. **August 24, 2021.** The Board met for a total of seven hours and eight minutes.<sup>33</sup> Mr. Torkelson noted that the public map drawing tool is live and stated that the tool “gives a member of the public the same level of precision and control that the board has in its professional software when drawing a district.”<sup>34</sup> Mr. Torkelson gave a demonstration of the public mapping tool and provided guidance regarding the constitutional redistricting requirements as he viewed them.<sup>35</sup> Mr. Presley suggested that the Board work together in Anchorage but work in subcommittees with regard to other regions, and the Board discussed

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28 ARB000155.

29 ARB000156.

30 ARB000156.

31 ARB000156-000157.

32 ARB000157.

33 ARB000157-000158.

34 ARB000157.

35 ARB000157.

this proposal.<sup>36</sup> The Board’s laptops were configured to display racial data and the Board discussed percentages of Alaska Natives included in the VRA Districts.<sup>37</sup> Mr. Torkelson informed the Board that the threshold percentage for VRA Districts in the last redistricting cycle was 45.2 percent Alaska Native voting age population.<sup>38</sup> The Board began some limited mapping exercises during which a member of the Doyon coalition made suggestions to the Board .<sup>39</sup> The Board further discussed the mapping process and agreed that individual Board members would have the opportunity to work with staff to create plans for discussion by the full Board during the week of September 7, 2021.<sup>40</sup> Third-party plans were again discussed, and the Board agreed that the deadline for such plans would be in advance of September 17, 2021. The Board decided that they would schedule a meeting on September 21 or 22, 2021 “to finalize the plans they would like to present to the state.”<sup>41</sup> The Board appears to have been considering the adoption of plans outside of the 30-day period for adopting proposed plans, even before the 30-day period had run.

23. **September 7, 2021.** The Board met for a total of six hours and ten minutes.<sup>42</sup> Sarah Obed of the Doyon Coalition provided public comment regarding its maps, which she stated satisfy constitutional criteria and address concerns raised in the last redistricting

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<sup>36</sup> ARB000157-000158.

<sup>37</sup> Board Meeting Tr. 204:4 -10 (Aug. 24, 2021) [ARB001475]

<sup>38</sup> Board Meeting Tr. 337:17-2010 (Aug. 24, 2021) [ARB0011608].

<sup>39</sup> ARB000158.

<sup>40</sup> ARB000158.

<sup>41</sup> ARB000158.

<sup>42</sup> ARB000159-000162.

process.<sup>43</sup> Mr. Torkelson provided a report on mapping processes, mapping challenges, and legal criteria for redistricting.<sup>44</sup> Mr. Torkelson also stated that “staff realized that if the Board chose to focus its attention on a few key questions before diving into smaller details, that would reduce the total number of possible maps from potentially thousands down to relatively few, to a manageable amount.”<sup>45</sup> Mr. Torkelson requested that the Board focus on some “key challenge questions” and “find a consensus on as many of these known challenges as possible” in order to reduce the possible redistricting options that the Board considers.<sup>46</sup> The Board then convened in executive session for one hour and forty-eight minutes.<sup>47</sup> This was followed by Board member presentations of draft plans and public testimony.<sup>48</sup> The Board then spent one hour and thirty-seven minutes in the first group map-drawing work session.<sup>49</sup> The Board spent more time in executive session than in a map-drawing work session.

24. **September 8, 2021.** The Board met for a total of five hours and thirty-four minutes.<sup>50</sup> Of that total time, the Board spent five hours and nineteen minutes in a map-drawing work session, and fourteen minutes hearing public testimony.<sup>51</sup>

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<sup>43</sup> ARB000160.

<sup>44</sup> ARB000160.

<sup>45</sup> Board Meeting Tr. 19:7-13 (Sept. 7, 2021) [ARB009548].

<sup>46</sup> Board Meeting Tr. 17:1 – 25:1 (Sept. 7, 2021) [ARB009546-009554].

<sup>47</sup> ARB000161.

<sup>48</sup> ARB000161.

<sup>49</sup> ARB000161.

<sup>50</sup> ARB000162.

<sup>51</sup> ARB000162.

25. **September 9, 2021.** The Board met for a total of five hours and fifty-two minutes.<sup>52</sup> The Board entered into a map-drawing work session eight minutes after it convened.<sup>53</sup> Ms. Borromeo voiced several concerns including disparate treatment of public testimony, the scope of discussions in executive session, her desire for the Board to do the actual map drawing rather than providing broad policy direction to staff and allowing staff to draw maps, and her desire that the map-drawing process be conducted by the Board as a group rather than by individual Board members.<sup>54</sup> At the end of the work session, the Board settled on two draft plans to present to the public: Board Composite Version 1 (V.1) and Board Composite Version 2 (V.2).<sup>55</sup> V.2. was drafted over a lunch hour and the drafter only focused on it for only an hour.<sup>56</sup> V.2 was an exercise and was never a complete full-40 plan.<sup>57</sup> The Board then heard public testimony and adopted V.1 and V.2.

26. **September 11, 2021.** This was the end of the 30-day period within which the Board was required to adopt proposed plans pursuant to article VI, section 10 of the Alaska Constitution and the beginning of the 60-day public-comment period within which the Board is required to receive public comments and adopt a final plan. The Board did not meet on September 10 or September 11. Thus, the only two plans developed and adopted

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<sup>52</sup> ARB000162-000165.

<sup>53</sup> ARB000162-000163.

<sup>54</sup> Board Meeting Tr. 113:12 – 118:12 (Sept. 9, 2021) [ARB009937-009941].

<sup>55</sup> ARB000164.

<sup>56</sup> Borromeo Depo. Tr. 170:2-12.

<sup>57</sup> Borromeo Depo. Tr. 166:20 – 167:8.

within the 30-day period for adopting proposed plans were V.1 and V.2. The Board did not meet again until September 17, 2021.

27. **September 17, 2021.** The Board met for a total of six hours and twelve minutes.<sup>58</sup> Following a presentation by the Executive Director, the Board took public testimony and received presentations from five third-party groups that each offered a proposed redistricting plan, and the Board took public testimony related to those plans.<sup>59</sup>

28. **September 20, 2021.** The Board met for a total six hour and six minutes.<sup>60</sup> This was the last meeting prior to the public outreach phase of the redistricting process.<sup>61</sup> The Board introduced Version 3 (V.3) and V.2 with Version 4 (V.4) and moved to replace V.1 with V.3 and V.2 with V.4 without taking any public comment on V.3 and V.4.<sup>62</sup> Prior to their adoption, V.3 and V.4 were never made available for public review or comment nor had V.4 been shared with other members of the Board.<sup>63</sup> V.4 which replaced V.2 was not a updated draft of V.2, but an entirely new “full 40” plan with radically different districts than those in either V.1 or V.2.<sup>64</sup> The Board adopted V.3 and V.4 after the 30-day period within which the Board was constitutionally required to adopt one or more proposed plans. In

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<sup>58</sup> ARB000166; ARB000174.

<sup>59</sup> ARB000170-000173.

<sup>60</sup> ARB 000175; ARB000192.

<sup>61</sup> ARB000173.

<sup>62</sup> Redistricting Process Report at 3 (Nov. 10, 2021) [ARB000007].

<sup>63</sup> Borromeo Depo. Tr. 50:8-21.

<sup>64</sup> See ARB000618-000855 (Board Packet for Sept. 17-19, 2021 Board meetings omitting any mention of revisions to V.1 or V.2 or proposed revisions to Board drawn maps); ARB000856-000943 (Board Packet for Sept. 20, 2021 omitting any proposed revisions to Board drawn maps or revised Board drawn maps).

doing so, the Board rendered obsolete V.1 and V.2 that the Board properly adopted during the 30-day period. The Board also adopted four of the five third-party plans.<sup>65</sup> Those plans were from Coalition of Doyon, Tanana Chiefs Conference, Fairbanks Native Association, Sealaska, and Ahtna (“Doyon Coalition”); AFFR; Alaska for Fair and Equitable Redistricting (“AFFER”) and the Alaska Senate Minority Caucus. The Board adopted and then rescinded the plan proposed by the Alaska Democratic Party, making it the only third-party plan the Board did not adopt at that time.<sup>66</sup>

29. **November 2, 2021.** The Board met for a total of six hours and fifty-five minutes.<sup>67</sup> Of that total time, the Board spent two hours and twenty-three minutes in executive session.<sup>68</sup> In addition, the Board spent two hours and forty-eight minutes in a mapping work session.<sup>69</sup>

30. **November 3, 2021.** The Board met for a total of seven hours, during which it entered a mapping work session.<sup>70</sup>

31. **November 4, 2021.** The Board met for a total of seven hours, during which it entered a mapping work session.<sup>71</sup>

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<sup>65</sup> ARB000190-000192.

<sup>66</sup> ARB000190-000191.

<sup>67</sup> ARB000193; ARB000199.

<sup>68</sup> ARB000196.

<sup>69</sup> ARB000199.

<sup>70</sup> ARB000200.

<sup>71</sup> ARB000200.

32. **November 5, 2021.** The Board met for a total of ten hours and nine minutes.<sup>72</sup> During that time, the Board met in executive session twice. The first executive session lasted one hour and thirty-five minutes.<sup>73</sup> This was followed by a mapping work session that lasted one hour and forty-six minutes.<sup>74</sup> Following public testimony, the second executive session lasted fifty-five minutes.<sup>75</sup> The Board thus met in executive session for a total of two and a half hours. The Board adopted a plan substantially similar to V.4, which was labeled “Board Consensus v.7” as the “final redistricting map with the allowance that staff may make minor changes to facilitate metes and bound, and will return a report with recommended changes to the Board for review prior to final proclamation adoption.”<sup>76</sup>

33. **November 10, 2021.** The Board adopted a Final Proclamation of Redistricting, including senate pairings. This is the Board’s Final Plan.<sup>77</sup>

### **III. STANDARD OF REVIEW**

34. Under article VI, section 11 of the Alaska Constitution, the superior court has original jurisdiction over lawsuits to “compel correction of any error in redistricting.”<sup>78</sup> The Alaska Supreme Court has established the general standard of review to be applied by the courts when exercising jurisdiction under article VI, section 11:

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<sup>72</sup> ARB00201; ARB000209.

<sup>73</sup> ARB000202.

<sup>74</sup> ARB000202.

<sup>75</sup> ARB000208.

<sup>76</sup> ARB000208.

<sup>77</sup> ARB000002-000115.

<sup>78</sup> *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012).



We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. We have stated that we shall review such regulations first to insure [sic] that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary.<sup>79</sup>

35. In determining whether a regulation (or plan) is reasonable and not arbitrary, a court must examine not policy but process and must ask whether the agency (or Board) “has failed to consider an important factor or whether it has “not really taken a ‘hard look’ at the salient problems and has not generally engaged in reasoned decision making.”<sup>80</sup>

36. The U.S. Supreme Court noted as follows with respect to “reasoned decision-making” in the context of administrative appeals:

Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches its decision must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies’ scope of authority, are not supported by the reasons that the agencies adduce.<sup>81</sup>

37. The U.S. Supreme Court has also found “reasoned decision-making” when an agency weighed competing views, selected a formula (or plan) with adequate support in the

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<sup>79</sup> *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 866 (Alaska 1974); see also *In re 2001 Redistricting Cases*, 2002 WL 34119573 at 19 (Alaska Super. Ct. (Feb. 1, 2002)) (citing *Carpenter*, 667 P.2d at 1214).

<sup>80</sup> *Interior Alaska Airboat Ass’n, Inc. v. State*, 18 P.3d 686, 693 (Alaska 2001). See also *In re 2001 Redistricting Cases*, 2002 WL 34119573 at 19 (citing *Interior Alaska Airboat*, 18 P.3d at 693).

<sup>81</sup> *Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

record, provided a detailed explanation of its choice, and responded at length to contrary views.<sup>82</sup>

38. The D.C. Circuit, which regularly makes determinations with respect to “reasoned decision-making” in the extensive administrative appeals that come before it, has indicated that “reasoned decision-making” includes “an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made.”<sup>83</sup>

39. The D.C. Circuit has also identified four principles to guide the inquiry regarding “reasoned decision-making:” deliberation, transparency, rationality, and evidentiary propriety.<sup>84</sup> Regarding deliberation, “[T]he agency must ‘engage the arguments raised before it.’ . . . It follows that an agency’s decision is not deliberative if it fails to ‘respond meaningfully to objections raised by a party.’”<sup>85</sup> Regarding transparency, “[T]he agency ‘must, of course, reveal the reasoning that underlies its conclusion.’”<sup>86</sup> Regarding rationality, “If an agency’s interpretation of a regulation [or constitutional provision] shifts such that the agency is treating like situations differently without sufficient

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<sup>82</sup> *Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n*, 577 U.S. 260, 289-95 (2016).

<sup>83</sup> *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm’n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984).

<sup>84</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d 512, 532 (D.C. Cir. 2016) (internal citations omitted).

<sup>85</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 532.

<sup>86</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 532.

reason, the court may reject the agency’s interpretation as arbitrary.”<sup>87</sup> And regarding evidentiary propriety, “[R]easoned decision-making also precludes the agency from offering ‘an explanation . . . that runs counter to the evidence before the agency.’”<sup>88</sup>

40. The D.C. Circuit has also explained that “[a]rbitrary and capricious review demands evidence of reasoned decision making *at the agency level*; agency rationales developed for the first time during litigation do not serve as adequate substitutes.”<sup>89</sup>

41. Courts regularly enforce the standard of “reasoned decision-making” when they remand cases because the agency fell short of “reasoned decision-making,” which includes an adequate explanation of the agency’s reasoning and adequate support in the record for the agency’s decision. By way of example, the U.S. Supreme Court regularly remands cases for failure to engage in “reasoned decision-making,”<sup>90</sup> as does the D.C. Circuit.<sup>91</sup>

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<sup>87</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 532-33.

<sup>88</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 533.

<sup>89</sup> *Williams Gas Processing – Gulf Coast Co., L.P. v. Fed. Energy Regulatory Comm’n*, 475 F.3d 319, 327 (D.C. Cir. 2006).

<sup>90</sup> *See Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 51-57 (1983) (remanded due to lack of reasoned decision-making, particularly a failure to offer a rational connection between facts and decision made); *Allentown Mack Sales and Service, Inc. v. Nat’l Labor Relations Bd.*, 522 U.S. 359, 375-80 (1988) (remanded due to lack of record evidence and reasoned decision-making); *Judulang v. Holder*, 565 U.S. 42, 63-64 (2011) (remanded due to lack of reasoned decision-making, particularly inadequate rationale without support for decision); *Dep’t of Commerce v. N.Y.*, 139 S. Ct. 2551, 2575-76 (2019) (remanded due to lack of reasoned decision-making, particularly inadequate explanation for agency action).

<sup>91</sup> *See Elec. Consumers Res. Council*, 747 F.2d at 1518 (remanded due to lack of record evidence and reasoned decision-making); *Colo. Interstate Gas Co. v. Fed. Energy Regulatory Comm’n*, 850 F.2d 769, 773-75 (D.C. Cir. 1998) (remanded due to lack of reasoned decision-making); *Williams Gas*, 475 F.3d at 330 (remanded for lack of reasoned

42. With respect to judicial review in redistricting cases in particular, the Alaska Supreme Court has stated that “review is meant to ensure that the Board’s Proclamation Plan is not unreasonable and is constitutional under article VI, section 6 of the Alaska Constitution.”<sup>92</sup> The Board’s redistricting process must also be constitutional under article VI, section 10.

43. In applying this standard to the Board’s Final Plan, the Alaska Supreme Court considers the evidence before it to ascertain whether the Final Plan is both reasonable and constitutional. The inquiry is fact-specific.

44. For example, the court in *Hickel* carefully considered facts specific to various regions and communities in Alaska in determining whether various districts passed constitutional muster. In its analysis of districts in Southeast Alaska, the court concluded “[l]ogical and natural boundaries cannot be ignored without raising the specter of gerrymandering.”<sup>93</sup> The court explained:

The trial court agreed [that Districts, 1, 2, and 3 violated article VI, section 6], finding specifically that “The districts of Southeast are not socio-economically integrated and they easily could have been.” We affirm this conclusion.

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decision-making at the agency level); *Tarpon Transmission Co. v. Fed Energy Regulatory Comm’n*, 860 F.2d 439, 445-46 (D.C. Cir. 1988) (remanded for want of reasoned decision-making).

<sup>92</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1037.

<sup>93</sup> *Hickel*, 846 P.2d at 51.

These districts do not contain, as nearly as practicable, relatively integrated socio-economic areas, identified with due regard for local governmental and geographic boundaries.<sup>94</sup>

45. The court in *Hickel* went through a similar fact-based review for the Mat-Su Borough:

District 6 merges Palmer with the Prince William Sound communities. Palmer is the governmental center of the Mat-Su Borough, an established agricultural area. In contrast, the Prince William Sound communities are oriented toward commercial fishing and maritime activities. The record does not establish any significant interaction or interconnectedness between these areas.

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District 28 also does not contain relatively socio-economically integrated areas. As above, the record simply does not establish significant social or economic interaction between the connected areas.<sup>95</sup>

46. The court then went through a fact-based review for Election District 35, which encompassed a vast part of interior and northern Alaska, and “[b]ased on the record” concluded that District 35 was unconstitutional.<sup>96</sup> The court even addressed the issue of the division of the Aleutian Islands into two districts *sua sponte*, because the division was “so plainly erroneous.”<sup>97</sup>

47. Reviewing courts “always have authority to review the constitutionality of the action taken.”<sup>98</sup> For judicial review to be meaningful, the court must be able to discern from

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<sup>94</sup> *Hickel*, 846 P.2d at 50.

<sup>95</sup> *Hickel*, 846 P.2d at 52-53.

<sup>96</sup> *Hickel*, 846 P.2d at 52-53.

<sup>97</sup> *Hickel*, 846 P.2d at 54.

<sup>98</sup> *Carpenter*, 667 P.2d at 1214; see also *In re 2001 Redistricting Cases*, 2002 WL 34119573 at 19 (citing *Carpenter*, 667 P.2d at 1214).

the evidence whether the requirements of the Alaska Constitution were actually met.<sup>99</sup> This is not a deferential standard of review, nor should it be when the issues before the Court are issues of constitutional compliance.

48. The Alaska Supreme Court has noted the difficulties in the redistricting process, and added: “But these difficulties do not limit the Board’s responsibility to create a constitutionally compliant redistricting plan, nor do they ‘*absolve this court of its duty to independently measure each district against constitutional standards.*’”<sup>100</sup> This Court similarly has a duty to independently measure each district against constitutional standards, and to ensure the Board engaged in reasoned decision-making.

#### **IV. ISSUES FOR TRIAL**

49. There was significant pretrial motion practice in this litigation. Included in that motion practice was the Board’s motion to dismiss Plaintiffs’ claim regarding article VI, section 10, and House Districts 3 and 4, which was denied,<sup>101</sup> none of which disposed of any of Plaintiffs’ claims. Following the motion practice, the issues remaining for trial were as follows:

- Did the Board violate article VI, section 10 of the Alaska Constitution (Redistricting Process) in the redistricting process used in reaching the Final Plan?

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<sup>99</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1034 (citing *In re 2011 Redistricting Cases*, 274 P.3d at 467-68).

<sup>100</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1035 (quoting *In re 2001 Redistricting Cases*, 44 P.3d at 147) (emphasis added)

<sup>101</sup> Order Re: Motion to Dismiss (Jan. 12, 2022).

- Did the Board violate article I, section 7 of the Alaska Constitution (Due Process) in the redistricting process the Board used in reaching its Final Plan?
- Did the Board violate the Open Meetings Act (OMA) (AS 44.62.310-.312) in the redistricting process the Board used in reaching its Final Plan?
- Did the Board violate article VI, section 6 of the Alaska Constitution (District Boundaries) with the Final Plan?
- Did the Board violate the *Hickel* Process by considering racial data and VRA compliance prior to drafting a redistricting plan based upon the constitutional criteria for redistricting?
- Did the Board violate article I, section 1 of the Alaska Constitution (Equal Protection) with the Final Plan?

## V. APPLICABLE LAW

### A. Article VI, Section 10 of the Alaska Constitution.

50. The redistricting process set forth in article VI, section 10 mandates:

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.<sup>102</sup>

51. In his Memorandum and Order on the 2001 redistricting cases, Judge Rindner held that “Article VI, Section 10 requires that public hearings be held only on the plan or

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<sup>102</sup> Alaska Const., art. VI, § 10.

plans adopted by the Board within thirty days of the reporting of the census.”<sup>103</sup> The Alaska Supreme Court affirmed this holding.<sup>104</sup>

52. The legislative history of HJR 44, which amended section 10 to read as it does today, supports Judge Rindner’s interpretation of section 10. In the minutes of the House Judiciary meeting on February 11, 1998, regarding HJR 44, Representative Porter explained that “the board is required to come up with a plan in 30 days and then have hearings on the plan or plans that they have developed, and to present a proclamation at the end of 90 days, which would constitute their reapportionment plan.”<sup>105</sup>

53. Public hearings are thus to be held on the plans the Board developed and adopted within the 30-day period, after which there are 60 days for public comment and for the Board adopt a final redistricting plan. Article VI, Section 6, of the Alaska Constitution

54. The requirements regarding district boundaries are set forth in article VI, section 6, which provides:

The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. 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

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<sup>103</sup> *In re 2001 Redistricting Cases v. Redistricting Board et al.*, 2002 WL 34119573 at 24.

<sup>104</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 143 (“Except insofar as they are inconsistent with this order, the orders of the superior court challenged by the petitioners are **AFFIRMED.**”).

<sup>105</sup> Minutes from House Judiciary Comm. Meeting on HJR 44 at 1:10 PM (Feb. 11, 1998). Comments by Representative Porter.



government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.<sup>106</sup>

55. The term “relatively” in this context means that “we [the courts] compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient.”<sup>107</sup> The term “relatively” in this context does not mean “minimally,” and it does not weaken the constitutional requirement of socio-economic integration.<sup>108</sup>

56. The requirements of contiguity, compactness, and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering—which is the “dividing of an area into political units ‘in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others.’”<sup>109</sup>

57. The “requirements for contiguity and compactness are meant to be read to avoid geographic manipulation of districts for voter dilution or enhancement.”<sup>110</sup>

58. The Board “must consistently enforce the constitutional requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting.”<sup>111</sup>

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<sup>106</sup> Alaska Const., art. VI, § 6.

<sup>107</sup> *Hickel*, 846 P.2d at 47.

<sup>108</sup> *Hickel*, 846 P.2d at 47.

<sup>109</sup> *Hickel*, 846 P.2d at 45 (quoting *Carpenter*, 667 P.2d at 1220).

<sup>110</sup> *Hickel*, 846 P.2d 38, n.25.

<sup>111</sup> *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1360 (Alaska 1987) (*Kenai*).

## 1. Contiguity.

59. Contiguous territory is “territory which is bordering or touching.”<sup>112</sup> 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 not divided into two or more discrete pieces).”<sup>113</sup>

60. Absolute contiguity of land masses is not possible in Alaska, given its numerous archipelagos.<sup>114</sup> As a result, a contiguous district may contain some amount of open sea, but the extent to which a redistricting board may include open sea in an election district is not without limits.<sup>115</sup>

61. The court in *Hickel* explained: “If it were [without limits], then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides for the additional requirements of compactness and socio-economic integration.”<sup>116</sup>

62. The constitutional requirement for contiguity does not stand alone, but must be considered in conjunction with the constitutional requirements for compactness and relative socio-economic integration -- as indicated by the mandatory language of article VI, section 6.

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<sup>112</sup> *Hickel*, 846 P.2d at 45.

<sup>113</sup> *Hickel*, 846 P.2d at 45 (quoting Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 84 (1985)).

<sup>114</sup> *Hickel*, 846 P.2d at 45.

<sup>115</sup> *Hickel*, 846 P.2d at 45.

<sup>116</sup> *Hickel*, 846 P.2d at 45.

## 2. Compactness.

63. In the context of redistricting “compact” means “having a small perimeter in relation to the area encompassed.”<sup>117</sup> The requirement of compactness thus means that “between two districts of equal area the one with the smaller perimeter is the more compact.”<sup>118</sup>

64. The most compact shape is a circle, but “[s]ince it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness.”<sup>119</sup> The relative compactness of proposed districts could be determined by drawing a circle around each proposed district, and the districts that occupy relatively greater areas within the circle are considered more compact.<sup>120</sup>

65. The court in *Carpenter* noted:

We recognize that the constitutional mandate to draw districts equal in their number of inhabitants may conflict with the mandate for compactness and that the former is paramount. Compactness is undoubtedly a material factor, however, when the choice of districting plans includes one yielding bizarre designs.... This is particularly so where compact districts may be drawn with a minimal increase in population deviation.<sup>121</sup>

66. The requirement for compactness also should not result in “corridors” of land.<sup>122</sup> The court in *Hickel* explained:

The compactness inquiry thus looks to the shape of a district. Odd shaped districts may well be the natural result of Alaska’s irregular geometry.

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<sup>117</sup> *Hickel*, 846 P.2d at 45 (citing *Carpenter*, 667 P.2d at 1218).

<sup>118</sup> *Carpenter*, 667 P.2d at 1219.

<sup>119</sup> *Carpenter*, 667 P.2d at 1218.

<sup>120</sup> *Carpenter*, 667 P.2d at 1219.

<sup>121</sup> *Carpenter*, 667 P.2d at 1219.

<sup>122</sup> *Hickel*, 846 P.2d at 45.

However, “corridors” of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.”<sup>123</sup>

67. The court will look to the relative compactness of proposed and potential districts in determining whether a particular district is sufficiently compact to satisfy the constitutional requirement for compactness.<sup>124</sup>

### 3. Socio-Economic Integration.

68. The delegates to the Constitutional Convention explained the “socio-economic principle” as follows:

[W]here people live together and work together and earn their living together, where people do that, they should be logically grouped that way.<sup>125</sup> [In addition,] the delegates define 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 pursuits.”<sup>126</sup>

69. This description supports the concept that election districts were intended to be comprised of socially and economically interactive people in a common geographic area.<sup>127</sup>

70. Article VI, section 6 does not require that districts be drawn along municipal boundaries, but “local boundaries are significant in determining whether an area is relatively

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<sup>123</sup> *Hickel*, 846 P.2d at 45-46.

<sup>124</sup> *Hickel*, 846 P.2d at 45 (citing *Carpenter*, 667 P.2d at 1218).

<sup>125</sup> *Hickel*, 846 P.2d at 46.

<sup>126</sup> *Hickel*, 846 P.2d at 46.

<sup>127</sup> *Carpenter*, 667 P.2d at 1215.

socio-economically integrated.”<sup>128</sup> A borough is by definition socio-economically integrated<sup>129</sup> but some areas within a borough may be more socio-economically integrated than others particularly where they are in close geographic proximity with one another.

71. To satisfy the constitutional requirement of socio-economic integration, there must be “sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction, and interconnectedness rather than mere homogeneity.”<sup>130</sup>

72. In his concurring opinion in *Carpenter*, Justice Matthews explained that “[i]ntegration connotes interaction and connectedness, while homogeneity refers to similarity or uniformity.”<sup>131</sup>

73. In previous reapportionment decisions, the Alaska Supreme Court has identified specific characteristics of socio-economic integration. For example, in *Kenai Peninsula Borough* the court found that service by the state ferry system, daily local air taxi service, a common major economic activity, shared fishing areas, and historical links evidenced socio-economic integration of Hoonah and Metlakatla with several other southeastern communities.<sup>132</sup>

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<sup>128</sup> *Hickel*, 846 P.2d at 51.

<sup>129</sup> *Hickel*, 846 P.2d at 52.

<sup>130</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

<sup>131</sup> *Carpenter*, 667 P.2d at 1218.

<sup>132</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1361).

74. The Board should seek to maximize socioeconomic integration within districts.<sup>133</sup> Consistent with the Court’s approach of maximizing socio-economic integration to the degree practicable in *Hickel*,<sup>134</sup> the superior court in *Hickel* noted the supreme court’s agreement with its holding that “the Alaska constitution requires maximizing socio-economic integration” within districts.<sup>135</sup>

75. Redistricting decisions that reduces socioeconomic integration may not be made except for purposes of maximizing the other constitutional requirements and contiguity and compactness.<sup>136</sup> The Board “is not permitted to diminish the degree of socio-economic integration in order to achieve other policy goals.”<sup>137</sup>

76. In 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.<sup>138</sup> The Alaska Supreme Court has commented on the significance of the constitutional requirement for socio-economic integration:

In 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.<sup>139</sup>

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<sup>133</sup> *Hickel*, 846 P.2d at 73.

<sup>134</sup> *Hickel*, 846 P.2d at 50-52 & 58.

<sup>135</sup> *Hickel*, 846 P.2d at at 70.

<sup>136</sup> *Hickel*, 846 P.2d at 45, n.10.

<sup>137</sup> *Hickel*, 846 P.2d at 45, n.10.

<sup>138</sup> *Hickel*, 846 P.2d at 46.

<sup>139</sup> *Hickel*, 846 P.2d at 46.

[W]e should not lose sight of the fundamental principle involved in reapportionment – truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure that representation of those areas of the state having common interests.<sup>140</sup>

#### **4. Local Government Boundaries.**

77. Article VI, section 6 of the Alaska Constitution states that “[c]onsideration may be given to local government boundaries” when establishing district boundaries. The reference to “local government boundaries” is the only reference in article VI, section 6 to a man-made boundary. The constitutional framers use of the permissive words “consideration may be given” permits local government boundaries to be considered but does not mandate they be considered.

78. Article X of the Alaska Constitution provides the constitutional framework for “local government” within Alaska. Article X, section 2, establishes two forms of local government for Alaska, boroughs and cities, and provides that the exercise of “all local government powers shall be vested” in those two forms of local government. Consistent with article X, Alaska statutes AS 29.04.010-.020 provide that boroughs and cities are municipal corporations and political subdivisions of the State of Alaska. In context, the reference to “local government” in article VI is a reference to boroughs and cities.

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<sup>140</sup> *Hickel*, 846 P.2d at 46 (citing *Groh v. Egan*, 526 P.2d at 890).

79. This definition of “local government” for the purposes of article VI is consistent with its common definition. Merriam Webster<sup>141</sup> defines local government as “the government of a specific local area constituting a subdivision of a major political unit (such as a nation or state).”

80. Similarly, article X, section 12 of the Alaska Constitution provides the constitutional framework for the “boundaries” for local government in Alaska. It provides for the establishment of a local boundary commission and permits the commission to consider “any proposed local government boundary change.” In context, the reference to local government “boundaries” in article VI is a reference to the “boundaries” of boroughs and cities.

81. The Court has held that while local government boundaries are not required to be used, they are a significant indication of socio-economic integration. In *Hickel*, in part, the Court addressed whether districts in Southeast Alaska were constitutional.<sup>142</sup> The Court affirmed the trial court’s holding that “[t]he districts of Southeast are not socio-economically integrated and they easily could have been.”<sup>143</sup> Among the Court’s concerns was the plan’s disregard for the socio-economic integration within local municipal

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<sup>141</sup> “Local government.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/local%20government>. Accessed 9 Feb. 2022.

<sup>142</sup> *Hickel*, 846 P.2d at 50.

<sup>143</sup> *Hickel*, 846 P.2d at 50.



boundaries, the separation of socio-economically integrated municipalities, and the splitting of closely interrelated cities.<sup>144</sup>

82. The Court ultimately ruled that three of the districts “do not contain, as nearly as practicable, relative socio-economic areas, identified with due regard for local government and geographic boundaries.”<sup>145</sup> The Court also affirmed that “[a]though these boundaries need not necessarily be followed in creating election districts, they must be considered by the Board in so far as they indicate the true socio-economic integration of several areas.”<sup>146</sup>

83. The *Hickel* Court first held that article VI, section 6 does not require that districts be drawn along municipal boundaries, “[r]ather, the provision states only that “consideration may be given to local government boundaries.”<sup>147</sup> Nonetheless, the Court held that “local boundaries are significant in determining whether an area is relatively socio-economically integrated,”<sup>148</sup> and noted that AS 29.05.031 provides, in part, that boroughs and municipalities are required to be “interrelated and integrated as to its social, cultural, and economic activities” in order to incorporate.<sup>149</sup>

84. The Court has also held local government boundaries may be considered when ensuring proportional representation. In *Hickel*, the Court also addressed whether the

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<sup>144</sup> *Hickel*, 846 P.2d at 50-51.

<sup>145</sup> *Hickel*, 846 P.2d at 52.

<sup>146</sup> *Hickel*, 846 P.2d at 52.

<sup>147</sup> *Hickel*, 846 P.2d at 51.

<sup>148</sup> *Hickel*, 846 P.2d at 51.

<sup>149</sup> *Hickel*, 846 P.2d at 51.

division of the Matanuska-Susitna (“Mat-Su”) Borough into five different districts, four of which included land not wholly within the Borough, was constitutional.<sup>150</sup> The Court ultimately held dividing the Mat-Su Borough into five districts unfairly dilutes proportional representation, and that “[a] municipality should not be made to contribute so much of its population to districts *centered elsewhere* that it is deprived of representation which is justified by its population.”<sup>151</sup>

85. In reaching this conclusion, the Court first recognized “[i]t is axiomatic that a district composed wholly of land belonging to a single borough is adequately integrated.” On that basis, the Court upheld the single district that was wholly composed of land within the Mat-Su Borough as socio economically integrated.

86. With regard to the other four districts composed of land not wholly within the Mat-Su Borough, the Court noted those resulting districts “have serious shortcomings in their resulting relative socio-economic integration.”<sup>152</sup> The Court’s analysis of whether districts composed of land not wholly within the Borough were socio-economically integrated was a fact specific inquiry based on the record before the Court in which it evaluated the socio-economic integration within each of the four districts.<sup>153</sup> The Court found (1) for District 6 with Palmer and the Prince William Sound communities (which included Valdez), the record did “not support any significant interaction or interconnectedness between these areas” and they were not socio-economically integrated,

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<sup>150</sup> *Hickel*, 846 P.2d at 52.

<sup>151</sup> *Hickel*, 846 P.2d at 53 (emphasis added).

<sup>152</sup> *Hickel*, 846 P.2d at 52.

<sup>153</sup> *Hickel*, 846 P.2d at 52-53.

(2) for District 26 with the Mat-Su Borough and Anchorage, the record indicated that Mat-Su Borough residences were “more naturally linked” to Palmer and Wasilla than to Anchorage and they were not socio-economically integrated, (3) for District 28 stretching to the Canadian border, the interior Ahtna areas as well as Glennallen, Tok, and Delta Junction, the record simply did “not establish significant social or economic interaction between the connected areas,” and (4) for District 34 which combined the Mat-Su Borough with the Denali Borough and parts of the Fairbanks North Star Borough (“FNSB”), failed due to both lack of compactness and lack of relative socio-economic integration.<sup>154</sup>

87. Further, the Court in *Hickel* acknowledged “that it may be necessary to divide a borough so that its excess population is allocated to a district situated elsewhere.”<sup>155</sup> In such an instance, however, the Court held that, “where possible, all of the municipalities’ excess population should go to one other district in order to maximize effective representation of the excess group.”<sup>156</sup>

88. The Court’s fact-specific approach when determining the degree to which local government boundaries should be relied upon when establishing a district not wholly within one borough is also apparent in *Kenai*.<sup>157</sup> In *Kenai*, the Court was considering whether District 7, which districted South Anchorage and North Kenai (Nikiski) in the same

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<sup>154</sup> *Hickel*, 846 P.2d at 52-53.

<sup>155</sup> *Hickel*, 846 P.2d at 52.

<sup>156</sup> *Hickel*, 846 P.2d at 52.

<sup>157</sup> *Kenai*, 743 P.2d. at 1361-62.

district,<sup>158</sup> violated article VI, section 6.<sup>159</sup> In *Kenai*, the Court first noted the State’s arguments that there was “no constitutionally permissible alternatives to joining North Kenai with South Anchorage,” and the result of not joining them would be a population deviation “in excess of the 16.4% maximum deviation permitted under the Federal Constitution.”<sup>160</sup>

89. In *Kenai*, the State invited the Court to consider South Anchorage and Anchorage “an indivisible area for the purpose for determining North Kenai’s socio-economic ties with South Anchorage.”<sup>161</sup> Instead of accepting the State’s invitation to consider Anchorage “indivisible,” the Court thoroughly evaluated multiple socio-economic factors (interaction, economic, social, transportation, and geographic factors) for North Kenai and South Anchorage both as hub communities of broader communities and as separate communities.<sup>162</sup> Ultimately, the Court compared the level of socio-economic integration to other cases in which it has rejected or accepted the integration as sufficient and held, “Kenai draws too fine a distinction between the interaction of North Kenai with Anchorage *and* that of North Kenai with South Anchorage.”<sup>163</sup>

90. Similarly, the Court’s fact-specific approach to the circumstances under which it will consider local boundaries is also apparent in *In re 2001 Redistricting Cases*, where

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<sup>158</sup> *Kenai*, 743 P.2d. at 1361-62.

<sup>159</sup> *Kenai*, 743 P.2d. at 1361-62.

<sup>160</sup> *Kenai*, 743 P.2d. at 1362.

<sup>161</sup> *Kenai*, 743 P.2d. at 1362.

<sup>162</sup> *Kenai*, 743 P.2d at 1362-63.

<sup>163</sup> *Kenai*, 743 P.2d at 1263 (emphasis added).

the Court noted that concerns it may have when a reapportionment plan “unnecessarily” divides a municipality in a way that dilutes the effective strength of municipal votes. However, the Court stated that these concerns “may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the article VI, section 6 requirements of compactness, contiguity, and socio-economic integration.”<sup>164</sup> Specifically, the Court held:

House Districts 12 and 32 must be reconsidered on remand because they are based on a mistaken legal premise that constrained the board’s view of the permissible range of constitutional options for these areas. The board interpreted this court’s decision in *Kenai Peninsula Borough v. State* to preclude the board from pairing population from the Matanuska-Susitna Borough with the Municipality of Anchorage because both Anchorage and the borough had sufficient excess population to “control” an additional seat. But *Kenai Peninsula Borough* does not entitle political subdivisions to control a particular number of seats based upon their populations. *Kenai Peninsula Borough* simply 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. *Kenai Peninsula Borough* recognizes that when a reapportionment plan unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters, the plan’s provisions will raise an inference of intentional discrimination. But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the article VI, section 6 requirements of compactness, contiguity, and socio-economic integration.

Because the board was mistaken in its interpretation of the doctrine of proportionality, the board’s range of choices was unduly limited. We therefore remand so the board can revisit the question of redistricting Southcentral Alaska unencumbered by this mistaken assumption.<sup>165</sup>

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<sup>164</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 144.

<sup>165</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 143-44 (internal citations omitted).

91. While 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,”<sup>166</sup> strict adherence to borough boundaries to the detriment of consideration of viable redistricting alternatives is not required under the Alaska Constitution.

### **5. ANCSA Regional Corporate Boundaries.**

92. While article VI, section 6 does expressly permit, but not require, consideration be given to “local government boundaries” when establishing district boundaries, it does not contain similar language permitting the boundaries of privately-held, for-profit, ANCSA regional corporations to be considered when establishing district boundaries.

93. In 1971, the Alaska Native Claims Settlement Act (“ANCSA”) created 12 privately-held, for-profit, regional corporations.<sup>167</sup> The boundaries for these 12 regional corporations were originally established based upon “common heritage and sharing common interests” of the Native Alaskans. As the Alaska Supreme Court has explained:

Under that Act, the state was divided into 12 regions, and separate corporations were established for each region. By the division it was sought

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<sup>166</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 144 (Alaska 2002).

<sup>167</sup> A 13th private, for-profit regional corporation headquartered in Seattle was established for Alaska Natives who lived outside of Alaska and did not receive land.

to establish homogeneous grouping of Native<sup>168</sup> peoples having a common heritage and sharing common interests.<sup>169</sup>

94. As noted by the Court, the purpose for the private-regional boundaries was to establish “homogeneous groupings” of Native Alaskans “having a common heritage and sharing common interests” as of the 1970 census date.<sup>170</sup> This purpose concerns the “homogeneous grouping” of Alaskans who were Native in 1970. This purpose does not concern the homogeneous grouping of the roughly 15 percent of Alaskans who are Natives in 2021.<sup>171</sup> This purpose does not concern the homogeneous grouping of the roughly 85 percent of Alaskans who are *non-Native* in 2021.<sup>172</sup> Perhaps most importantly, this purpose does not concern the article VI, section 6 constitutional standards for contiguity, compactness, or socio-economic integration (as opposed to homogeneous grouping) required to be considered in forming house districts in 2021.

95. The use of the boundaries for these privately-held, regional corporations was addressed by the Court in *Groh v. Egan*,<sup>173</sup> just three years after they were established. The Court in *Groh* held that the reasons given for the population disparities in the final plan “do not withstand close scrutiny under the standards enunciated by the United States Supreme

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<sup>168</sup> *In re 2001 Redistricting Cases*, 44 P.3d at n.58 (“Native” is basically defined in the Act as a citizen of the United States who is 1/4th degree or more Alaska Indian, Eskimo or Aleut, or combination thereof.”) (citing 43 U.S.C.A. § 1602(b)).

<sup>169</sup> *In re 2001 Redistricting Cases*, 44 P.3d at n.59 (citing 43 U.S.C.A § 1606).

<sup>170</sup> 43 U.S.C.A. 1604(b).

<sup>171</sup> VDZ-3003 at 1216.

<sup>172</sup> VDZ-3003 at 1216.

<sup>173</sup> *Groh v. Egan*, 536 P.2d 863 (Alaska 1974) (*Groh*).

Court.”<sup>174</sup> It also noted that “one of the principal reasons advanced by the Board [for population disparities among districts] was the preservation of the boundaries of regional corporations established under the Alaska Native Claims Settlement Act.”<sup>175</sup>

96. In responding to the Board’s focus on preserving the boundaries of the privately held regional corporations under ANSCA, the Court first acknowledged that while such boundaries “might” provide some justification for population disparities among districts, “none of those districts has the boundaries of a native corporation,” and, instead, “[e]ach included substantial portions of more than one corporate region.”<sup>176</sup>

97. In *Hickel*, the Court later characterized its holding in *Groh* as: “we implied that adherence to Native corporate boundaries *might* also provide justification [for population disparities], *as long as the boundaries were adhered to consistently.*”<sup>177</sup>

98. Setting aside the implication in *Groh* later summarized in *Hickel* that the boundaries for the privately-held regional corporations “might” “if adhered to consistently” be used to justify minor population deviations, the Court has never approved the use of the boundaries for the privately-held regional corporations for establishing districts.

## **6. Drainage and Geographic Features.**

99. As set forth in article VI, section 6, “[d]rainage and other geographic features shall be used in describing boundaries whenever possible.”

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<sup>174</sup> *Groh*, 526 P.2d at 877.

<sup>175</sup> *Groh*, 526 P.2d at 877 (bracketed material added).

<sup>176</sup> *Groh*, 526 P.2d at 877.

<sup>177</sup> *Hickel*, 846 P.2d at 48 (bracketed material and emphasis added).



**B. Article I, Section 1 of the Alaska Constitution (Equal Protection).**

100. Article I, section 1 of the Alaska Constitution provides for equal rights, opportunities, and protections under the law:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protections under the law; and that all persons have corresponding obligations to the people and to the State.<sup>178</sup>

101. With respect to voting rights and redistricting litigation in particular, the Alaska Supreme Court has held:

“In the context of voting rights in redistricting and reapportionment litigation, there are two 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.” The former is quantitative, or purely numerical, in nature; the latter is qualitative.<sup>179</sup>

102. The first principle, “one person, one vote” has mirrored the federal requirement, but the second principle, “fair and effective representation” has been interpreted more strictly than federal requirement.<sup>180</sup> The Alaska Supreme Court has noted that achieving fair and effective representation for all citizens is concededly the basic aim of legislative apportionment.<sup>181</sup>

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<sup>178</sup> Alaska Const., art. I, § 1.

<sup>179</sup> *Hickel*, 846 P.2d at 47 (citing *Kenai*, 743 P.2d at 1366 (Alaska 1987) (internal citation omitted)).

<sup>180</sup> *Hickel*, 846 P.2d at 47.

<sup>181</sup> *Kenai*, 743 P.2d at 1367 (citing *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)).

## **VI. THE BOARD'S REDISTRICTING PROCESS**

103. Plaintiffs maintain that the Board violated the constitutional requirements of article VI, section 10, and article I, section 7, as well the requirements of the OMA in the redistricting process for 2021.

### **A. The Board's Delay in the Redistricting Process.**

104. The Board's staff did not take preliminary steps necessary to facilitate the redistricting process prior to receiving the census data.<sup>182</sup> For example, the geography for the 2020 census blocks was available well before delivery of the actual census data. Specifically, the Topologically Intergraded Geographic Encoding and Reference system ("TIGER") file, which contains the geography for the census blocks, was available in February 2020.<sup>183</sup> The Board's staff should have configured AutoBound with the available geography data and incorporated existing district boundaries into AutoBound.<sup>184</sup>

105. The Board received the 2020 census data on August 12, 2021, after which the Board had 30 days to prepare and adopt proposed redistricting plans. The Board, however, did not meet for purposes of joint mapping until August 23, 2021 at which point the Board received training and began some regional mapping exercises. On August 24, the Board engaged in some limited mapping exercises but did not produce a statewide redistricting plan. The first time the Board met to draft a statewide redistricting plan was September 7,

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<sup>182</sup> Trial Tr. 592:24 – 595:5 (Brace).

<sup>183</sup> Trial Tr. 593:18 – 594:3 (Brace).

<sup>184</sup> Trial Tr. 595:10 – 597:14 (Brace).

2021 —twenty-six days after the census data was released.<sup>185</sup> This left only five days for the Board to adopt proposed plans, which must be made available for public comment, within the constitutionally mandated time period.

106. Although the delivery of the 2020 census data was delayed by approximately four months, the Board’s deadlines begin to run from the date the data is delivered or the date the Board is appointed, whichever is later. Accordingly, the Board’s delay in beginning joint mapping exercises is not attributable to the delay in the delivery of the census data.

107. After receipt of the 2020 census data, the Board’s staff undertook an effort to verify and upload the data into the Board’s redistricting program AutoBound Edge (“AutoBound”).

108. Mr. Torkelson agreed that one of the key mapping challenges was his learning about the way that census blocks worked for mapping purposes. At his deposition, Mr. Torkelson testified:

Q: Okay. And one of the key mapping challenges was your learning about the way that these census blocks worked for mapping purposes, is that fair?

A: Yeah, that’s -- that’s fair. And I – I don’t know if you’ve read all my e-mail or not, but here are certainly -- I had exchanges with -- how do I say this? The census block shapes were a severe limitation on our ability to draw districts that were -- appeared compact, that didn’t appear to have bizarre protrusions or odd shapes to them. So when we kept hitting these problems, I naturally thought, well, are we bound to census blocks? Like, could we draw another line? And I chased that one down with the Department of Labor, you know, saying, hey, I know autoBound just lets us pick blocks, but you guys have GIS software. You can draw a shapefile any shape you want, right? Yes. You know, could we do that? And the answer was just no.<sup>186</sup>

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<sup>185</sup> Trial Tr. 362:14 – 363:10 (Brace); Marcum Depo. Tr. 12:15 – 13:8; Binkley Depo. Tr. 26:12-16.

<sup>186</sup> Torkelson Depo. Tr. 51:2-20.

109. At the time the census data was received, the Board's staff was underprepared and did not understand basic elements of the redistricting process and the functionality of AutoBound. As a result, the map-drawing process was impeded because issues that could have been explored and resolved prior to receiving the census data were instead being discussed during the limited time period for mapping.<sup>187</sup>

110. The Board was also making fundamental decisions regarding the mapping process during the September 7 through 9, 2021, meetings that should have been decided well in advance. For example, by September 9, 2021, the Board had not decided whether the Board should control the mapping efforts or whether staff should take policy direction from the Board and do the mapping.<sup>188</sup>

111. The Board also was debating whether to draw maps jointly or individually. Ms. Borromeo stated on September 9:

There's also been -- my third point is, you know, several comments disparaging the group process as being tedious or taking too long or not efficient or not effective and a waste of time even, it's been said. If that's the case, Mr. Chairman, there's no need to convene this board. We can just continue to work individually and bring different maps to the process. The benefit of us working together as a board is to have input on where these lines should be, because we have different expertise and different ties to different areas of the state. And I would respectfully ask that comments that the group process is negative anyway be held back from certain members as we move forward. Thank you.<sup>189</sup>

112. Despite this concern that the mapping process should be an effort by the Board as a whole, V.4, which was largely adopted as the Final Plan, was the result of

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<sup>187</sup> Trial Tr. 596:16 – 597:14 (Brace).

<sup>188</sup> Board Meeting Tr. 117:2-21 (Sept. 9, 2021) [ARB009941].

<sup>189</sup> Board Meeting Tr. 117:22 – 118:12 (Sept. 9, 2021) [ARB009941-009942].

Ms. Borromeo’s individual mapping efforts and was never shared with any other Board member prior to its introduction and adoption without public comment during the September 20, 2021, meeting. Ms. Borromeo testified:

Q: Is it fair to say that you spent considerable time with staff and other board members building out maps that were presented to the Board?

A: No. I think it would be fair to say that I spent considerable time with staff, not necessarily with my colleagues on the Board, building out maps.<sup>190</sup>

113. The Board spent very little time in joint-mapping work sessions and proposed plans were drawn and adopted hastily, with little joint participation among the Board members. For example, V.2 was the result of Ms. Borromeo working through lunch to show that “that we didn’t have to cherry-pick which boundaries were more important than others.”<sup>191</sup> Similarly, FNSB districts as they appear in the Final Plan were drafted by Chairman Binkley the morning of November 4, 2021, before that meeting began and was adopted the next day.<sup>192</sup>

114. The Court finds that the Board’s lack of preparation prior to receipt of the 2020 census data, general unfamiliarity with basic redistricting concepts and AutoBound, and limited time spent jointly preparing redistricting maps unnecessarily constrained the range of options considered by the Board and facilitated the advancement of the individual Board Member priorities. Those priorities are discussed later in this decision.

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<sup>190</sup> Borromeo Depo. Tr. 165:11-16.

<sup>191</sup> Borromeo Depo. Tr. 117:6-11.

<sup>192</sup> Board Meeting Tr. 41:7-25 (Nov. 4, 2021) [ARB0009211].

**B. The Board’s Failure to Satisfy the Requirements of Article VI, Section 10 in the Redistricting Process.**

115. Under article VI, section 10, public hearings are to be held on the plans the Board developed and adopted within the 30-day period, after which there are sixty days for public comment and for the Board to make modifications to those plans and adopt a final redistricting plan.<sup>193</sup> This interpretation is supported by the plain language of article VI, section 10, the legislative history, and Judge Rindner’s Order that the Alaska Supreme Court affirmed on this issue.

116. The Board’s joint drafting efforts within the 30-day period for adopting proposed plans was limited to less than three full days. Joint drafting on V.1 and V.2 began on September 7, 2021, and those plans were subsequently adopted by the Board on September 9, 2021.<sup>194</sup> V.2 was drafted in an hour over lunch by Board Member Borromeo and was considered by even her to be an incomplete exercise.<sup>195</sup>

117. V.1 and V.2 were the only two plans adopted by the Board within the 30-day constitutionally mandated period for adopting proposed plans. Both were subsequently abandoned by the Board a mere eleven days later, on September 20, 2021, without the benefit of any apparent public hearings.<sup>196</sup>

118. By developing and adopting V.1 and V.2 over three days (September 7 through 9, 2021) and replacing both plans eleven days later (September 20, 2021), there was

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<sup>193</sup> Alaska Const., art. VI, § 6.

<sup>194</sup> Board Meeting Tr. 177:22 – 178:10 (Sept. 9, 2021) [ARB010001-2].

<sup>195</sup> Borromeo Depo. Tr. 168:14-20.

<sup>196</sup> Board Meeting Tr.147:2-19 (Sept. 20, 2021) [ARB010290].

no meaningful public comment period for the only two plans adopted by the Board within the constitutionally mandated 30-day adoption period for proposed plans. The constitutional process does not anticipate the Board adopting proposed plans throughout the public comment period.

119. One can ill imagine a more confusing process for presenting adopted proposed plans to the public than the Board abandoning adopted plans days or minutes after adoption and then adopting new plans throughout the public comment period. Under both sets of circumstances, the public's ability to comment on a stable set of adopted plans by the Board is constitutionally compromised.

120. After presentation of V.3 and V.4, the Board voted to adopt those proposed plans without receiving public comment on them.<sup>197</sup> V.4, which was created by Ms. Borromeo after the 30-day period for adoption of proposed plans and was not even made available to other Board Members until the end of the September 20, 2021, meeting.<sup>198</sup>

121. The Board also adopted five third-party plans and then promptly rescinded one it had just adopted.<sup>199</sup> By adopting V.3, V.4, and four third-party plans on September 20, nine days after the end of the 30-day period for adopting of proposed plans, the Board truncated the 60-day period for public comment on those plans. Not a single redistricting plan was available for public comment for the full 60-day period, as anticipated by article VI, section 10.

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<sup>197</sup> Board Meeting Tr. 147:2 – 196:22 (Sept. 20, 2021) [ARB10290-010339].

<sup>198</sup> Borromeo Depo. Tr. 50:2-21.

<sup>199</sup> Redistricting Process Report at 3-4 (Nov. 10, 2021) [ARB000007-000008].

122. The Board adopted an interpretation of article VI, section 10 that allowed the Board to develop and adopt new redistricting plans at any time after the 30-day period had passed. That interpretation, however, is not supported by the plain language of article VI, section 10; it is not supported by legislative history; and it is not supported by Judge Rindner's Order that the supreme court affirmed on this issue.

123. Article VI, section 10 does not anticipate that the Board will develop and adopt radically different plans after the 30-day period with inadequate notice and no meaningful opportunity for a public comment period.

124. Adoption of a proposed plan is an act of legal significance. Once proposed plans are adopted by the Board within the constitutionally mandated 30-day adoption period, the Board is constitutionally obligated to hold public hearings on those adopted plans. This Board did not.

125. There is no constitutional language anticipating that the public-comment period may be truncated by the adoption of multiple plans throughout the public-comment period. In this case, there was not a single proposed plan by the Board that was afforded the full opportunity for public comment anticipated in article VI, section 10.

126. The Board is entitled to modify parts of the redistricting plans it adopted within the 30-day period to arrive at a final redistricting plan within the 60-day period that follows. The Board is not entitled to replace plans it adopted within the 30-day period with radically new plans outside the 30-day period.

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127. All six of the proposed plans that framed public comment for the redistricting process were adopted after the constitutional deadline for adopting proposed plans. As noted above, V.3 and V.4 were not subject to public comment before their adoption.

128. The Court concludes that the Board failed to satisfy the requirements of article VI, section 10 in its redistricting process. If the Board could simply develop and adopt radically new plans outside the 30-day period and thereby avoid the constitutional requirement for public hearings on plans it developed and adopted within the 30-day period, the redistricting process would defeat the public process that the constitution and legislature envisioned, that Judge Rindner recognized, and that the supreme court affirmed.

**C. Due Process Issues.**

129. Plaintiffs contend the following actions of the Board violated due process: (1) adopting two plans over the course of three days within the 30-day period without adequate notice or public testimony; (2) replacing those two plans with two different plans, one of which became the basis for the adopted Final Plan that was radically different from the previous plan, and outside of the 30-day period without adequate notice or public testimony; (3) adopting four third-party plans outside of the 30-day period without adequate notice or public testimony; (4) having substantive discussions and making important decisions behind closed doors with no opportunity for public participation; (5) making critical decisions with regard to house district boundaries without offering an adequate opportunity for public comment; and (6) adopting a Final Plan that was not one of the plans published by the Board, without adequate notice, or public testimony.

130. The concept of due process stems from the idea of fairness.<sup>200</sup> The Alaska Supreme Court has stated that, “[w]hat procedural due process may require under any particular set of circumstances depends on the nature of the governmental function involved and the private [or public] interest affected by the governmental action.”<sup>201</sup>

131. On September 9, 2021, the Board adopted V.1 and V.2 within the 30-day period as required. As set forth above, the Board was then required to hold public hearings on those plans. The Board did not meet again until September 17, 2021. The vast majority of that meeting was spent receiving presentations for third-party redistricting plans.

132. On September 20, 2021, nine days after the end of the 30-day period for adopting proposed plans and eleven days after adopting V.1 and V.2, the Board replaced V.1 and V.2 with V.3 and V.4.<sup>202</sup> The radical differences between V.2 and V.4 are apparent in the minutes from the Board meeting held on September 20, 2021.<sup>203</sup> The late introduction and adoption of V.3 and V.4 precluded Plaintiffs from any meaningful opportunity to be heard on those plans. The Board also adopted four of five third-party plans. The Board did not meet again until November 2, 2021, and adopted its Final Plan for House districts on November 5, 2021.

133. The Board is not afforded unfettered discretion during the redistricting process.<sup>204</sup> The Board’s redistricting process did not afford Plaintiffs a meaningful

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<sup>200</sup> *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 21.

<sup>201</sup> *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 21.

<sup>202</sup> Board Meeting Tr. 196:14-22 (Sept. 20, 2021) [ARB000190].

<sup>203</sup> See ARB000186-000192.

<sup>204</sup> See *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 21.

opportunity to be heard on the Board's plans developed and adopted within or after the 30-period.

134. The Court thus concludes that the Board denied Plaintiffs due process under article I, section 7 as a result of its failure to satisfy the requirements of article VI, section 10 in the redistricting process.

**D. The Open Meetings Act.**

135. Plaintiffs contend that the following actions of the Board violated the OMA: (1) improperly meeting in executive session multiple times during a three-day period from September 7, 2021 through September 9, 2021; (2) adopting two plans over the course of that three-day period, within the 30-day period, without adequate notice or public testimony; (3) replacing those two plans with two different plans outside the 30-day period without adequate notice or public testimony; (4) having substantive discussions and making important decisions behind closed doors after the 30-day period; (5) using email among three or more Board members to discuss Board business; and (6) adopting a Final Plan that was not one of the plans published by the Board without adequate notice or public testimony.

136. The Alaska Supreme Court has expressly stated:

Open decision-making is regarded as an essential aspect of the democratic process. It is believed that public exposure deters official misconduct, makes government more responsive to its constituency, allows for greater public provision of information to the decision-maker, creates greater public acceptance of government action, and promotes accurate reporting of governmental processes.<sup>205</sup>

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<sup>205</sup> *Alaska Cmty. Colleges' Fed'n of Teachers, Local No. 2404 v. Univ. of Alaska*, 677 P.2d 886, 891 (Alaska 1984).

While the mandates of the OMA are not constitutional mandates, they nonetheless go to an essential aspect of the democratic process.

137. The OMA provides that “all 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.”<sup>206</sup> As a governmental body of a public entity of the State, the Board is subject to the requirements of AS 44.62.310-.312.<sup>207</sup> The OMA also provides that “[r]easonable public notice shall be given for all meetings required to be open under this section.”<sup>208</sup>

138. The Board failed to properly notice the proposed actions to be taken at public meetings. A salient example of this failure is the agenda for the meeting on September 20, 2021, which included an item regarding “improvements to Board proposed plans V.1 and V.2.”<sup>209</sup> Under that agenda item, the Board presented and adopted V.3 and V.4 to replace V.1 and V.2 without taking public comment. In addition, V.4 is radically different than both V.1 and V.2 and cannot be considered a mere “improvement.”

139. With regard to meeting in executive session, the OMA provides:

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 private. Subjects may not be considered at the executive session except those mentioned in the motion calling for executive session unless auxiliary to the main question. Action may not be

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<sup>206</sup> AS 44.62.310(a).

<sup>207</sup> *See also Hickel*, 846 P.2d at 57 (“[W]e affirm the trial court’s determination that the Open Meetings Act and Public Records Act apply generally to the activities of the Reapportionment Board.”).

<sup>208</sup> AS 44.62.310(e).

<sup>209</sup> Board Meeting Agenda (Sept. 20, 2021) [ARB001174].

taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.<sup>210</sup>

140. The pertinent question with regard to whether private meetings of a governmental unit violate the OMA “is whether activities of public officials have the effect of circumventing the OMA.”<sup>211</sup> Important decision making and substantive discussion that takes place outside the public eye constitutes a violation of the OMA.<sup>212</sup>

141. The Board’s public meetings policy adopts the OMA standards and expressly states that public notice shall be given seventy-two hours in advance, with twenty-four hours being allowable.<sup>213</sup> The Board failed to properly notice executive sessions on numerous occasions and instead added executive sessions to agendas during meetings or *sua sponte* entered executive session for nebulous reasons, such as the broad purpose of obtaining “legal advice” without providing any description of the subject matter to be discussed in executive session.<sup>214</sup>

142. The Board paid little regard to the narrow scope of exceptions to the OMA. The Board engaged in substantive deliberations and decision making in executive session, thereby shielding what is required to be a public process from public scrutiny. The Board

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<sup>210</sup> AS 44.62.310(b).

<sup>211</sup> *Hickel v. Southeast Conference*, 868 P.2d 919, 929 (quoting *Brookwood*, 702 P.2d at 1323, n.6).

<sup>212</sup> *Hickel*, 868 P.2d at 930.

<sup>213</sup> Board Public Meeting & Notice Requirement Policy [ARB000422-000423].

<sup>214</sup> *See, e.g.*, Board Meeting Tr. 3:9-11 (Sept. 7, 2021) [ARB009532] (“Mr. Chairman, I move to amend the agenda to add an Executive Session for the purpose of receiving legal advice.”).

is not permitted to make substantive decisions or engage in deliberations regarding how to draw district boundaries in executive session.<sup>215</sup>

143. The scope of discussion in executive session often exceeded the scope of the subjects mentioned in the motion calling for executive session or auxiliary subjects.<sup>216</sup> In doing so, the Board failed to meet the requirement that “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 private.”<sup>217</sup>

**E. Specific OMA and Due Process Violations.**

144. In the same way that there is overlap between article VI, section 10 violations and due-process violations, there is overlap between OMA violations and due-process violations.

145. By engaging in deliberations and making substantive, behind-closed-doors decisions, the Board not only violates the OMA—the Board also violates the Alaska Constitution.

146. The September 7--10, 2021, Board meeting agenda did not include executive session as an agenda item, and there was otherwise no public notice of executive session. Yet, the Board entered executive session on September 7, 2021.<sup>218</sup>

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<sup>215</sup> *Hickel*, 868 P.2d at 929; AS 44.62.310(b) (“Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.”).

<sup>216</sup> AS 44.62.310(b).

<sup>217</sup> AS 44.62.310(b).

<sup>218</sup> Board Meeting Agenda (Sept. 7-10, 2021) [ARB000537].

147. During the September 7, 2021, meeting the Board added executive session to the agenda during the meeting without providing public notice of their intention to do so,<sup>219</sup> failed to state clearly and with specificity the topic of executive session,<sup>220</sup> changed the time for the executive session from after presentation of Board drawn maps to before presentation of Board drawn maps,<sup>221</sup> entered executive session for the purpose of obtaining general legal advice prior to presenting the Board drawn plans to the public,<sup>222</sup> and counsel for the board provided a summary of the executive session thereby filtering the Board’s discussion of its “constitutional mandate,” through the Board’s counsel.<sup>223</sup>

148. Concerns regarding executive session were raised early on in the redistricting process,<sup>224</sup> but the Board dismissed those concerns without substantive discussion regarding the proper scope of executive session or the process the Board should implement for

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<sup>219</sup> Board Meeting Tr. 3:9-11 (Sept. 7, 2021) [ARB009532] (“Mr. Chairman, I move to amend the agenda to add an Executive Session for the purpose of receiving legal advice.”).

<sup>220</sup> Board Meeting Tr. 29:17-22 (Sept. 7, 2021) [ARB0009558] (“So, Mr. Chairman, I move the Board enter Executive Session for the purposes of receiving legal advice under Alaska Statute 44.62.310(c)(4) for matters involving consideration of government records set by a [sic] law are not subject to public disclosure.”).

<sup>221</sup> Board Meeting Tr. 28:1 – 30:22 (Sept. 7, 2021) [ARB009557-009559] (moving executive session initially scheduled for after review of Board drawn maps to before review of Board drawn maps.).

<sup>222</sup> Board Meeting Tr. 26:6 – 27:5 (Sept. 7, 2021) [ARB009555-009556].

<sup>223</sup> Board Meeting Tr. 31:1 – 34:2 (Sept. 7, 2021) [ARB009560-009564] (public discussion of “constitutional mandate” that the Board discussed in executive session); *Id.* at 31:1-5 [ARB009560] (“We had an opportunity in Executive Session to hear from legal counsel regarding a discussion on some of the previous opinions when it comes to the different criteria for the Board to consider in drawing the District boundaries.”); *Id.* at 31:10-13. (“So the Board has asked -- has asked me to make a public presentation to explain the Board’s thinking with regard to its constitutional mandate.”).

<sup>224</sup> *See* Native American Rights Fund Letter at 12-13 [ARB000600-000601].

purposes of entering executive session.<sup>225</sup> The Board did not employ a uniform practice with regard to executive sessions and appears to have been generally unconcerned with limiting executive sessions in a manner that complied with the OMA.

149. During the September 9, 2021, Board meeting, Ms. Borrromeo raised concerns regarding the use of executive session.<sup>226</sup>

150. Thus, even members of the Board had concerns with the use of executive sessions and opined that procedural topics were discussed in executive session that should have been discussed in public.

151. Ms. Borrromeo also stated that she was concerned about legal counsel for the Board meeting with staff and Chairman Binkley outside the presence of other Board members and that “it’s the advice and counsel of our attorney and the appearance that there

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<sup>225</sup> Board Meeting Tr. 8:25 – 9:4 (Sept. 8, 2021) [ARB010503-010504] (“And six, the accusation that we are abusing the executive session process. I, again, dispute that. The executive session process is appropriate for receiving advice from our attorney, which we have done, and we will continue to do as a Board.”); *Id.* at 11:11-18 [ARB010506] (“And, you know, the – I’ve represented public entities for over 20 years. This Board’s use of executive session doesn’t come anywhere close to the line. The -- I think the Board has had 25, 30 hours of public meetings, and maybe two or three of exec- -- have been executive session. And so I just don’t -- there’s just nothing – there’s just -- we’re not – it’s not even a concern.”).

<sup>226</sup> Board Meeting Tr. 115:12 – 116:4 (Sept. 9, 2021) [ARB009939-009940] (“My second point is about executive session, where I feel as though some board members are allowed to have the benefit of our counsel and others were not. And I’ll give an example. Yesterday, we wasted -- maybe not wasted. We ate up a lot of time in executive session talking about procedural issues that maybe didn’t need to be done in executive session and eating lunch. I wanted to have the benefit of having discussions with our counsel about our map, and I was told, no, we have to come out of executive session to come back on the record. This is important for public confidence, which I totally agree. And then on the other side, yesterday our lunch was extended for 15 minutes because it was late. I wasn’t asking for another two hours in executive session. 15 minutes would have been more than sufficient.”).



are small group discussions going on I think should be avoided.”<sup>227</sup> It is readily apparent that the Board continued to have small group discussions among themselves, with counsel, and with staff. This practice implicates decision-making by virtue of serial communications whereby decisions are made by relaying discussions among small groups to other members of the Board outside of the public eye and in violation of the OMA.

152. During the November 2, 2021, meeting, the Board entered into executive session for purposes of receiving a presentation from their VRA experts. The Board merely recited the statutory language of the OMA for the motion to enter into executive session.<sup>228</sup> After the executive session, the Board’s counsel provided a summary of the discussion that was conducted in executive session, which suggests the discussion that occurred in executive session was not subject to an exception to the OMA.<sup>229</sup> Again, the Board’s discussion of what appear to be subjects that are not appropriate for executive session was filtered through the Board’s counsel for presentation to the public. The public was not provided with any materials presented during the executive session, and the Board’s VRA experts did not participate in any public discussions or deliberations.

153. The agenda for the November 2, 2021, meeting identified that executive session would be held at 10:30 a.m. prior to discussion of the VRA.<sup>230</sup> There was no agenda

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<sup>227</sup> Board Meeting Tr. 120:21 – 121:20 (Sept. 9, 2021) [ARB009944-009945].

<sup>228</sup> Board Meeting Tr. 68: 23 – 69: 4 (Nov. 2, 2021) [ARB008998-008999].

<sup>229</sup> Board Meeting Tr. 69:21 – 78:3 (Nov. 2, 2021) [ARB008999-009008].

<sup>230</sup> Board Meeting Agenda (Nov. 2, 2021) [ARB000944].

published for the November 3-5 meetings, and no public notice was provided regarding the executive sessions that took place during this time period.

154. On November 3, 2021, the Board began exploring where to place Valdez.<sup>231</sup> In the midst of this discussion, the Board decided to enter into executive session despite the fact that no public notice of the executive session was provided.<sup>232</sup> The subject of the executive session appears to be whether to place Valdez in District 36 or whether to place Valdez with the Mat-Su Borough. The Board described this decision as a “binary choice”<sup>233</sup> and wanted to explore options for Valdez. Counsel for the Board stated that “[i]f folks want to have those kinds of questions, that’s one way to we could finish the day.”<sup>234</sup> After taking a five-minute break, the Board reconvened and entered into executive session.<sup>235</sup> Again, the Board merely recited the OMA statutory language rather than specifically and clearly identifying the topic of executive session.<sup>236</sup> After entering executive session the Board did not reconvene in public session on November 3, 2021.<sup>237</sup> As a result, the duration of the executive session is unclear.

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<sup>231</sup> Board Meeting Tr. 326:13 – 337:20 (Nov. 3, 2021) [ARB007686 -007697].

<sup>232</sup> Board Meeting Tr. 337:5 – 338:23 (Nov. 3, 2021) [ARB007697-007698].

<sup>233</sup> Board Meeting Tr. 330:12-17 (Nov. 3, 2021) [ARB007690] (“I mean, it seems like the -- a binary choice here is based on what we do with Valdez. We decided to go this way. We found a map we can use. If we keep it on the Richardson, we have a different version.”).

<sup>234</sup> Board Meeting Tr. 337:10-11 (Nov. 3, 2021) [ARB007697].

<sup>235</sup> Board Meeting Tr. 337:22 – 338:23 (Nov. 3, 2021) [ARB007697-007698].

<sup>236</sup> Board Meeting Tr. 337:22 – 338:23 (Nov. 3, 2021) [ARB007697-007698].

<sup>237</sup> Board Meeting Tr. 338:24 – 339:1 (Nov. 3, 2021) [ARB007698-007699].

155. The next day on November 4, 2021, the Board came back on the record in public session. At the outset of the meeting, Ms. Borromeo stated that “I do believe that we have reached consensus or close to in a couple of districts and regions, and so it would be appropriate to start putting that final map together.”<sup>238</sup> Ms. Bahnke stated in the opening minutes of the meeting: “In terms of process, I’d like to also ask our counselor if we need to be prepared to have any kind of discussions that would require us to go into executive session today or not, based on what you observed yesterday, or -- or is it premature?”<sup>239</sup> In response Mr. Singer stated:

It’s premature. If I see a decision on which I would like to share legal advice with you, I’ll suggest that we have an executive session. And if you reach a point for a decision where you’d like some input from counsel, the – as we discussed, there are -- there are VRA implications or analyses that need to be done with regard to districts that -- the districts you have heretofore labeled 37 through 40 and potentially districts in Anchorage. And so if there’s going to be drastic changes from board-adopted or -- six board-adopted plans, if you have a new solution, after the board engages in the Hickel process and comes up with a proposed idea, there’s a second piece, which is a legal analysis with the VRA. And so some of that we can do on the fly in executive session. Some of that will require input from our experts, and they’re standing by. So -- (indiscernible) way of saying ---- it depends.<sup>240</sup>

156. Mr. Simpson then stated:

Mr. Chair, I mean, I have maybe a little bit different take on that. If -- if we wait for counsel to, you know, throw up a red flag and say I need to talk to you guys, that kind of implies something’s about to go sideways. I would rather that we just sort of have some ordinary scheduled executive sessions

<sup>238</sup> Board Meeting Tr. 4:23 – 5:1 (Nov. 4, 2021) [ARB009174-009175].

<sup>239</sup> Board Meeting Tr. 7:4-9 (Nov. 4, 2021) [ARB009177].

<sup>240</sup> Board Meeting Tr. 7:10 – 8:7 (Nov. 4, 2021) [ARB009177-009178].

where we could talk candidly to counsel without throwing up a red flag, just talk through – where we’re at, at any given time.<sup>241</sup>

157. After this exchange and contrary to his statement that it was premature to schedule an executive session, Mr. Singer suggested that the Board schedule executive session for 11:30 a.m. that day for 30 minutes.<sup>242</sup>

158. This exchange among the Board and counsel exemplifies the Board’s practice of treating executive session in an inconsistent manner and paying little regard for compliance with the OMA. The Board anticipated that it may need executive session for some then unknown reason rather than ensuring that the issues to be discussed at 11:30 a.m. were properly within the narrow exceptions to the OMA. There was no agenda for the November 4, 2021, meeting, and no public notice of executive session was provided.

159. The Board discussed the creation of a Doyon–Ahtna district that would result in the FNSB shedding population to District 36 in order to replace the population of Valdez, which would then be placed in a district with the Mat-Su Borough.<sup>243</sup> Shortly before entering executive session, the Board was engaged in substantive discussions regarding what district Valdez should be placed in and had yet to reach consensus.<sup>244</sup> The Board entered executive session without specifically and clearly identifying the topic for discussion or the reason executive session was required at {incomplete thought}

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<sup>241</sup> Board Meeting Tr. 8:15 – 9:1 (Nov. 4, 2021) [ARB009178-009179].

<sup>242</sup> Board Meeting Tr. 9:2-6 (Nov. 4, 2021) [ARB009178].

<sup>243</sup> Board Meeting Tr. 72:1 – 74:6 (Nov. 4, 2021) [ARB009243-009245].

<sup>244</sup> Board Meeting Tr. 80:2 – 82:22 (Nov. 4, 2021) [ARB009250-009251].

160. After reconvening in open session at approximately 1:00 p.m., the Board immediately began discussing areas of consensus and indicated they had reached consensus on Valdez.<sup>245</sup> Thus, it appears that the Board reached consensus during the executive session that Valdez would not be paired with Richardson Highway communities, which were included in District 36.

161. During the November 5, 2021, Board meeting, Ms. Marcum recited the process by which the Board foreclosed any possible pairing of Valdez with Richardson Highway communities or Prince William Sound communities.<sup>246</sup>

162. This statement combined with the lack of any substantive discussion regarding pairing Valdez with Richardson Highway or Prince William Sound communities after the Board entered executive session on November 4, 2021, makes clear that the Board reached consensus on this issue during the executive session. After the executive session the Board's deliberations turned on choosing whether to pair Valdez with Anchorage or the Mat-Su Borough.

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<sup>245</sup> Board Meeting Tr. 102:25 – 104:6 (Nov. 4, 2021) [ARB009272-009274].

<sup>246</sup> Board Meeting Tr. 5:2-16 (Nov. 5, 2021) [ARB007862] (“I have concerns about Valdez and, you know, so I had offered yesterday to - to try to find another solution to Valdez. They’ve been really clear about their desire to be with Richardson Highway, and that was taken off the table yesterday. There are other solutions that they proposed for coastal, and that was also not a possibility. It was taken off the table. And so what -- you know, that kind of left them with Anchorage or the Mat-Su. They’ve testified that they do not want to be with the Mat-Su -- official resolutions and such -- the Mat-Su has testified they don’t want Valdez with them, so I wanted to -- to look at really the only other opportunity to pair them with another area, and that would be with Anchorage.”).

163. During the November 5, 2021, meeting the Board entered into executive session twice, there was no Agenda for the November 5, 2021, meeting, and no public notice of executive session was provided. First, the Board entered executive session at the outset of its meeting to receive VRA analysis by reciting the statutory language of the OMA without identifying why the executive session was required. Second, the Board entered executive session to receive legal advice without identifying the specific topic for executive session or the reason why the executive session was required.<sup>247</sup> The Board’s discussion regarding the second executive session reveals a general disregard for OMA compliance, including limiting the scope of discussion to subjects that properly fall within exception to the OMA.<sup>248</sup>

164. Immediately after returning to public session, the Board began analyzing two maps that placed Valdez with the Mat-Su Borough.<sup>249</sup> Thus, it appears that further consensus regarding how to pair Valdez with the Mat-Su Borough was reached in executive session out of the public eye.

**F. Data Anomalies and Persistent Confusion.**

165. The Board’s practice of renumbering districts in various redistricting plans on numerous occasions and in the Final Plan undermined the ability of the public to provide meaningful input on proposed plans or other draft plans created by the Board.

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<sup>247</sup> Board Meeting Tr. 184:8 – 185:16 (Nov. 5, 2021) [ARB008041-008042].

<sup>248</sup> Board Meeting Tr. 184:8 – 185:16 (Nov. 5, 2021) [ARB008041-008042].

<sup>249</sup> Board Meeting Tr. 186:24 – 187:2 (Nov. 5, 2021) [ARB008043-008044] (“Both of them bring Valdez into the Mat-Su, which I know has been a point of, you know, considerable conversation, but they are somewhat different).

Mr. Torkelson described the renumbering practices of the Board and testified that renumbering resulted in “persistent confusion” regarding what districts were being discussed during public meetings.<sup>250</sup>

166. As a result of the Board’s renumbering practices, the deviation table for the Final Plan, which was presented on the Board’s website under the 2021 Redistricting Proclamation section, contained erroneous population data for 23 of the 40 districts.<sup>251</sup> These errors were also included in the interactive version of the final plan contained on the Board’s website.<sup>252</sup> This error was not corrected until January 13, 2022. The publicly accessible population data for the 2021 Redistricting Plan was incorrect for over two months after the adoption of the Final Plan. These errors undermined the ability of the public to analyze the Board’s Final Plan and reflect the confusion caused by repeatedly renumbering districts.

## **VII. THE BOARD WAS IMPROPERLY MOTIVATED BY THE ADVANCEMENT OF INDIVIDUAL PRIORITIES**

167. Rather than fulfill its mandate to create a redistricting plan based upon the constitutional criteria for redistricting set forth in article VI, section 6 of the Alaska Constitution, the Board instead focused on other priorities, which resulted in a Final Plan that fails to satisfy the constitutional criteria. The Board was improperly motivated by the advancement of individual Board members’ interest or the interests of Board member’s employers, communities, or their constituents. As a result, the Board failed to consider

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<sup>250</sup> Torkelson Depo. Tr. 110:14 – 114:21 (Jan. 12, 2022).

<sup>251</sup> ARB007234; Ex. VDZ-3003 at 759 [ARB000117] (Population Deviation Charts).

<sup>252</sup> Ex. VDZ-3003 at 14 (Brace).

viable redistricting options that better satisfy the constitutional criteria for redistricting and developed a Final Plan that fails to comport with Alaska law. The Supreme Court has expressly prohibited diminishing the constitutional criteria in order to achieve other policy goals.<sup>253</sup>

168. First, the Board focused on ANCSA-related priorities including drawing Districts 36-40 in a manner that satisfied the priorities of Ms. Bahnke<sup>254</sup> and Ms. Borrromeo.<sup>255</sup> Second, Chairman Binkley<sup>256</sup> prioritized maintaining the boundaries of FNSB despite the fact that FNSB was overpopulated and needed to shed excess population into another district to reach reasonable deviations. Third, Mr. Simpson prioritized pairing Mendenhall Valley with Skagway and Haines despite the voluminous amount of public testimony to the contrary and the fact that his proposal splits the Mendenhall Valley

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<sup>253</sup> See *Hickel*, 846 P.2d 38, 45, n.10.

<sup>254</sup> Trial Tr. 974:23 – 975:2 (Jan. 27, 2021) (Bahnke) (“I am the president of Kawerak, which is a regional tribal consortium in the Bering Straits? region of Alaska. I also am a board member for the Alaska Federation of Natives. I am involved with the National Congress of American Indians.”).

<sup>255</sup> Borrromeo Aff. at 1-2, ¶¶ 4-5 Borrromeo Depo. Tr. 14:2-3 (Ms. Borrromeo is Executive Vice President and General Counsel for the Alaska Federation of Natives, the Board Chairman for MTNT, Ltd., a board member for the Alaska Native Justice Center, a committee member of the United States Census Bureau National Advisory Committee on Racial, Ethnic, and Other Populations, and a shareholder of Doyon Limited.).

<sup>256</sup> Binkley Depo. Tr. 17:12 – 24:14 (Mr. Binkley is a lifelong Alaskan from Fairbanks, operated a tug and barge business on the Yukon River and the Y-K Delta, and former representative for the Bethel area and senator for the Bethel area and interior rural communities and villages.).



community.<sup>257</sup> Fourth, Mr. Singer<sup>258</sup> who serves as counsel for the Board appears to have supported pairing Valdez with Mat-Su in order to maintain Doyon and Ahtna’s ANCSA boundaries. The record reflects that Board members advocated for specific districts based upon their personal priorities rather than focus on the constitutional redistricting criteria or respecting the wishes of the public as expressed during the public comment period.

**A. Protection of Doyon, Ahtna, and Bering Straits ANCSA Regional Corporation Boundaries.**

169. At the outset of the redistricting process, the Board focused on historical VRA Districts, sought to maintain ANCSA boundaries, and prioritized socio-economic integration among Native groups. In so doing, the board sacrificed maintaining borough boundaries and satisfying the constitutional criteria of compactness and socio-economic integration.

170. The Board’s process of creating District 36 reflects that the Board was improperly motivated by a desire to advance the interests of Doyon, Ahtna and Bering Straits over the interests of other communities.

171. The Board improperly prioritized maintaining the ANCSA boundaries of Doyon, Ahtna, and Bering Straits to the detriment of constitutionally mandated redistricting criteria.

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<sup>257</sup> Simpson Depo. Tr.16:3 – 18:3 (Mr. Simpson lives in Douglas and is an attorney in private practice in Juneau. His practice focuses particularly on Native Corporation, and he has served as principal outside counsel for Sealaska since the 1970s.).

<sup>258</sup> Ex.VDZ-3007 (Mr. Singer serves as Ahtna’s Attorney in two cases pending before the Alaska Supreme Court: *James Caswell v. Ahtna, Inc.* (S-18005) and *State of Alaska, Dep’t of Transp. & Pub. Facilities, et al. v. Ahtna, Inc.* (S-17526)).

172. The Board openly acknowledged the Doyon Coalition’s goal of keeping interior Doyon and Ahtna villages together in one District<sup>259</sup> and endeavored to create a Doyon-Ahtna district.<sup>260</sup>

173. The Board received a presentation from the Doyon Coalition early on in the redistricting process in a private meeting that was not a matter of public record.<sup>261</sup> Ms. Bahnke testified that this meeting with the Doyon Coalition was the only private meeting that concerned substantive redistricting issues that she could recall.<sup>262</sup> Chairman Binkley had a private conversation with Doyon’s CEO, Mr. Schutt, regarding Doyon’s priorities prior to any presentation by Doyon to the Board and before the Board started

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<sup>259</sup> Board Meeting Tr. 196:8 -13 (Nov. 4, 2021) [ARB009366] (“Doyon didn’t seem to be -- in terms of what happened in the borough, it didn’t seem to be -- and again, this was informally, but they didn’t seem to be that concerned about it. Their primary mission, keep Doyon villages together, keep Ahtna region villages together.”); Board Meeting Tr. 161:14-25 (Nov. 4, 2021) [ARB009331] (“MEMBER BAHNKE: We’ve also heard perspective from Doyon. The whole reason they formed their coalition was to preserve the socioeconomic integrity of those rural Interior communities. So everyone’s got their preference, but what litmus test -- which -- which of the two pairings of Valdez, either in that rural Interior District versus where it has already been established by the courts that it has socioeconomic ties to the Mat-Su Valley. In my mind we’ve got court precedence and then the constitutional requirement of trying to do the best that we can socioeconomically.”).

<sup>260</sup> Trial Tr. 1158:15 – 21 (Jan 27, 2022); Borromeo Depo. Tr. 135:24 – 136:12 (Jan. 10, 2022); Binkley Depo. Tr. 154:25 – 155:18 (Jan. 11, 2022); Board Meeting Tr. 253:20-25 (Nov. 5, 2021) [ARB008110] (“you’ve heard testimony, and a specific request from the ANCSA Regional Corporation to include Cantwell with the other Ahtna villages, and the Board has -- with District 36, it’s really sought to create a Doyon district. So it’s -- it’s consistent, and I think it’s within your discretion.”).

<sup>261</sup> Bahnke Depo. Tr. 87:6 – 89:22.

<sup>262</sup> Bahnke Depo. Tr. 89:12-21.

drawing maps.<sup>263</sup> The Board was well aware of the Doyon Coalition’s objectives from the outset of the redistricting process.<sup>264</sup>

174. Counsel for the Doyon Coalition actively participated in the Board’s initial training and mapping exercises on August 23, 2021, and presented the Doyon Coalition’s proposed map at that time.<sup>265</sup> Ms. Borromeo requested that the map be sent to the Board that night.<sup>266</sup> Counsel for the Doyon Coalition also participated in the Board’s mapping of the VRA districts and what would become District 36 during the August 24, 2021 meeting.<sup>267</sup>

175. Legal counsel for the Board represented Ahtna in two pending supreme court cases at the time the Board was engaged in the redistricting process.<sup>268</sup> However, this potential conflict was not expressly disclosed to the Board, and Chairman Binkley was unaware that Mr. Singer represented Ahtna.<sup>269</sup>

176. The Doyon Coalition articulated their desire to maximize electoral influence of interior Athabascan communities’ numerous times throughout the redistricting process<sup>270</sup>

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<sup>263</sup> Binkley Depo. Tr. 53:1-17; 55:5-22.

<sup>264</sup> Binkley Depo. Tr. 52:2-25.

<sup>265</sup> Board Meeting Tr. 186:24 – 194:14 (Aug. 23, 2021) [ARB011225 – 011233].

<sup>266</sup> Board Meeting Tr. 190:19-20 (Aug. 23, 2021) [ARB011229].

<sup>267</sup> Board Meeting Tr. 260:3 – 262:23 (Aug. 24, 2021) [ARB011531 – 011533].

<sup>268</sup> Ex. VDZ-3007.

<sup>269</sup> Binkley Depo. Tr. 60:5 – 62:11.

<sup>270</sup> *See e.g.* ARB004041; ARB002331; ARB002087; ARB002257; ARB002261-002264.

and the Board articulated its desire to maximize the percentage of Native voters in District 36.<sup>271</sup>

177. The Board consistently referred to District 36 the “Doyon district” or the “Doyon-Ahtna district” throughout the redistricting process. The Final Plan satisfies the Doyon Coalition’s priorities and creates a Doyon-Ahtna district in District 36.<sup>272</sup>

178. Despite the fact that the majority of the population in District 36 does not reside in Doyon or Ahtna Native villages, the Board prioritized creating a district that included all Doyon and Ahtna villages together and avoided combining any Bering Straits or Calista communities with Doyon communities.

179. The record establishes a pattern of deference to the preferences of the Doyon Coalition and Board Members Borrromeo and Bahnke<sup>273</sup> at the expense of breaking borough boundaries and creating districts that are not compact or socio-economically integrated.<sup>274</sup>

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<sup>271</sup> Board Meeting Tr. 243: 9 – 245:22 (Nov. 3, 2021) [ARB007603-007605].

<sup>272</sup> Binkley Depo. Tr. 159:4-7 (“Q: So I’m wondering if you have, for example, House District 36 isn’t just the Doyon district, it’s the Doyon-Ahtna district; right? A: Correct.”)

<sup>273</sup> Simpson Depo Tr, 47:12-15 (“I think, in many cases, the member from a particular region received deference from the other members as to that region.”); Bahnke Depo Tr. 53:18-19 (“I felt like I had certain expertise and that should be given some deference.”); Simpson Depo Tr. 172:15-22 (“Yes. And in terms of the big rural districts, in northern -- well, like the big horseshoe district and the western districts that are definitely indigenous language groups that were considered, it was not anything I particularly knew about, so there was deference, I think, given to board members who did have that knowledge, but yes, that could be an issue.”); Simpson Depo Tr. 14:1-5 (“I think most of the board gave quite a bit of deference to Melanie Bahnke, who was from Nome, and kind of took the lead as far as, you know, the socioeconomic issues for those western Alaska districts.”)

<sup>274</sup> Board Meeting Tr. 19:3-9 (Sept. 8, 2021) [ARB010514] (“MEMBER BAHNKE: This actually leads nicely into what I was reflecting on last night. You know, we got the testimony from Doyon because the Interior villages had been kind of adopted out to different regions the last cycle, and I feel like -- I was feeling like at the -- the Bethel region was -- we’re

180. Ms. Borrromeo’s text messages with Mr. Amdur-Clark and Ms. Sanford during Board meetings reflects both her and Ms. Bahnke’s alignment with the priorities of the Doyon Coalition.<sup>275</sup> Towards the end of the redistricting process on November 8, 2021, Ms. Sanford texted Ms. Borrromeo “We are poised to help defend this map if Budd doesn’t completely f[] up the senate pairings. Not sure we can defend some of what I am hearing discussed.”<sup>276</sup> On November 9, 2021, Ms. Borrromeo texted Ms. Sanford “I’m sorry I left it

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basically doing the same thing to them to spare the Doyon region from that.”); Board Meeting Tr. 178:24 – 183:9 (Nov. 3, 2021) [ARB007538-007543] (“MEMBER BAHNKE: John, one thing I’d like to point out is beyond Calista’s testimony, outside of my region, there is a coalition of Doyon, Sealaska -- ... TCC, and maybe Ahtna ... that has clearly indicated their preference for a rural Interior district. That is comprised of Athabascan Native communities, or that they’re not pushed off into various other socioeconomically non-compatible sections of the state.”); Board Meeting Tr. 196:18 – 197:15 (Sept. 7, 2021) [ARB007556-007557] (“MEMBER BAHNKE: So for 39, which was breaking an ANCSA boundary once, it’s now breaking it twice. You’re adding the number of breaks to the Doyon region. So for – CHAIR BINKLEY: I think what Bethany was saying, that’s -- MEMBER BAHNKE: For the Bering Straits region, for the Doyon region. CHAIR BINKLEY: -- an improvement, though. MEMBER BAHNKE: It’s not an improvement to the ANCSA (indiscernible). CHAIR BINKLEY: For Doyon. For Doyon it is. MEMBER BAHNKE: How? CHAIR BINKLEY: Because now they’re in four different districts, and this would just allow them to be in two different districts. MEMBER BORROMEO: This also is not what they requested. MEMBER BAHNKE: Yeah, this is not what they requested. CHAIR BINKLEY: This is what Calista had requested, and it gives Doyon much of what they requested.”); Board Meeting Tr. 52:4-13 (Nov. 4, 2021) [ARB000922] (“MEMBER BAHNKE: I do think, though, socioeconomically, it makes more sense to do that as opposed to pulling rural Interior Athabascan communities and pushing them into a whole other ANCSA -- ANCSA region, which ANCSA regions were defined -- were established based on socioeconomic connectivity and where there are no boroughs identified. To me it’s closest thing that you can have to a borough that delineates socioeconomic integration.”).

<sup>275</sup> Ex. VDZ-3010 [ARB00155140-00155159].

<sup>276</sup> Ex. VDZ-3010 [ARB00155153].

all on the table.” To which Ms. Sanford responded “you made an excellent record you and Melanie are heroes.”<sup>277</sup>

181. Ms. Borromeo appears to have coordinated her efforts with the Doyon Coalition and advanced the agenda of the Doyon Coalition through her position as a member of the Board. The Doyon Coalition worked in concert with Ms. Borromeo to actively solicit public comment that advanced their priorities, including the priority of taking excess population from FNSB in order to remove Valdez from District 36, and maintaining Ahtna’s ANCSA boundaries by placing Cantwell in District 36.

182. Ms. Sanford utilized her position as a member of the FNSB assembly caused the FNSB assembly to pass a resolution supporting the concept of shedding population from FNSB. Text messages between Ms. Borromeo and Ms. Sanford reveal their apparent involvement in procuring the resolution.<sup>278</sup> Ms. Sanford stated that it was her last night on the FNSB assembly and that “We got it passed. And even the mayor finally got it. A day late and a dollar short. But still.”<sup>279</sup> Ms. Borromeo responded “Going out with a bang I see, LOL” and stated that “It’s good timing. Fresh.”<sup>280</sup> The resolution resulted in Chairman Binkley’s change of position with regard to breaking the FNSB boundary and shedding

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<sup>277</sup> Ex. VDZ-3010 [ARB00155155].

<sup>278</sup> Ex. VDZ-3010 [ARB00155141].

<sup>279</sup> Ex. VDZ-3010 [ARB00155141].

<sup>280</sup> Ex. VDZ-3010 [ARB00155141].

population from FNSB.<sup>281</sup> While Ms. Borromeo was aware that the Doyon Coalition was involved in procuring the resolution, Chairman Binkley was not.<sup>282</sup>

183. It is apparent that Ms. Borromeo coordinated with the Doyon Coalition to influence the type of information received by the Board to advance the Doyon Coalition’s priorities. For example, Ms. Borromeo and Ms. Sanford coordinated “to make sure that Sealaska’s written comments make it to Budd’s eyes.”<sup>283</sup> During the November 2, 2021, Board meeting Ms. Borromeo texted Ms. Sanford that “Budd appears to have the votes” and “you guys gotta weigh in ASAP.”<sup>284</sup> Ms. Borromeo also solicited public comment from Ahtna, a member of the Doyon Coalition, in support of placing Cantwell in District 36.<sup>285</sup>

184. Both Ms. Sanford and Mr. Amdur-Clark provided Ms. Borromeo information during Board meetings that Ms. Borromeo subsequently relayed to the Board. During the November 3, 2021, Board meeting Ms. Sanford texted Ms. Borromeo regarding arguments against including Scammon Bay and Hooper Bay in District 38, that would necessitate combining some Doyon communities with communities in the Bering Straits region. Ms. Sanford texted Ms. Borromeo that “You heard from Calista and not the Tribe’s.”<sup>286</sup> Ms. Borromeo repeated this information on the record shortly thereafter.<sup>287</sup> During this same

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<sup>281</sup> Board Meeting Tr. 40:2 – 41:22 (Nov. 4, 2021) [ARB009210-009211].

<sup>282</sup> Trial Tr. 1149:16 – 1150:12 (Jan. 27, 2022).

<sup>283</sup> Ex. VDZ-3010 [ARB00155141].

<sup>284</sup> Ex. VDZ-3010 [ARB00155143].

<sup>285</sup> ARB001795-001796 (Ahtna Letter to Binkley (Nov. 3, 2021)).

<sup>286</sup> Ex. VDZ-3010 [ARB00155146].

<sup>287</sup> Board Meeting Tr. (Nov. 3, 2021) 228:12-14 (“We haven’t even heard from the other majority of the tribes, village corporations in that region.”).

discussion by the Board, Mr. Amdur-Clark also texted Ms. Borromeo with arguments against including any Doyon villages with Bering Straits villages. During this exchange Ms. Borromeo responded “We have it.”<sup>288</sup> Ms. Borromeo also relayed the preferences of the Doyon Coalition as expressed by Ms. Sanford via text message with regard to Southeast Alaska, Anchorage, FNSB, and senate pairings to the Board.<sup>289</sup> Thus, Ms. Borromeo was receiving information from the Doyon Coalition during Board meetings and relaying that information to the Board.

185. On November 3, 2021, Ms. Borromeo also texted Mr. Amdur-Clark requesting case law supporting her proposal to pair Valdez exclusively with the Mat-Su Borough. Mr. Amdur-Clark provided the case law and responded that “it’s not super strong but the current district with Valdez and the Mat Su was litigated.”<sup>290</sup>

186. Ms. Borromeo and Ms. Bahnke strongly opposed any variation to Districts 36-40 that would impact their priorities of separating Doyon villages from Bering Straits and Calista communities, keeping Doyon and Ahtna whole, and keeping Doyon and Ahtna separate from Valdez.

187. There are numerous examples of Board members refusing to consider alternative configurations for Districts 36-40 that did not maintain the ANCSA boundaries of Doyon and Ahtna or that resulted in the combination of Bering Straits communities with any Doyon communities.

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<sup>288</sup> Ex. VDZ-3010 [ARB00155157].

<sup>289</sup> Ex. VDZ-3010 [ARB00155140-00155159].

<sup>290</sup> Ex. VDZ-3010 [ARB00155157-00155158].



188. When discussing the possibility of altering District 39 to place Scammon Bay, Hooper Bay, and Chevak in District 38 with Bethel as requested by Calista, Ms. Bahnke strongly opposed that proposition.<sup>291</sup> Regarding the same proposal—to place Scammon Bay, Hooper Bay, and Chevak in District 38, Ms. Borrromeo stated:

But that's not what [the Doyon Coalition] said they want. I'm very uncomfortable as an Alaska Native leader saying that one ANC's voice is more important than another at the regional level. I respect Calista and I appreciate that they went on record for this. I also respect the fact that Doyon, Sealaska, TCC, Ahtna, FNA have been at this table since day one presenting testimony, drawing maps, presenting new ideas of maps, as well. And this weighted preference to Calista is very uncomfortable for me.<sup>292</sup>

189. Board Members Borrromeo and Bahnke also refused to include Valdez in District 36 with Ms. Bahnke stating it was off the table.<sup>293</sup> As a result of Board Members Bahnke and Borrromeo's refusal to place Bering Straits or Calista communities with Doyon communities and insistence on keeping Doyon and Ahtna communities together in one district, the Board was bound to create a large non-compact and non-socio-economically integrated horseshoe shaped district, District 36, that stretches from Holy Cross on the Yukon to Glennallen on the intersection of the Glenn and Richardson Highways down to the outskirts of Valdez.

190. Ms. Borrromeo drafted V.4, which closely resembles the Doyon Coalition map, was the basis for the Final Plan.<sup>294</sup> Ms. Borrromeo's preferences were adopted by the

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<sup>291</sup> Board Meeting Tr. 174:13 – 175:25 (Nov. 3, 2021) [ARB007534-007535].

<sup>292</sup> Board Meeting Tr. 182:1-12 (Nov. 3, 2021) [ARB007542].

<sup>293</sup> Board Meeting Tr. 168:2-11 (Nov. 4, 2021) [ARB009338].

<sup>294</sup> Borrromeo Depo. Tr. 48:2 – 49:9.

Board to the extent that Chairman Binkley felt that Ms. Borromeo had “won too much” because the Final Plan so closely resembled her proposed plan.<sup>295</sup> This sentiment reflects Ms. Borromeo’s advocacy for the advancement of her priorities over the constitutionally mandated redistricting criteria.

191. The Board acknowledges that it is “fundamentally wrong to give one community undue influence over another”<sup>296</sup> and that extending electoral influence of one community is “outside the constitutional parameters by which we are guided in redistricting.”<sup>297</sup> Board Member Borromeo testified that “[t]aking things into consideration, such as giving a particular part of the state more influence is not listed in our constitution, and it’s irrational there to me, then”<sup>298</sup> and agreed that “it would be a constitutional concern anytime that one groups’ vote is diluted for the benefit of another.”<sup>299</sup>

192. Despite apparent recognition of the underlying intention of article VI, which is to prevent gerrymandering and the dilution of voting power,<sup>300</sup> the Board improperly prioritized giving Doyon and Ahtna villages more influence by keeping them united in one district.

193. Board members have also acknowledged that the Board is obligated to consider all viable options and that “[i]f there’s a situation in which viable options are not

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<sup>295</sup> Borromeo Depo. Tr. 48:2 – 49:9; *Id.* at 35:24 – 36:3.

<sup>296</sup> Borromeo Depo. Tr. 58:22 – 59:1.

<sup>297</sup> Borromeo Depo. Tr. at 57:19-24.

<sup>298</sup> Borromeo Depo. Tr. at 58:8-11.

<sup>299</sup> Borromeo Depo. Tr. at 61:9-14.

<sup>300</sup> *Hickel*, 846 P.2d at 45 (citing 3 PACC 1846 (January 11, 1956)).

considered, then that represents a challenge to the Board to fulfill its constitutional mandate.”<sup>301</sup> However, the Board did not seriously consider viable alternatives that did not accomplish the priorities of creating a Doyon-Ahtna district and segregating Bering Straits communities from Doyon communities.

194. The Board improperly focused on homogeneity among Native populations without adequate consideration of socio-economic integration of population in District 36 as a whole.

195. The Court finds that the Board’s creation of District 36 was motivated by the Board’s desire to maximize the electoral influence of Doyon and Ahtna villages to the detriment of other communities including Valdez. District 36 is, thus, the result of gerrymandering, which is defined as “dividing of an area into political units in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others.”<sup>302</sup>

**B. Protection of FNSB’s Borough Boundaries.**

196. Chairman Binkley advocated for maintaining the integrity of FNSB boundaries throughout the redistricting process. Only on November 4, 2021, just one day before the adoption of the final house district plan, did Chairman Binkley concede that FNSB should shed population.

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<sup>301</sup> *Borromeo Depo. Tr.* at 35:24 – 36:3.

<sup>302</sup> *Hickel*, 846 P.2d at 45 (quoting *Carpenter*, 667 P.2d at 1220).

197. As a result of Chairman Binkley’s prioritization of protecting the borough boundaries of FNSB where he lives, <sup>303</sup> the Board did not consider a full range of redistricting options. At the November 4, 2021, Board meeting Chairman Binkley stated:

198.

You know, the premise that I looked at for Fairbanks was keeping the borough whole, because I thought there was definitely a – we lost population. We came down from 5.6, I believe it was, or thereabouts to 5.2, and that that then brought it into the reasonable age, excuse me, of keeping the borough whole and slightly overpopulating each of the five districts within the borough. . . . Again, I felt that that was within the legal bounds, and I think our counsel wore that out, that that would be perfectly defensible. But then we had the borough assembly that weighed in on that. . . . And that’s significant. And I gave that a lot of weight. Even though it wasn’t a unanimous decision on the part of the borough, it was significant that the elected body from the entire borough said you should push out people from the borough to the broader District 36 -- to try and achieve the ideal -- to achieve the ideal district size, and that if you do take that group, put them into one district. So those were the major takeaways that I got from the borough’s resolution.

So I -- I really view that -- I take that seriously and respect that. So I worked with Peter on -- we were just working on it before the meeting started, to try to look at that to see how close we could get to ideal district size and still take into account some of the other factors that I heard in Fairbanks, as well, some of which were keep the city intact, the City of Fairbanks, put it into two legislative districts, keep it to the city limits the best you can, and have two legislative districts in the City of Fairbanks and one Senate district.<sup>304</sup>

199. Chairman Binkley’s desire to maintain FNSB’s boundaries foreclosed consideration of numerous viable redistricting options including districting Valdez with

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<sup>303</sup> Binkley Depo. Tr. 17:12-22 (“Q: Okay. I’m going to start out by asking you some questions about your background. You were born and raised in Fairbanks; right? A: That’s correct. Q: Graduated from Lathrop? A: Yes. Q: Fairbanks boy through and through; right? A: Well, they say that you can take the boy out of Fairbanks but not Fairbanks out of the boy.”).

<sup>304</sup> Board Meeting Tr. 40:2 – 41:22 (Nov. 4, 2021) [ARB009210-9211].

Richardson Highway communities and the FNSB. Ms. Borromeo testified that it would be “fundamentally wrong to ask of the Board to protect the boundaries of Fairbanks to a greater degree than the borough boundaries for other boroughs.”<sup>305</sup> However, Chairman Binkley sought to protect FNSB boundaries at the expense of breaking other borough boundaries and creating districts that fail to satisfy the constitutionally mandated redistricting criteria. Chairman Binkley’s statements during Board meetings make clear that he was attempting to protect FNSB’s boundaries while ignoring borough boundaries for other boroughs including the Mat-Su Borough, Denali Borough, Kodiak Island Borough, and Kenai Peninsula Borough.

200. Ms. Borromeo testified that it was “painfully obvious” that FNSB boundaries had to be broken.<sup>306</sup> However, Chairman Binkley continued advocating for maintaining the boundaries of the FNSB as late as the November 3, 2021, Board meeting. Chairman Binkley did not concede that the FNSB should shed some population until the evening of November 3, 2021. By that time the Board could not consider viable redistricting alternatives that were not previously considered due to Chairman Binkley’s prioritization of protecting FNSB boundaries.

201. As a result of the Board’s prioritization of personal goals the Final Plan fails to satisfy constitutional criteria.

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<sup>305</sup> Borromeo Depo. Tr. 117:12-16.

<sup>306</sup> Borromeo Depo. Tr. 115:13-15.

## **VIII. THE BOARD MISAPPLIED AND INCONSISTENTLY APPLIED REDISTRICTING CRITERIA**

202. The Board has misapplied Alaska law with regard to redistricting criteria and applied redistricting criteria in a wholly inconsistent manner. The Board “must consistently enforce the constitutional article VI, section 6 requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting.”<sup>307</sup> The record reflects that particular redistricting criteria that aided the Board in achieving its priorities were stringently enforced when they advanced the Board’s underlying priorities but were ignored or minimized when such enforcement undermined the ability of the Board to achieve its priorities.

203. The Board misapplied and/or inconsistently applied fundamental redistricting criteria including compactness, socio-economic integration, the proportionality doctrine, the use of local government boundaries, the use of ANCSA boundaries, the use of historical house districts, the use of public testimony, and concepts of connectivity via transportation corridors.

### **A. Inconsistent Application of the Compactness Requirement.**

204. The Board inconsistently defined and applied the compactness requirement during the redistricting process and gave compactness varying degrees of weight depending upon whether compactness advanced or justified other underlying priorities.

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<sup>307</sup> *Kenai*, 743 P.2d at 1360.

205. Taking the requirement of compactness into account in the redistricting process should not yield “bizarre designs”<sup>308</sup> and “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 . . . appendages attached to otherwise compact areas may violate the requirement of compact districting.”<sup>309</sup> The court will look to the relative compactness of proposed and potential districts in determining whether a particular district is sufficiently compact to satisfy the constitutional requirement for compactness.<sup>310</sup>

206. In District 36, for example, the Board paid virtually no regard to compactness and made decisions that negatively impacted compactness for the sake of creating a Doyon-Ahtna district.<sup>311</sup>

207. During the course of this litigation, the Board used compactness as justification for ignoring redistricting alternatives that included Valdez with Prince William Sound and Richardson Highway communities, which could improve overall compactness

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<sup>308</sup> *Hickel*, 846 P.2d at 45 (citing *Davenport v. Apportionment Comm’n of New Jersey*, 124 N.J. Super. Ct. 30, 304 A.2d 736, 743 (N.J. Super. Ct. App. Div. 1973) (quoted in *Carpenter*, 667 P.2d at 1218-19)).

<sup>309</sup> *Hickel*, 846 P.2d at 45-46.

<sup>310</sup> *Hickel*, 846 P.2d at 45 (citing *Carpenter*, 667 P.2d at 1218).

<sup>311</sup> Meeting Tr. 198:9-12 (Nov. 3, 2021) [ARB007558] (“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.”); Board Meeting Tr. 253:8-10 (Nov. 5, 2021) [ARB008110] (“in the light of the fact that we have noted the socioeconomic reasons for taking Cantwell out. Obviously it is not a compact change, right, so do you have any concerns about the compactness.”); Board Meeting Tr. 253:15-17 (Nov. 5, 2021) [ARB008110] 36 becomes a little less compact as a result of putting Cantwell in, and it’s sort of a coin toss as to whether that makes sense.”)

of the plan as a whole.<sup>312</sup> The Board’s reliance on compactness as a justification for districting Valdez exclusively with the Mat-Su Borough reflects an inconsistent application of the compactness requirement.

208. The Affidavit of Chairman Binkley states that “Valdez’s option was not satisfactory to me because it spans from Valdez northward reaching into the Fairbanks North Star Borough with an odd appendage that grabs Eielson Air Force Base.”<sup>313</sup> However, the Board paid no regard to the strange appendages extending from District 36 into Cantwell or the appendage extending into Glennallen and neighboring communities along the Glenn Highway.

209. In Districts 3 and 4, compactness was relied upon as a primary justification for districting Skagway and Haines with a portion of the Mendenhall Valley despite the abundance of public testimony supporting a district that paired Skagway and Haines with downtown Juneau.<sup>314</sup>

210. Similarly, in District 39, compactness was used as justification for maintaining the Bering Straits Regional Corporation boundary even though it necessitated drawing District 36 in a much less compact manner than would otherwise be possible.<sup>315</sup>

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<sup>312</sup> Torkelson Aff. at 32:1-2 (“In my opinion, the Board’s adopted District 29 in the Final Proclamation Plan is substantially more compact than Valdez’s Option 1 district.”); Bahnke Aff. at 15:26 – 16:2.

<sup>313</sup> Binkley Aff. at 12, ¶ 34.

<sup>314</sup> Simpson Aff. at 12:13-16 (“The Skagway plaintiffs want to keep Skagway’s current pairing with downtown Juneau but that pairing results in a much-less compact house District for this area of Southeast Alaska.”).

<sup>315</sup> Board Meeting Tr. 194:16 – 199:2 (Nov. 3, 2021) [ARB007554-007559].



211. The Alaska Supreme Court has mandated that the Board apply the constitutional redistricting criteria including compactness consistently.<sup>316</sup> The Board failed to do so.

212. The Court finds that the compactness requirement was applied inconsistently. The Board used compactness as justification for ignoring public comment and alternatives that provided relatively greater socio-economic integration only where increased compactness served some other underlying purpose unrelated to the constitutional redistricting criteria. The Board ignored or minimized the compactness requirement and made redistricting decisions that yielded non-compact districts where doing so advanced the Board's priority of creating a Doyon-Ahtna district.

**B. Misapplication of the Socio-economic Integration Requirement.**

213. The Board misapplied the concept of socio-economic integration by relying on evidence of homogeneity rather than actual socio-economic integration and inconsistently relied upon socio-economic integration to justify underlying redistricting goals. The Alaska Supreme Court has held that the concepts of socio-economic integration and socio-economic homogeneity “are by no means synonymous.”<sup>317</sup> “Integration connotes interaction and connectedness, while homogeneity refers to similarity or uniformity.”<sup>318</sup>

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<sup>316</sup> *Kenai*, 743 P.2d at 1360 (“The state must consistently enforce the constitutional article VI, section 6 requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting.”).

<sup>317</sup> *Carpenter*, 667 P.2d at 1218.

<sup>318</sup> *Carpenter*, 667 P.2d at 1218.

214. Socio-economic integration “requires proof of actual interaction, and interconnectedness rather than mere homogeneity.”<sup>319</sup>

215. With regard to socio-economic integration in Districts 29 and 36, the only evidence proffered or considered by the Board is evidence of homogeneity rather than integration. The record does not establish any significant interaction or interconnectedness among the communities included in Districts 29 and 36. Analysis of specific socio-economic factors considered by the Board is provided later herein.

216. The Board relied heavily on evidence of homogeneity or similarities between communities rather than evidence of actual interaction as justification for Districts 36 and 29 in particular. The dearth of evidence supporting a determination that District 36 and 29 contain socio-economically integrated communities did not deter the Board from adopting these districts. However, the Board refused to consider viable alternatives that included Doyon communities in District 39 based upon the false premise that no socio-economic integration exists between these communities.

217. The record establishes socio-economic integration between Doyon communities and communities within the Calista and Bering Straits regions.<sup>320</sup> There are historical ties regarding regional interaction among native communities located within these

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<sup>319</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

<sup>320</sup> Trial Tr. 1164:1-9 (“Q: Do you think St. Mary’s or Glennallen is more socioeconomically integrated with Anvik? Which one? A: I mean, I would say St. Mary’s and Anvik probably have more in common. They’re both on the Yukon River. One is primarily Yup’ik and in the AVCP region. Anvik is in the Tanana Chiefs region and Athabascan, but, you know, they are certainly geographically closer.”) (Binkley); Board Meeting Tr. (Sept. 20, 2021) 22:10 – 23:20 [ARB010165-010166]; ARB002046-002047.

regional corporation boundaries. Communities along the Yukon River share both a transportation corridor and common interests with regard to the Yukon River as a fishery and the management of the Yukon River. Indeed, socio-economic integration associated with the Yukon River is evidenced by the Emergency Bycatch Petition submitted to the Secretary of Commerce on December 21, 2021, by Native organizations from several different ANCSA regions including Calista, Bering Straits, and Doyon.<sup>321</sup> Socio-economic ties between these communities are also established by historical redistricting plans including the 2013 Proclamation plan, which combines populations from Bering Straits and the Doyon regions.<sup>322</sup>

218. There is relatively more socio-economic integration between Doyon communities and neighboring Calista or Bering Straits communities than there is between Valdez and the Palmer area included in District 29, and the Yukon River and road communities included in District 36.

219. Despite evidence of socio-economic integration among Doyon, Calista, and Bering Straits communities, the Board refused to consider redistricting alternatives that combined Doyon with ANCSA regions to the west. The Board's failure to properly consider relative socio-economic integration based upon the evidence presented to the Board is

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<sup>321</sup> Ex. VDZ-3027.

<sup>322</sup> Ex. VDZ-3005 at 6 [ARB001581].

reflected in Board member testimony regarding socio-economic integration within District 36.<sup>323</sup>

220. The Court finds that the Board misapplied Alaska law by relying on evidence of homogeneity to establish socio-economic integration.

221. The Court finds that the Board inconsistently applied the requirement for relative socio-economic integration and failed to seriously consider redistricting alternatives that provided greater relative socio-economic integration for Districts 29 and 36.

**C. Inconsistent Use of Historical Districts.**

222. The Board used historical house district boundaries as support for their priorities while ignoring historical boundaries that did not advance their goals. For example, the historical districting of Skagway and Haines with downtown Juneau was entirely ignored while the sole justification for pairing Valdez with the Mat-Su Borough in District 29 was historical districts that had done so to a much lesser extent.<sup>324</sup>

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<sup>323</sup> Trial Tr. 998:6-17 (Bahnke) (“It’s your position that Holy Cross and Anvik and Russian Mission and Marshall and St. Mary’s, all along the Yukon waterway, major corridor, are not sufficiently socioeconomically integrated to be within the same district, correct? A: Correct. Q: Okay. It’s also your testimony or your position, is it not, that Holy Cross and Anvik are sufficiently socioeconomically integrated with Glennallen to be included in the same district, correct? A: Yes.”).

<sup>324</sup> See e.g., Borromeo Aff. At 12:17-18 (“House District 29 of the Board’s Final Plan is substantially similar to the 2013 House District 9.”); Binkley Aff. At 10:10-11 (“I also found it persuasive that House District 29 of the Final Plan is largely similar to the current Valdez house district.”); Board Meeting Tr. 161:14-25 (Nov. 4, 2021) [ARB009331] (“MEMBER BAHNKE: We’ve also heard perspective from Doyon. The whole reason they formed their coalition was to preserve the socioeconomic integrity of those rural Interior communities. So everyone’s got their preference, but what litmus test -- which -- which of the two pairings of Valdez, either in that rural Interior District versus where it has already been established by the courts that it has socioeconomic ties to the Mat-Su Valley. In my mind we’ve got

223. The record establishes that the Board relied exclusively on historical districts that paired Valdez with some Mat-Su Borough communities in the past and did not engage in any substantive analysis of socio-economic integration within District 29.

224. The Board's reliance on historical redistricting plans as the sole justification for pairing Valdez exclusively with the Mat-Su Borough is misplaced. Never before has Valdez been entirely separated from both Richardson Highway communities and Prince William sound communities. The Board appears to have ignored the fact that the 1994, 2002 and 2013 redistricting plans, which included Valdez with a portion of the Mat-Su Borough, also included Richardson Highway communities.<sup>325</sup>

225. Similarly, the Board ignored the fact that Bering Straits communities and Doyon communities are included together in District 39 under the 2013 Proclamation<sup>326</sup> and refused to combine these communities even though it would have allowed Chevak, Scammon Bay, and Hooper Bay to be included with Bethel as requested by Calista.

226. This Court finds that the Board inconsistently relied upon historical redistricting plans in a manner that resulted in a Final Plan that fails to satisfy the socio-economic integration requirement for District 29 and District 36.

**D. ANCSA Boundaries.**

227. The Board relied upon ANCSA boundaries to support the creation of District 36 and justify keeping Bering Straits communities separate from Doyon

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court precedence and then the constitutional requirement of trying to do the best that we can socioeconomically.”).

<sup>325</sup> Ex. VDZ-3005.

<sup>326</sup> Ex. VDZ-3005 at 3.

communities. There is no legal authority specifically identifying ANCSA boundaries as an indicator of socio-economic integration nor is there authority suggesting that breaking ANCSA boundaries should be avoided.

228. The Board is not required to adhere to ANCSA boundaries or even consider ANCSA boundaries during the redistricting process. Contrary to testimony from members of the Board,<sup>327</sup> ANCSA boundaries alone do not provide evidence of socio-economic integration within a district. The Board must engage in fact specific analysis of socio-economic integration among the communities included in a proposed district.

229. The boundaries of regional corporations were established under ANCSA<sup>328</sup> as follows:

Under the Act, the state was divided into 12 regions, and separate corporations were established for each region. By the division it was sought to establish homogeneous grouping of Native<sup>329</sup> peoples having a common heritage and sharing common interests.<sup>330</sup> The use of such corporate boundaries in districting might constitute justification for some population deviation.<sup>331</sup>

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<sup>327</sup> Bahnke Depo. Tr. 56:11-15 (“And the ANCSA regions are socioeconomically integrated. The -- you know, the corporations are major economic engines in the state, and they have shareholders that are predominantly from specific geographic parts of our state.”).

<sup>328</sup> *Groh*, 526 P.2d at 877.

<sup>329</sup> *Groh*, 526 P.2d at 877 n.2 (“Native” is basically defined in the Act as a citizen of the United States who is 1/4th degree or more Alaska Indian, Eskimo or Aleut, or combination thereof.”) (citing 43 U.S.C.A. § 1602(b)).

<sup>330</sup> 43 U.S.C.A § 1606.

<sup>331</sup> *Groh*, 526 P.2d at 877.

230. ANCSA corporations are private for-profit corporations<sup>332</sup> and, therefore, are not entitled to control a house or senate district under the proportionality doctrine or otherwise.

231. Enrollment of ANCSA members was based primarily upon the place of residence for Alaska Natives “on the date of the 1970 census enumeration.”<sup>333</sup> ANCSA further provides:

[A] Native eligible for enrollment who is not, when the roll is prepared, a permanent resident of one of the twelve regions established pursuant to section 1606(a) of this title shall be enrolled by the Secretary in one of the twelve regions, giving priority in the following order to--

- (1) the region where the Native resided on the 1970 census date if he had resided there without substantial interruption for two or more years;
- (2) the region where the Native previously resided for an aggregate of ten years or more;
- (3) the region where the Native was born; and
- (4) the region from which an ancestor of the Native came.

The Secretary may enroll a Native in a different region when necessary to avoid enrolling members of the same family in different regions or otherwise avoid hardship.<sup>334</sup>

232. Thus, ANCSA enrollment resulted in intermingling of distinct Native populations in various regional corporations. For example:

CIRI is known as the “melting pot” of Alaska Native regional corporations, and virtually every Alaska Native group is featured among our nearly 9,100 shareholders-Aleut/Unangax, Alutiiq/Sugpiaq, Athabascan, Haida, Inupiat,

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<sup>332</sup> Binkley Depo. Tr. 154:5-7; Trial Tr. 975:19-23.

<sup>333</sup> 43 U.S.C.A. § 1604(b).

<sup>334</sup> 43 U.S.C.A. § 1604(b).

Tlingit, Tsimshian and Yup'ik. The diversity of CIRI's shareholders is a key to the company's success.<sup>335</sup>

233. A homogenous group of Alaska Native peoples having a common heritage and sharing common interests in 1970 is distinct from a group of people "living within a geographic unit, socio-economic, following if possible, similar economic pursuits."<sup>336</sup>

234. While ANCSA regional corporation boundaries may reflect some homogeneity among Native populations in 1970, socio-economic integration "requires proof of actual interaction, and interconnectedness rather than mere homogeneity."<sup>337</sup>

235. ANCSA boundaries do not provide evidence of socio-economic integration among *non-Native* populations, which were not considered during the process of establishing ANCSA regional corporation boundaries. Analysis of socio-economic integration must consider all population within a district regardless of whether the population is predominantly Native.

236. Standing alone ANCSA boundaries are of dubious value for determining socio-economic integration within a specific house district. Ms. Otte testified at trial that you do not have to be Athabascan in order to be a shareholder, that Doyon has Yup'ik shareholders and that she assumed Doyon has Inupiaq shareholders, and that Yup'iks and Cup'iks live in her village of McGrath.<sup>338</sup> When asked whether she was aware that less than twenty percent of Doyon shareholders live in traditional Doyon villages, Ms. Otte replied

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<sup>335</sup> Ex. VDZ-3023.

<sup>336</sup> *Hickel*, 846 P.2d at 46.

<sup>337</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

<sup>338</sup> Trial Tr. 900:15 – 903:4.



that “I would say that that is probably pretty common with all of the regions.”<sup>339</sup> Ms. Wright testified that “[e]ach region, I don’t think, consists of just one Native American group. We have many people like, you know, Doyon region as an example, some of our boundaries go further north, that have some Inupiaq people.”<sup>340</sup>

237. The record establishes that ANCSA boundaries do not necessarily connote socio-economic integration of the communities contained therein or the lack of socio-economic integration among communities located in different ANCSA regions.

238. ANCSA boundaries offer very little utility for purposes of analyzing socio-economic integration in areas where the population is not predominantly Native. For example, Ms. Wright also testified that Doyon has “a large non-native population”<sup>341</sup> and evidence presented at trial established that District 36 contains less than 30 percent Native population.<sup>342</sup> Reliance on ANCSA native corporation boundaries for redistricting is improper where the majority of the population within the regional corporation boundaries is non-Native. Non-Native populations were not considered during the creation of the ANCSA regional corporations and, therefore, regional corporation boundaries do not reflect socio-economic integration of non-Native populations.

239. Accordingly, ANCSA boundaries have little value for purposes of redistricting without a fact specific inquiry regarding socio-economic integration of specific communities contained within each house district.

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<sup>339</sup> Trial Tr. 901:21-25.

<sup>340</sup> Trial Tr. 926:3-7.

<sup>341</sup> Trial Tr. 927:12-14.

<sup>342</sup> Ex. VDZ-3003 at 1 (Brace).

240. Counsel for the Board provided inconsistent interpretations of Alaska law regarding the use of ANCSA boundaries in the redistricting process. On September 17, 2021, Mr. Singer advised the Board that “Alaska’s Supreme Court has recognized ANCSA boundaries as a -- one way to look at socioeconomic integration”<sup>343</sup> and stated that prioritizing ANCSA boundaries over borough boundaries was an open question under Alaska law.<sup>344</sup> Subsequently, on September 20, 2021, Mr. Baxter advised the Board as follows:

Member Bahnke, we have precedent on -- we have precedent on this, that local political boundaries. So borough -- borough’s municipalities are, by definition, socioeconomically integrated. We do not have that for ANCSA boundaries. So ANCSA boundaries can provide a -- a way of looking at an area and determining whether it’s socioeconomically integrated. Obviously, the people of the NANA region have that in common, that many of them are shareholders in the NANA Corporation, but there is not any Supreme Court precedent telling us that ANCSA boundaries are more predominant than local political boundaries.<sup>345</sup>

. . . .

Member Bahnke, I would just say that because we know that local political boundaries are, by definition, socioeconomically integrated, they are a -- a -- something that should be followed by the Board. *With ANCSA boundaries, it should be an analysis of whether that area, whether the specific town, village we are talking about is economically integrated, sufficiently, relatively economically integrated to pair it together.* And I know I’m not giving you a precise answer, and the reason for that is we don’t have one on the specific question you’re asking.<sup>346</sup>

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<sup>343</sup> Board Meeting Tr. 164:16-21 (Sept. 17, 2021) [ARB008466].

<sup>344</sup> Board Meeting Tr. 177:17 – 178:6 (Sept. 17, 2021) [ARB008479-008480].

<sup>345</sup> Board Meeting Tr. 35:3-15 (Sept. 20, 2021) [ARB010178].

<sup>346</sup> Board Meeting Tr. 36:4-15 (Sept. 20, 2021) [ARB010179].

241. While the Alaska Supreme Court has “implied that adherence to Native corporation boundaries might also provide justification [for a population deviation greater than ten percent], as long as the boundaries were adhered to consistently,”<sup>347</sup> the court has never endorsed the use of ANCSA boundaries in redistricting and has not analyzed the utility of using ANCSA boundaries as evidence of socio-economic integration.

242. ANCSA regional corporation boundaries should not be afforded the same status as local government boundaries, which are specifically mentioned in article VI, section 10.<sup>348</sup> There is no legal authority suggesting that the Board should consider ANCSA boundaries, avoid breaking ANCSA boundaries, or rely on ANCSA boundaries as evidence of socio-economic integration.

243. The Board did not receive clear guidance regarding the legal standards for the use of ANCSA boundaries in redistricting. As a result, the Board improperly prioritized maintaining certain ANCSA boundaries throughout the redistricting process and sought to maintain such boundaries to the detriment of constitutionally mandated redistricting criteria. The Board’s focus on maintaining ANCSA boundaries improperly constrained consideration of viable redistricting alternatives.

244. Despite the lack of legal authority supporting the use of ANCSA boundaries as evidence of socio-economic integration, the Board repeatedly expressed concerns with breaking ANCSA boundaries and compared breaking ANCSA boundaries to breaking

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<sup>347</sup> *Hickel*, 846 P.2d at 48 (citing *Groh*, 526 P.2d at 877-78).

<sup>348</sup> Alaska Const., art. VI, § 10 (“Consideration may be given to local government boundaries.”).

borough boundaries.<sup>349</sup> The Board’s focus on maintaining ANCSA boundaries began early on in the redistricting process and was apparent throughout the process.<sup>350</sup>

245. Ms. Bahnke described ANCSA boundaries as “the closest thing that you can have to a borough that delineates socioeconomic integration”<sup>351</sup> and considered ANCSA boundaries to carry similar weight to borough boundaries.<sup>352</sup>

246. The Board’s discussion of ANCSA boundaries during the redistricting process confirms the prioritization of protecting these boundaries to the detriment of constitutionally mandated redistricting criteria.

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<sup>349</sup> Board Meeting Tr. 78:8-15 (Sept. 20, 2021) [ARB010221] (“On this District 39, not only is it breaking a borough boundary, but now it’s comprised of communities that are located within four different ANCSA boundaries. I know Counsel has advised that ANCSA boundaries versus borough boundaries, there’s not necessarily a hierarchy, but there are things that we should consider.”).

<sup>350</sup> Board Meeting Tr. 227:2-10 (Aug. 24, 2021) [ARB011498]; Board Meeting Tr. 164:16-21 (Sept. 17, 2021) [ARB008466]; Board Meeting Tr. 176:25 – 178:6 (Sept. 17, 2021) [ARB008478-008480]; Board Meeting Tr. 214:12-24 (Sept. 17, 2021) [ARB008516]; Board Meeting Tr. 34:21 – 36:18 (Sept. 20, 2021) [ARB010177-010179]; Board Meeting Tr. 51:19 – 52:7 (Sept. 20, 2021) [ARB010194-010195]; Board Meeting Tr. 78:8 – 79:2 (Sept. 20, 2021) [ARB010221-010222]; Board Meeting Tr. 134:4-15 (Sept. 20, 2021) [ARB010277]; Board Meeting Tr. 134:4-16 (Sept. 20, 2021) [ARB010277]; Board Meeting Tr. 156:21 – 23 (Nov. 3, 2021) [ARB007516]; Board Meeting Tr. 178:22-23 (Nov. 3, 2021) [ARB007538]; Board Meeting Tr. 196:2 – 198:25 (Nov. 3, 2021) [ARB007556-007558]; Board Meeting Tr. 227:3-14 (Nov. 3, 2021) [ARB007587]; Board Meeting Tr. 38:6-10 (Nov. 4, 2021) [ARB009208]; Board Meeting Tr. 52:4 – 53:7 (Nov. 4, 2021) [ARB009222-009223].

<sup>351</sup> Board Meeting Tr. 52:8-13 (Nov. 4, 2021) [ARB009222].

<sup>352</sup> Board Meeting Tr. 78:12-14 (Sept. 20, 2021) [ARB010221] (“I know Counsel has advised that ANCSA boundaries versus borough boundaries, there’s not necessarily a hierarchy.”).

247. The Board acknowledged that maintaining ANCSA boundaries resulted in less compactness as early as September 7, 2021.<sup>353</sup> During the redistricting process the Board acknowledged that creating a Doyon-Ahtna district was detrimental to the constitutional requirements of compactness and socio-economic integration. Chairman 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.”<sup>354</sup> This opinion was based upon District 36 as it appeared in V.3 and V.4, neither of which included the strange appendage extending into the Mat-Su Borough and Denali Boroughs to reach Cantwell’s population.

248. The Board’s focus on creating a Doyon-Ahtna district resulted in bizarre appendages to District 36 that run afoul of the compactness requirement and break borough boundaries. During the November 5, 2021, meeting the Board decided to add an appendage to District 36 to subsume Cantwell’s population without including adjacent nonpopulated areas. This decision was based upon the Board’s desire to maintain Ahtna’s boundaries. The Board justified its decision to include Cantwell in District 36 by relying on public comment from Ahtna employees and members including testimony solicited by

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<sup>353</sup> Board Meeting Tr. 139:21 – 140:3 (Sept. 7, 2021) [ARB009668-009669] (“BOARD MEMBER NICOLE BORROMEO: I think how you do that is to take Valdez out and then move down, and in -- in a perfect world, we would be able to keep the YK and Doyon regions intact. The problem that I’m personally running into is that they’re geographically large and population small. So you -- you really [can’t] see on the compactness too with these huge, huge districts.”).

<sup>354</sup> Board Meeting Tr. 198:9-12 (Nov. 3, 2021) [ARB007558].

Ms. Borromeo.<sup>355</sup> Cantwell’s population is only 27.5 percent Native<sup>356</sup> and only 30 Ahtna shareholders live in Cantwell,<sup>357</sup> yet the Board broke both the Denali Borough and the Mat-Su Borough boundaries in order to keep Ahtna whole.

249. Counsel for the Board appeared to encourage the decision to keep Ahtna whole by adding Cantwell. Mr. Singer stated that “you’ve heard testimony, and a specific request from the ANCSA Regional Corporation to include Cantwell with the other Ahtna villages, and the Board has -- with District 36, it’s really sought to create a Doyon district. So it’s -- it’s consistent, and I think it’s within your discretion.”<sup>358</sup> At the same time, the Board openly acknowledged that adding Cantwell was detrimental to the compactness requirement<sup>359</sup> and ignored comment from the Denali Borough opposing “having Cantwell carved out.”<sup>360</sup>

250. In order to include adequate population in the Doyon-Ahtna district, the Board drew District 36 in a manner that places all Richardson Highway communities south of FNSB in District 36 with the exception of Valdez. In addition, District 36 includes an appendage that carves out population from Glennallen and surrounding communities along Glenn Highway without including adjacent unpopulated areas.

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<sup>355</sup> ARB001795-001796 (Ahtna Letter to Binkley (Nov. 3, 2021)).

<sup>356</sup> Ex. VDZ-3008 at 3.

<sup>357</sup> Trial Tr. 942:18-21 (Jan. 26, 2021) (Anderson).

<sup>358</sup> Board Meeting Tr. 253:20-25 (Nov. 5, 2021) [ARB008110].

<sup>359</sup> Board Meeting Tr. 253:14-19 (Nov. 5, 2021) [ARB008110].

<sup>360</sup> Board Meeting Tr. 188:15-20 (Nov. 5, 2021) [ARB008045].

251. The Board’s creation of a Doyon-Ahtna district not only resulted in the creation of District 36, but also resulted in the Board’s decision to pair Valdez exclusively with the Mat-Su Borough in District 29.

252. By prioritizing the creation of a Doyon-Ahtna district, the Board ignored the lack of socio-economic integration within both District 29 and District 36. With regard to socio-economic integration in District 36, Chairman Binkley stated:

But as I said, there’s -- you know, when you look at 36, it’s very – even without any of the Fairbanks North Star Borough, when you look at Valdez and, you know, all those areas along the Richardson Highway, compared to all the rural villages out west along the Yukon River, there’s a huge difference in socio-economic integration between those areas.<sup>361</sup>

Chairman Binkley further stated that communities on the highway system such as Glennallen were completely different than other rural communities in District 36 and that “it’s difficult to say, socio-economically that, you know that 36 is homogenous.”<sup>362</sup> Despite the absence of evidence establishing socio-economic integration within District 36 and District 29, the Board adopted District 36 in order to create a Doyon-Ahtna district.

253. The Board failed to adequately consider the absence of socio-economic ties among the communities within District 36 as a whole, including the lack of integration between predominantly non-Native communities such as Glennallen and predominantly Native communities such as Holy Cross. Instead, the Board improperly focused on

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<sup>361</sup> Board Meeting Tr. 251:15-22 (Nov. 3, 2021) [ARB007611].

<sup>362</sup> Board Meeting Tr. 242:15 – 243:3 (Nov. 5, 2021) [ARB008099-008100].

homogeneity among the Alaska Native communities within District 36, that constitute less than 30 percent of the population within District 36.<sup>363</sup>

254. The result of the Board prioritization of protecting the Bering Straits, Doyon, and Ahtna boundaries, District 39 has the highest deviation of any district at negative 4.81 percent and is under populated by 882 people.<sup>364</sup> The underpopulation of District 39 to this extent reflects the result of the Board's refusal to include any Bering Straits region population with population from the Doyon or NANA regions.<sup>365</sup> The region within which NANA is located has the second highest deviation at 2.67 percent and is overpopulated 489 people.<sup>366</sup>

255. Regional corporation boundaries may provide justification for some population deviations, but only if the boundaries were adhered to consistently.<sup>367</sup> For example, the Alaska Supreme Court has held that the utilization of a part of the Calista corporate boundary as a district boundary was not a legitimate justification when the Calista region was otherwise broken up by the reapportionment plan.<sup>368</sup> Regional corporation boundaries do not justify high population deviations in the Final Plan including in District 39 and 40 because they were not applied consistently. Thus, the Board diminished the

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<sup>363</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

<sup>364</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

<sup>365</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

<sup>366</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

<sup>367</sup> *Hickel*, 846 P.2d at 48.

<sup>368</sup> *Hickel*, 846 P.2d at 48.



constitutional criteria that districts be drawn as nearly as practicable to allow one person one vote in order to maintain some ANCSA boundaries.

256. In order to preserve the ANCSA boundaries for Doyon and Ahtna the Board improperly broke borough boundaries, ignored the lack of socio-economic integration within Districts 29 and 36, ignored the compactness requirement for District 36, and unnecessarily underpopulated District 39 while overpopulating District 40, which abuts District 39.

257. The Court finds that the Board improperly prioritized the protection of ANCSA corporation boundaries over constitutionally mandated redistricting criteria and misapplied Alaska law regarding the use of ANCSA boundaries in the redistricting process.

258. The Board gave undue weight to ANCSA boundaries during the redistricting process and improperly constrained the viable redistricting alternatives it considered by focusing on maintaining ANCSA boundaries.

259. The Court finds that the Board improperly prioritized maintaining ANCSA regional corporation boundaries and the creation of a Doyon-Ahtna district over the constitutionally mandated redistricting criteria set forth in article VI, Section 6.

260. The Court finds that the Board's prioritization of creating a Doyon-Ahtna district improperly constrained its consideration of viable redistricting alternatives that better satisfy constitutionally mandated redistricting requirements set forth.

261. The Court finds that the Board's prioritization of creating a Doyon-Ahtna district despite resulted in the creation of districts that are substantially less compact and less socio-economically integrated than other viable alternatives.

262. In addition to the inconsistent legal advice the Board received regarding the use of ANCSA boundaries in the redistricting process, the Board also inconsistently relied upon such boundaries as justification for redistricting decisions.

263. The Board refused to seriously consider any redistricting alternative that broke the Bering Straits boundary by adding population from Doyon communities. Board Members Borromeo and Bahnke were adamant in their opposition to any redistricting alternative that did not segregate Bering Straits communities from Doyon communities or create a Doyon-Ahtna district.<sup>369</sup>

264. While the Board strictly adhered to ANCSA boundaries for the Doyon-Ahtna district, the Board inconsistently applied ANCSA boundaries throughout the rest of the districts. The Board broke the Calista region into three districts, the Chugach region into two districts, broke the Koniag region for no apparent purpose, and combined a portion of Calista with the Bristol Bay region, and Aleut region along with a portion of Koniag and CIRI regions. The Board's decisions to maintain, combine, or break ANCSA-region boundaries were inconsistent aside from when protecting such boundaries served their primary goal of keeping Doyon and Ahtna whole and separating those communities from Bering Straits communities.<sup>370</sup>

265. The Court finds that the Board did not use ANCSA boundaries consistently during the 2021 redistricting process.

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<sup>369</sup> Board Meeting Tr. 167:3 – 231:25 (Nov. 3, 2021) [ARB007527-007591].

<sup>370</sup> Board Meeting Tr. 157:15-20 (Nov. 3, 2021) [ARB007517].

266. The Court finds that the Board improperly prioritized protecting ANCSA boundaries over constitutionally mandated redistricting criteria.

267. The Court finds that the Board improperly constrained the consideration of viable redistricting alternatives that better satisfy the constitutionally mandated redistricting criteria by virtue of rigidly adhering to Doyon and Ahtna’s boundaries.<sup>371</sup>

268. The Court finds that the Board’s reliance on ANCSA boundaries to create a Doyon-Ahtna district resulted in a Final Plan that fails to satisfy the constitutional requirement of compactness and socio-economic integration. Specifically, District 36 fails to satisfy the compactness and socio-economic integration requirements and District 29 fails to satisfy the socio-economic integration requirement.

**E. Misapplication of the Proportionality Doctrine.**

269. The Board misapplied Alaska law regarding borough boundaries and the proportionality doctrine.

270. The Board improperly constrained the redistricting alternatives it considered by misapplying Alaska law regarding how population from within borough boundaries may be included in districts with population from outside borough boundaries. For example, the Board refused to consider redistricting alternatives such as Valdez Option 1 that combined population from FNSB with population from communities outside of FNSB in more than one district.<sup>372</sup>

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<sup>371</sup> Ex. D (Final Plan with ANCSA Overlay), Valdez-Detter Pre-Trial Brief (Jan. 18, 2022).

<sup>372</sup> Bahnke Depo. Tr. 102:17-19 (“I also remember that that map that Valdez presented as their preferred map would have broken the Fairbanks Borough boundaries twice.”).

271. At trial, counsel for the Board suggested that breaking FNSB boundaries twice would require the Board to “go to the Alaska Supreme Court and convince it that it wasn’t possible to put those excess population for Fairbanks in just one rural district.”<sup>373</sup> The Board appears to have operated under the assumption that it was bound to only break FNSB’s boundaries once regardless of whether breaking the boundaries more than once would facilitate a redistricting plan that better satisfies the constitutional redistricting criteria.<sup>374</sup>

272. Prioritizing the protection of borough boundaries over compactness, contiguity, and socio-economic integration is contrary to Alaska law. The Alaska Constitution states that “consideration *may* be given to local government boundaries.”<sup>375</sup>

273. In *Hickel* the Alaska Supreme Court held that *excess* population within a borough should, where possible, be placed in one other district<sup>376</sup> and “[a] municipality should not be made to contribute so much of its population to districts centered elsewhere that it is deprived of representation which is justified by its population.”<sup>377</sup> The plan being reviewed in *Hickel* divided the Mat-Su Borough into five districts only one of which was wholly composed of land within the Mat-Su Borough.<sup>378</sup> On those facts, the Court held that

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<sup>373</sup> Trial Tr. 667:20-23.

<sup>374</sup> Borromeo Supp. Aff. at 6-7, ¶ 19; Bahnke Aff. at 15, ¶ 24; Binkley Aff. at 12, ¶ 34 (“Valdez’s approach also required splitting the Fairbanks North Star Borough twice, which was contrary to what we understood to be the instructions of the court as to how to handle excess population from a borough.”); Torkelson Aff. at 32, ¶ 55.

<sup>375</sup> Alaska Const., article VI, section 6 (emphasis added).

<sup>376</sup> *Hickel*, 846 P.2d at 52 (citing *Kenai*, 743 P.2d at 1369, 1372-73).

<sup>377</sup> *Hickel*, 846 P.2d at 53 (Mar. 12, 1993)

<sup>378</sup> *Hickel*, 846 P.2d at 52 (Mar. 12, 1993).

the “plan unfairly diluted the proportional representation the residents of the Mat-Su Borough are guaranteed.”<sup>379</sup>

274. In the 2001 Redistricting Cases litigation, the Supreme Court found that the Board unduly limited the range of choices it considered by virtue of a misinterpretation of Alaska law.<sup>380</sup> The Board interpreted *Kenai Peninsula Borough* “to preclude the board from pairing population from the Matanuska-Susitna Borough with the Municipality of Anchorage because both Anchorage and the borough had sufficient excess population to “control” an additional seat.”<sup>381</sup> The Supreme Court held:

*Kenai Peninsula Borough* does not entitle political subdivisions to control a particular number of seats based upon their populations. *Kenai Peninsula Borough* simply 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.<sup>8</sup> *Kenai Peninsula Borough* recognizes that when a reapportionment plan unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters, the plan's provisions will raise an inference of intentional discrimination. But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the article VI, section 6 requirements of compactness, contiguity, and socio-economic integration.<sup>382</sup>

275. Thus, it is improper to constrain the scope of redistricting alternatives considered based upon the premise that boroughs are entitled to control a specific number of house districts.

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<sup>379</sup> *Hickel*, 846 P.2d at 53 (Mar. 12, 1993).

<sup>380</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 144.

<sup>381</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 144.

<sup>382</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 144.

276. The Board interprets *Hickel* as precluding consideration of options that break FNSB boundaries more than once based upon the premise that FNSB is entitled to full control of five house districts.<sup>383</sup> This is a misinterpretation of Alaska law. A redistricting plan does not run afoul of the legal requirement that geographic areas be afforded proportional representation merely because population from within a borough is joined with population outside of a borough in more than one district. Accordingly, it is improper to foreclose consideration of such redistricting alternatives.

277. The Board must conduct a fact specific analysis of redistricting options based upon the constitutional redistricting criteria and determine whether specific alternatives satisfy the proportionality requirement in the context of the specific alternative being considered.

278. The Court finds that the Board misapplied Alaska law by limiting the range of viable redistricting options it considered based upon the assumption that FNSB boundaries could only be broken once. The Board must take a hard look at options that it may have ignored based upon its misinterpretation of the law.

**F. Inconsistent Use of Borough Boundaries.**

279. In addition to the Board’s misinterpretation of the proportionality doctrine, the Board, and Chairman Binkley in particular, focused heavily on maintaining borough boundaries for the FNSB but ignored maintaining borough boundaries for other boroughs including the Mat-Su Borough, Denali Borough, Kodiak Island Borough, and Kenai Peninsula Borough. Ms. Borromeo testified that “[i]t would be fundamentally wrong to task

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<sup>383</sup> Trial Tr. 662:15 – 667:23.

of the Board to protect the boundaries of Fairbanks to a greater degree than the borough boundaries for other boroughs,”<sup>384</sup> yet the Board prioritized which borough boundaries it should focus on maintaining.

280. The Supreme Court has held that “the retention of political boundaries is a legitimate justification for a deviation from ideal district population size in excess of ten percent, but this policy must be consistently applied to the state as a whole.”<sup>385</sup> Where maintaining borough boundaries is a policy used by the Board to justify deviations from other redistricting criteria, the policy must be applied consistently.

281. District 36 reflects the Board’s disregard for borough boundaries. District 36 in the Final Plan seeks to protect the Ahtna and Doyon ANCSA boundaries at the expense of breaking borough boundaries. In order to create District 36, the Final Plan breaks borough boundaries four times. First, the Board added an appendage to include Cantwell in District 36 that broke the boundaries of both the Denali Borough and the Mat-Su Borough. Second, the Board took population from the Goldstream area of the FNSB. Third, the Board combined Valdez, which is outside of the Mat-Su Borough, exclusively with population from within the Mat-Su Borough.

282. The Board refused to consider alternative redistricting plans that included FNSB population in more than one district with population outside the FNSB while

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<sup>384</sup> *Borromeo Depo. Tr.* 117:12-16.

<sup>385</sup> *Kenai*, 743 P.2d at 1360.

simultaneously breaking borough boundaries in order maintain the integrity of ANCSA districts or advance other board priorities.

283. In District 37, the Board decided to cross Cook Inlet in order to add the Native communities of Port Graham and Nanwalek to District 37. These communities combined have a population of 623 people. The Board's decision to combine the populations of Nanwalek and Port Graham with District 37 broke both the Kodiak Island Borough boundary and the Kenai Peninsula Borough boundary.

284. The record establishes that the Board failed to consistently consider local government boundaries as a criterion for redistricting and used the maintenance of borough boundaries a justification for redistricting decisions only when doing so advanced other underlying priorities of the Board.

**G. Inconsistent Use of Public Testimony.**

285. The Board selectively relied on public testimony to support its redistricting priorities and in some cases solicited testimony to support its goals. The great weight of public testimony regarding Valdez and the Mat-Su Borough's opposition to being paired in a District was ignored. Both of these communities provided unanimous public comment from their respective governing bodies opposing pairing Valdez and the Mat-Su Borough in a district. The Board ignored this public comment and did the exact opposite of what the citizens and governing bodies of Valdez and the Mat-Su Borough requested and paired Valdez in a district exclusively with the Mat-Su Borough.

286. By contrast, the Board gave much greater weight to public comments that aligned with their underlying priorities and solicited public comment that advanced those



priorities. For example, the Board prioritized the creation of a Doyon-Ahtna district and based upon a letter from Ahtna solicited by Ms. Borrromeo<sup>386</sup> decided to break both the Mat-Su and Denali Boroughs to include Ahtna in district 36.<sup>387</sup> The Board made this decision despite the fact that it recognized that adding the Cantwell appendage to District 36 was detrimental to compactness<sup>388</sup> and that it was contrary to the request of the Denali Borough, within which Cantwell is located.<sup>389</sup> Mr. Singer advised the Board that in light of the specific request from the ANCSA regional corporation the decision to add Cantwell to District 36 was within the Board's discretion.<sup>390</sup> Thus, the Board gave more weight to testimony from Ahtna than testimony from the Denali Borough and based upon Ahtna's request the Board ignored borough boundaries and compactness in order to satisfy that request.

287. The Board also gave much more weight to the resolution of the FNSB, which was not unanimous, than to the public comments it received from Valdez and the Mat-Su Borough communities and the unanimous resolutions passed by their respective local

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<sup>386</sup> ARB00050122-00050123 (Ahtna letter to Binkley (Nov. 3, 2021).

<sup>387</sup> Board Meeting Tr. 188:15-20 (Nov. 5, 2021) [ARB008045] (“I will say for the record that we should all probably just acknowledge the fact that the Denali Borough has weighed in, and they were not in favor of having Cantwell carved out of the Denali Borough, so I just want to make sure we recognize that that is a concern that they had.”).

<sup>388</sup> Board Meeting Tr. 253:6-13 (Nov. 5, 2021) [ARB008110] (“Obviously it is not a compact change, right, so do you have any concerns about the compactness, or do you believe that in this instance, for socioeconomic reasons that we took Cantwell out of the borough probably are sufficient to overcome the compact -- the loss of compactness with that removal?”).

<sup>389</sup> Board Meeting Tr. 79:16 – 80:7 (Nov. 4, 2021) [ARB009249-009250].

<sup>390</sup> Board Meeting Tr. 253:14 – 25 (Nov. 5, 2021).

governments.<sup>391</sup> Chairman Binkley stated that he gave the FNSB resolution “a lot of weight . . . [e]ven though it wasn’t unanimous.”<sup>392</sup> The resolution was given so much weight by Mr. Binkley that he changed his position regarding maintaining FNSB’s boundaries, which he had held since the outset of the redistricting process. The Board gave no such weight to the resolutions passed by the Mat-Su Borough and Valdez.

#### **H. Inconsistent Use of Transportation Corridors.**

288. The Board expressed significant concern over South Muldoon’s senate pairing with Eagle River to the extent that Ms. Borromeo and Ms. Bahnke refused to sign the 2021 Proclamation. One of the primary reasons this pairing was offensive to Ms. Bahnke and Ms. Borromeo was the fact that residents in District 21 would “have to drive almost four miles down Muldoon Road, through District 20, before even reaching the Glenn Highway and then drive another 12 miles north before they can exit into Eagle River.”<sup>393</sup> The Board entirely disregarded a much more extreme example of this issue with regard to District 29.

As Mr. Nathan Duval testified:

Under District 29, when making my drives to Fairbanks, I would leave my house district approximately 45 miles from Valdez’s city center and drive through District 36 for approximately 300 miles before reaching the FNSB boundary. When making a drive to Anchorage, I would leave District 29 and have to drive approximately 120 road miles on the Richardson and Glenn Highways through District 36 before re-entering District 29 near Glacier View.<sup>394</sup>

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<sup>391</sup> ARB002011; ARB004074-004212; Binkley Depo. Tr. 139:14-18 (“it was significant that the elected body from the entire borough said you should push out people from the borough to the broader District 36; correct? A: Correct.”).

<sup>392</sup> Binkley Depo. Tr. 40:22 – 41:2.

<sup>393</sup> Borromeo Depo. Tr. 40:25 – 41:4.

<sup>394</sup> Duval Aff. at 6, ¶ 28.

289. While Ms. Borrromeo was extremely concerned about pairing house districts that required a citizen from South Muldoon to drive 16 miles through other districts before reaching Eagle River, she drew District 29 in a manner that entirely ignores this same concern. District 29 separates Valdez from all Richardson Highway communities and the Richardson Highway itself so that 120 miles of the only transportation corridor linking Valdez with the Palmer and Wasilla suburbs is outside the district.

#### **IX. THE HICKEL PROCESS AND THE VRA**

290. The Alaska Supreme Court elaborated on the requirements of article VI, section 6 in *Hickel v. Southeast Conference*:

The *Hickel* process provides the Board with defined procedural steps that, when followed, ensure redistricting satisfies federal law without doing unnecessary violence to the Alaska Constitution. The Board must first design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socioeconomic [sic] integration; it may consider local government boundaries and should use drainage and 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.”<sup>395</sup>

291. The initial map drawn by the Board should not be affected by VRA considerations in any way.<sup>396</sup> If the initial map is affected by VRA considerations, it is noncompliant.<sup>397</sup>

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<sup>395</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1035 (citing *In re 2011 Redistricting Cases*, 274 P.3d at 467-68 (quoting *Hickel*, 846 P.2d at 51, n.22)).

<sup>396</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1037.

<sup>397</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1037 (“We agree with the superior court that *Hickel* and our order mandated that the initial map drawn by the Board should not be

292. The *Hickel* process is designed to “ensure that the requirements of article VI, section 6 of the Alaska Constitution are not unnecessarily compromised by the Voting Rights Act.”<sup>398</sup>

293. On August 23, 2021, Ms. Bahnke requested access to Alaska native population data and Executive Director Torkelson stated that “I do know our deputy director's been working late into the hours last night to upgrade the active matrix in our professional software to have that information for you.”<sup>399</sup> Mr. Torkelson went on to state:

[W]e will have that -- that data loaded in the professional software and be able to -- if you draw districts here, we can load them there and then give you a full report on what the -- what the Alaska Native percentages are in every one of your proposed districts. That's absolutely -- has to happen, and we've made good headway on that with the professional software.<sup>400</sup>

294. On August 24, 2021, the Board considered racial data and discussed racial data within the VRA districts as they drew them. Member Bahnke’s Board issued laptop was configured to reflect racial data and Mr. Presley indicated that he would configure all every Board member’s laptop to display racial data.<sup>401</sup> Mr. Presley described this configuration as allowing the Board to see what percentage of the selection that we’ve made is Alaska Native.<sup>402</sup> Mr. Torkelson informed the Board that the threshold percentage for

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affected by VRA considerations in any way, and therefore the Board’s Amended Proclamation Plan was noncompliant.”).

<sup>398</sup> *In re 2011 Redistricting Cases*, 274 P.3d at 468 (quoting *Hickel*, 846 P.2d at 51 n.22).

<sup>399</sup> Board Meeting Tr. 18:15 – 19:4 (Aug. 23, 2021) [ARB011289 – 011290].

<sup>400</sup> Board Meeting Tr. 19:23 – 20:4 (Aug. 23, 2021) [ARB011290 – 011291].

<sup>401</sup> Board Meeting Tr. 203:12 – 204:10 (Aug. 24, 2021) [ARB011474 – 001475].

<sup>402</sup> Board Meeting Tr. 204:4 -10 (Aug. 24, 2021) [ARB001475].

VRA districts in the last redistricting cycle was 45.2 percent Alaska Native voting age population.<sup>403</sup>

295. During the August 24, 2021, meeting the Board focused largely on drawing the districts that would become Districts 36 – 40. The Board labeled these districts one through five starting on the North Slope and working down the coast and adjourned the meeting with these districts drawn in a manner substantially similar to those adopted in the Final Plan. The Board discussed Native populations percentages within these districts throughout their mapping exercise with a focus on maintaining high percentages of Native populations.<sup>404</sup>

296. As of September 8, 2021, the active matrix in AutoBound included racial data.<sup>405</sup> By that time individual Board members had already drawn proposed VRA Districts. The Board gained general consensus on the VRA Districts prior to adopting V.1 and V.2 on September 9, 2021. V.1 and V.2 contained identical VRA Districts. Ms. Bahnke requested that the Board “engage our VRA experts as soon as practicable after we adopt a draft proposed plan.”<sup>406</sup>

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<sup>403</sup> Board Meeting Tr. 337:17-2010 (Aug. 24, 2021) [ARB0011608].

<sup>404</sup> Board Meeting Tr. 204:11-15 (Aug. 24, 2021) [ARB0011475]; Board Meeting Tr. 266:12-15 (Aug. 24, 2021) [ARB011537]; Board Meeting Tr. 287:20-23 (Aug. 24, 2021) [ARB011558]; Board Meeting Tr. 296:7-10 (Aug. 24, 2021) [ARB011567]; Board Meeting Tr. 307:19-20 (Aug. 24, 2021) [ARB011578]; Board Meeting Tr. 331:7-10 (Aug. 24, 2021) [ARB011602].

<sup>405</sup> Board Meeting Tr. 9:6-15 (Sept. 8, 2021) [ARB0010504].

<sup>406</sup> Board Meeting Tr. 108:9-16 (Sept. 9, 2021) [ARB009932].

297. Mr. Torkelson testified that the Board was fully aware of the historic VRA Districts when it began the redistricting process and took steps to avoid retrogression in Districts 37-40. Specifically, Mr. Torkelson testified:

Q: Now, what were the VRA protected districts?

A: So in the 2013 cycle and for the last decade, effectively, Districts 37, 38, 39, and 40 of the 2013 plan, and we retained those numbers in the 2021 plan because we started numbering at the south, so it was natural to end in District 40 in the north. So 37, 38, 39, 40 have successfully elected candidates of the minority's choice for the last election cycles, and my understanding was that those needed to be -- retrogression to those districts would be something we had to look very closely at.

Q: Okay. And there's no -- there's no secret that 37, 38, 39, and 40 are VRA protected districts for the last decade, is there?

A: Oh, no. *I mean, it's widely known and, you know, we were all certainly aware from the beginning that those previous districts had been under the protection of the VRA.*<sup>407</sup>

298. The VRA Districts in V.3 and V.4 adopted on September 20, 2021, are identical to the VRA Districts in V.1 and V.2 with the exception that V.4 does not place the portion of the Kodiak Island Borough located on the Alaska Peninsula, which is unpopulated, in District 37. The populations for the VRA Districts in V.1 to V.4 are identical. Thus, the Board reached general consensus on its VRA Districts on September 9, 2021 when it adopted two proposed plans containing identical VRA Districts.

299. The Final Plan makes only minor changes to the VRA Districts by appending Port Graham and Nanwalek, which are located on the east side of Cook Inlet, to District 37,

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<sup>407</sup> Torkelson Depo. Tr. 124:13 – 125:5.

extending the boundary of District 37 slightly north to include Platinum and Goodnews Bay, and extending the Northern Boundary of District 38 to include Chevak.<sup>408</sup>

300. Ms. Borromeo testified that the Board considered Native populations in drafting Districts 37-40 in order to ensure compliance with the VRA.<sup>409</sup>

301. VRA analysis was conducted on V.3 and/or V.4 shortly after the adoption of those plans on September 20, 2021. Mr. Torkelson testified that by September 29 he had “handed the baton, so to speak to our VRA consultants and gotten them all the information I think they need to analyze our v3 and v4 and see if there’s any concerns” and “I think we had them look at all of -- all of the plans, actually.”<sup>410</sup>

302. It thus appears that the Board knew that Districts 37-40 were VRA compliant in September. Mr. Torkelson went on to testify: “And so if a VRA protected district had changed in the last week, November 2, 3, 4 or 5, then we would have to circle back to our Voting Rights Act team to have them check and be sure that we hadn’t made any changes that would have impact – Voting Rights Act implications.”<sup>411</sup>

303. By including in the Final Plan the VRA Districts that the Board drew and gained consensus on in September, the Board avoided any doubt regarding VRA compliance and eliminated the need for any additional VRA analysis for those Districts. While this may appear like a legitimate course of action, the *Hickel* process precludes the Board from

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<sup>408</sup> Ex. B (VRA Districts Maps, Board V.1 - V.4 and Final), Valdez-Detter Pre-Trial Brief (Jan. 18, 2022).

<sup>409</sup> Borromeo Depo. Tr. 216:7 – 218:13.

<sup>410</sup> Torkelson Depo. Tr. 122:15-21.

<sup>411</sup> Torkelson Depo. Tr. 124:7-12.

considering the VRA prior to drafting districts that best satisfy the constitutional redistricting criteria in article VI, section 10.

304. During the November 2, 2021, Board meeting, counsel for the Board stated that VRA Analysis had been conducted for V.3 and informed that the Board that no modifications were required to Districts 37, 38, 39, and 40 to satisfy the VRA.<sup>412</sup> This appears to have reinforced the Board’s intransigence with regard to any significant modification of the VRA Districts, which were originally adopted on September 9.

305. The Court finds that the Board failed to abide by its mandate to abstain from consideration of the VRA prior to drafting a plan pursuant to the constitutional redistricting requirements and, instead, drafted a plan that focused on protecting VRA districts as its first priority. The Board’s VRA considerations resulted in the Board’s creating Districts 37-40 first, gaining consensus on those districts early in the process, and declining to consider options that required any substantial modification to those VRA Districts.

306. Ms. Borromeo stated, during the November 2, 2021, Board meeting, that the “number one” justification for including Port Graham and Nanwalek was because “it helps with VRA deviations in 37, which was our lowest overall.”<sup>413</sup> The inclusion of Nanwalek and Port Graham in District 37 was not required by the VRA, yet the Board elected to break the Kenai Peninsula Borough boundary to add these two communities located on the east side of Cook Inlet in District 37, which includes the west side of Cook Inlet, the Bristol Bay region, the Alaska Peninsula and the Aleutian chain.

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<sup>412</sup> Board Meeting Tr. 72:20 – 73:9 (Nov. 2, 2021) [ARB009002-009003].

<sup>413</sup> Board Meeting Tr. 65:11-15 (Nov. 2, 2021) [ARB008762].



307. The Court finds that the addition of Port Graham and Nanwalek to District 37 based upon VRA considerations violated the *Hickel* process.

308. The Court thus concludes that the Board failed to comply with the *Hickel* process because it considered VRA compliance from the outset of the redistricting process. The Board’s decision to focus on VRA districts from the outset resulted in districts that do not best satisfy the constitutional criteria for redistricting set forth in article VI, section 6.

## **X. SPECIFIC ARTICLE VI, SECTION 6 VIOLATIONS**

309. The Board failed to observe the constitutional redistricting requirements set forth in article VI, section VI of the Alaska constitution with regard to Districts 29 and 36.

### **A. Existing Districts for Skagway and Juneau**

310. Since the 2013 Proclamation, the City and Borough of Juneau has been divided into two districts with the Mendenhall Valley in District 34 and Downtown Juneau with Skagway, Haines, and Gustavus in District 33.<sup>414</sup>

311. There is no evidence that a significant change to District 33 or 34, as established by the 2013 Proclamation, was required as the result of population changes or other constitutional requirements. Board Member Simpson, who took the lead for the Board in drawing the Southeast Alaska districts, has acknowledged that the existing Districts 33 and 34 is “highly defensible” and “meet[] the constitutional criteria for districting.”<sup>415</sup>

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<sup>414</sup> 2013 Proclamation Map for District 33 [ARB001614].

<sup>415</sup> Simpson Depo. Tr. 109:5-10; Trial Tr. 1799:15 – 1800:1 (Simpson).

## B. Public Testimony

312. The public testimony overwhelming supported continuing with two districts with the Mendenhall Valley in one and Downtown Juneau with Skagway, Haines, and Gustavus in the other. Skagway Mayor Cremata testified as to the public testimony before the Board from the residents of Skagway and Juneau:

Q. Of the people that testified in Skagway, would you characterize what their -- what their suggestion was to the board about whether to continue with the existing map or not?

A. The overwhelming majority were to maintain the existing map. There was one voice of dissent but even they referenced the airport as being a link between Skagway and Juneau. So they weren't aware of the fact that the redistricting board put the airport in with the downtown district. So even the one dissenting voice in Skagway out of the many that commented didn't understand that the Valley was going to be split in two.

Q. And then with regard to the testimony of Juneau residents, was there anybody that you are aware of that -- that supported the board's map that made any specific comment or -- or expressed any knowledge that the result of supporting that would be to split the Valley in half?

A. There was not one.<sup>416</sup>

313. The full record demonstrates the vast majority of public testimony from the residents of both Skagway and Juneau was in favor of (1) continuing to keep the Mendenhall Valley and Downtown Juneau whole and in separate districts with the dividing line in between the two at Fred Meyer or Sunny Point and (2) continuing to include Skagway,

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<sup>416</sup> Trial Tr. 1624:13 – 1625:7 (Cremata); *see also*, Trial Tr. 1673:2 – 1675:19 (Walsh) (discussing the general support in Juneau for a district line in the Fred Meyer or Sunny Point area and no support for dividing the Mendenhall Valley as the Board's line does).

Haines, and Gustavus in the same district with Downtown Juneau.<sup>417</sup> Not a single public commenter expressed a preference for splitting the Mendenhall Valley in order to district a portion of the Mendenhall Valley with Skagway, Haines, and Gustavus and to district the other portion of the Mendenhall Valley with Downtown Juneau, as Board Member Simpson's plan does.

314. Board Member Borromeo acknowledged that the Borough Assembly, Mayor, and City Manager of Skagway had unanimously urged the Board to continue to include Skagway, Haines, and Gustavus with Downtown Juneau.<sup>418</sup>

315. Board Member Simpson also acknowledged that no one testified in favor of Districts 3 and 4 as he drew them. He acknowledged no one supported splitting the Mendenhall Valley in order to district a portion of it with Downtown Juneau and the other portion with Skagway, Haines, and Gustavus; he also acknowledged that the vast majority of people supported continuing to have Skagway, Haines, and Gustavus in the same district with Downtown Juneau. More specifically, Board Member Simpson testified:

Q: Okay. I'd like to -- was there anybody, that you recall from your notes, that suggested that the Valley and downtown -- that the Valley should be split in half and joined with the downtown?

A: Not that I recall, no.

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<sup>417</sup> Trial Tr. 1777:4 – 1797:25 (Simpson); Ex. SGY-2011; ARB001823; ARB001924-25; ARB001947; ARB001986; ARB002124; ARB002125-26; ARB002145; ARB002185; ARB002206; ARB002243; ARB002393; ARB002526; ARB002558; ARB002561; ARB002569; ARB002630; ARB002661; ARB002885; ARB002998; ARB003017; ARB003056; ARB003073; ARB003120; ARB003189; ARB003195; ARB003199; ARB003211; ARB003268; ARB003276; ARB003422; ARB003452; ARB003456; ARB003495; ARB003659; ARB004009; ARB004236; ARB004263.

<sup>418</sup> Borromeo Depo. Tr. 83:1-15.

Q: So there wasn't any public testimony at the -- at the Juneau outreach that specifically supported your division of the Valley in half; correct?

A: 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.*

*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.*<sup>419</sup>

316. Board Member Simpson also acknowledged that no current public official spoke in favor of Districts 3 and 4 as he drew them.<sup>420</sup> Board Member Borrromeo recalled the same weight of testimony:

Q: Okay. So, I'm sorry, is it fair to say that the majority of -- well, the vast majority of the people who spoke to the issue suggested that the Valley be held whole and separated from Downtown Juneau?

A: Yes.

Q: Okay So people from Downtown Juneau didn't want to split the Valley in half; right?

A: Yes.

Q: People from the Valley didn't want to split the Valley in half; right?

A: Yes.

...

Q: Okay. And so -- and you say, "The weight of the testimony -- starting on line 7 -- "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"; right? That was --

A: Yes.<sup>421</sup>

<sup>419</sup> Simpson Depo. Tr. 115:22 – 116:18 (emphasis added).

<sup>420</sup> Simpson Depo. Tr. 97:9-17.

<sup>421</sup> Borrromeo Depo. Tr. 95:6 – 97:10.

**C. Board Member Simpson’s Districts 3 and 4**

317. Despite the weight of public testimony against Districts 3 and 4 as Board Member Simpson drew them, the Board’s Final Plan (1) splits the Mendenhall Valley and divides its neighborhoods, (2) places roughly two-thirds of the population of the Mendenhall Valley with Skagway, Haines, and Gustavus in District 3, and (3) places the remaining roughly one-third of the population of the Mendenhall Valley with Downtown Juneau in District 4.<sup>422</sup>

318. The record does not reveal why Board Member Simpson chose to redistrict Skagway, Haines, and Gustavus with the Mendenhall Valley and split the Mendenhall into portions to achieve his goal. When asked to identify when the Board first began deliberating whether to separate Skagway, Haines, and Gustavus from Downtown Juneau and district them the Mendenhall Valley, Board Member Simpson’s responded that “from the beginning . . . . it had always been [his] intention to make the district more compact and put Skagway and Haines with the north end.”<sup>423</sup>

319. The Alaska Constitution requires that appointments of Board members “shall be made without regard to political affiliation.”<sup>424</sup> According to his testimony, Board Member Simpson’s political affiliation as a Republican in Southeast Alaska was an express element of his appointment to the Board.<sup>425</sup> Because Board Member Simpson’s

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<sup>422</sup> 2021 Proclamation Map for Districts 3 and 4 [ARB00021].

<sup>423</sup> Simpson Depo. Tr. 51:22 – 52:6.

<sup>424</sup> Alaska Const., art. VI, § 8(a).

<sup>425</sup> Trial Tr. 1725:21 – 1726:18 (Simpson).

appointment was made with explicit regard to his political affiliation, his appointment violates article VI, section 8(a) of the Alaska Constitution. Neither the constitution nor precedent provides a specific remedy for such a violation,<sup>426</sup> which would appear to make Board Member Simpson’s actions as a Board member suspect given that the only person from Skagway to testify in favor of his general approach is the Republican Chair of District 3<sup>427</sup>—although even she was not apparently aware that he would have to split the Mendenhall Valley in order to district Skagway, Haines, and Gustavus with a portion of it.<sup>428</sup>

320. Board Member Simpson has been principal outside counsel for Sealaska for decades and gave considerable deference to Sealaska’s positions with regard to the districts that involved their lands.<sup>429</sup> He stated Sealaska is probably his largest single client and estimated his annual billings to Sealaska to be a six-figure amount.<sup>430</sup> Board Member Simpson noted that four Southeast Alaska districts are “exactly coextensive with the Sealaska regional corporate boundaries.”<sup>431</sup> Sealaska submitted a map as part of a coalition

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<sup>426</sup> See *Egan v. Hammond*, 502 P.2d 856, 872 (Alaska 1972) (“Nevertheless, in reviewing the validity of the appointment, some (although not necessarily all) of the following considerations would appear to be germane: The political affiliation of members of the board; the nature of their activities in partisan politics, particularly if from one political party only; and the expertise and general qualifications which members bring to the board.”).

<sup>427</sup> Trial Tr. 1736:1-19, 1785:16 – 1786:1 (Simpson).

<sup>428</sup> Trial Tr. 1624:7 – 1625:7 (Cremata); ARB002630 (the Hosfords’ testimony referencing small planes from the airport).

<sup>429</sup> Trial Tr. 1737:22 – 1738:19 (Simpson).

<sup>430</sup> Trial Tr. 1738:20 – 1739:20 (Simpson).

<sup>431</sup> Trial Tr. 1738:4-13 (Simpson).

that included Skagway, Haines, and Gustavus with Downtown Juneau.<sup>432</sup> When asked if he reached out to Sealaska and asked them to “sign off” on his plan, Board Member Simpson confirmed that “we did have a conversation like that.”<sup>433</sup> He also confirmed that he did not seek such approval from any other private corporation.<sup>434</sup>

321. Board Member Simpson’s admitted deference to his largest single client with regard to the redistricting process demonstrates a singular bias that diminishes his apparent independent judgment and brings into question whether the Board is acting as a neutral body. Such questions may not be easily answered but should be weighed in evaluating the degree to which the Board evaluated viable options other than the one Board Member Simpson seemed determined from the beginning to achieve.

322. Board Member Simpson entered the redistricting process with an established preconception of how Skagway and Juneau should be redistricted: “I think that issue had been brought up, really, from the beginning, because *it had always been my intention* to make the district more compact and put Skagway and Haines with the north end.”<sup>435</sup> During the Board’s final deliberations, he reiterated his unchanged view that “the existing structure has a Juneau doughnut hole, and it wraps around from the south end of Juneau and Douglas to pick up Haines and Skagway in the north. *I’ve never understood*, you know, why that would be.”<sup>436</sup>

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<sup>432</sup> Trial Tr. 1803:14 – 1804:6 (Simpson).

<sup>433</sup> Trial Tr. 1740:3 – 1742:11 (Simpson).

<sup>434</sup> Trial Tr. 1803:4-13 (Simpson).

<sup>435</sup> Simpson Depo. Tr. 51:22 – 52:6 (emphasis added).

<sup>436</sup> Board Meeting Tr. 90:24 – 91:3 (Nov. 2, 2021) [ARB008787-88] (emphasis added).

323. Board Member Simpson described the mechanical process for determining the line between Districts 3 and 4 as follows:

The northern boundary passes through the Mendenhall Valley area of Juneau. I drew the northern line by gathering census blocks moving outward from downtown Juneau, stopping when I had sufficiently populated the district. I worked with Board staff to make the line as straight as possible in light of the population and compactness goals, and the odd shape of available census blocks.<sup>437</sup>

The drafting of a mechanical line through the middle of the Mendenhall Valley neighborhoods lacks sufficient consideration of the socio-economic impact arising from the line.

324. Board Member Simpson’s stated rationale for reshaping the established districting of Skagway and Juneau, despite also acknowledging it as highly defensible and constitutional,<sup>438</sup> was the constitutional criterion of compactness: “my principal concern there was the compactness of that district, that it did not—it was clearly not compact, and there was a way to draw it so that it was, with—and still maintain the socio-economic integration factors that we were looking for.”<sup>439</sup>

#### **D. Compactness**

325. “The compactness inquiry thus looks to the shape of a district. Odd-shaped districts may well be the natural result of Alaska’s irregular geometry. However, ‘corridors’ of land that extend to include a populated area, but not the less-populated land around it,

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<sup>437</sup> Simpson Aff. at 8-9, ¶ 18.

<sup>438</sup> Simpson Depo. Tr. 109:5-10; Trial Tr. 1799:15 – 1800:1 (Simpson).

<sup>439</sup> Simpson Depo. Tr. 79:15-21.



may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.”<sup>440</sup>

326. Board Member Simpson testified that he used a visual approach to compactness without any calculation:

Q: And how do you determine compactness?

A: Mostly it’s by the look of it. You -- you know, you have to deal with the census blocks as they are given to you. But we, you know, tried to maintain the integrity of rural boundaries. So we, you know, we used those. We tried to use geographic boundaries or natural things, if possible. So, you know, that’s why you have districts that maybe include a particular island or, you know, in this case, you know, run up Lynn Canal and so forth. But yeah, we never applied any kind of a formulaic approach to determining compactness based on, you know, measuring the—the boundary or anything like that.<sup>441</sup>

327. The visual approach described by Board Member Simpson underscores the subjective nature of the compactness requirement described in *Hickel* as “the *relative* compactness of proposed and possible districts in determining whether a district is *sufficiently* compact.”<sup>442</sup>

328. In his testimony, Board Member Simpson emphasized objective geographic proximity for determining compactness:

Q: Now, what’s your take on the notion that while your – your take on compactness is subjective, someone else can have a different opinion?

A: They could.

Q: Did -- did you think it was appropriate for you use your own judgment as to—as to what’s compact?

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<sup>440</sup> *Hickel*, 846 P.2d at 45-46.

<sup>441</sup> Simpson Depo. Tr. 111:10-23.

<sup>442</sup> *Hickel*, 846 P.2d at 45 (citing *Carpenter*, 667 P.2d at 1218) (emphasis added)).

A: I thought that's what I was appointed to do.

Q: And is it -- is it subjective or objective that as you drew the plan Skagway and Haines are joined with Juneau residents who live closer to Skagway and Haines?

A: That's -- that's very objective. They either are or they aren't closer. It's -- in that sense it's sort of like the contiguity issue, you can generally look at a district and say that's contiguous or not. In this case the way the board finally landed on those districts, I feel they are much better in terms of compactness.<sup>443</sup>

329. Conflating the compactness requirement with the contiguity requirement, or otherwise suggesting that parts of a district should be joined by the most direct line to be considered sufficiently compact, is inconsistent with prior redistricting maps,<sup>444</sup> the Board's treatment of other districts in its Final Plan,<sup>445</sup> Board Member Simpson's own statement that the current pairing of Skagway with downtown Juneau is highly defensible and constitutional,<sup>446</sup> and any effort to balance compactness with the constitutional criteria of maximizing the socio-economic integration of the districts to the degree practicable.

330. The current pairing of Skagway with downtown Juneau was deemed sufficiently compact for the 2013 Proclamation,<sup>447</sup> and several of the proposed plans before the Board also districted Skagway with downtown Juneau, including the Board Proposed

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<sup>443</sup> Trial Tr. 1864:12 – 1865:6 (Simpson).

<sup>444</sup> See, e.g., House District 5 in the 1994 Final Reapportionment Plan [Ex. VDZ-3005 at 1]; House District 5 in the 2002 Amended Final Redistricting Plan [Ex. VDZ-3005 at 4]; House District 32 in the 2013 Proclamation House Districts [Ex. VDZ-3005 at 6].

<sup>445</sup> For example, the Board's large District 36 wraps around the Fairbanks area and features an appendage/corridor that crosses two borough boundaries to reach the Cantwell area between Districts 29 and 30 [ARB000054]; Trial Tr. 1969:11 – 1971:17 (Brace).

<sup>446</sup> Simpson Depo. Tr. 109:5-10; Trial Tr. 1799:15 – 1800:1 (Simpson).

<sup>447</sup> ARB001614.

v.4 Alaska Statewide map,<sup>448</sup> the Doyon Coalition Proposed Alaska map,<sup>449</sup> and the Senate Minority Proposed Alaska map.<sup>450</sup>

331. Skagway expert witness Kimball Brace presented two additional alternative maps, Skagway Alternative A<sup>451</sup> and Skagway Alternative B,<sup>452</sup> each of which occupy the same combined area as the Board’s Districts 3 and 4 and thereby avoid any conflicts with the other districts in Southeast, Districts 1 and 2. Mr. Brace testified that “Alternative A (the donut hole) creates two districts that are as close as possible in population between the two districts,” while “[m]oving District 3 farther up the coast in Alternative B pulls the population differences between the two districts a little farther apart but nothing to potentially violate acceptable population windows for deviations.”<sup>453</sup> Both Skagway alternatives present more compact versions of District 3 than the Board’s Final Plan, while also increasing the contiguity and compactness of District 4 compared to the established District 33 in the 2013 Proclamation.

332. In light of the established Districts 33 and 34 under the 2013 Proclamation, this Court finds the various configurations of House Districts 3 and 4 in the Board’s Final Plan, the Board’s Board Proposed v.4 Alaska Statewide map, the Doyon Coalition Proposed Alaska map, the Senate Minority Proposed Alaska map, and the presented Skagway

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<sup>448</sup> ARB001397.

<sup>449</sup> ARB001445.

<sup>450</sup> ARB001521.

<sup>451</sup> Ex. SGY-2004 at 2690.

<sup>452</sup> Ex. SGY-2004 at 2698.

<sup>453</sup> Ex. SGY-2004 at 42.

Alternative maps to exhibit sufficient relative compactness as required by the Alaska Constitution. However, the compactness requirement must be balanced against the other constitutional requirements for a district, including when it results in relative socio-economic integration to the degree practicable. “A district lacking any one of these characteristics may not be constitutional under the Alaska Constitution.”<sup>454</sup>

### **E. Socio-Economic Integration**

333. “In 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.”<sup>455</sup>

334. The delegates to Alaska’s Constitutional Convention described “an integrated socio-economic unit” as “a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits.”<sup>456</sup> In evaluating relative socio-economic integration, the *Hickel* court looked to specific factual characteristics such as transportation links, a common major economic activity, shared fishing, management of state lands, whether there is a predominately Native character of the populace, and geographical similarities and historical links.<sup>457</sup> The requirement for relative socio-economic integration requires examination of such factual characteristics with comparison to “other previously

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<sup>454</sup> *Hickel*, 846 P.2d at 44-45.

<sup>455</sup> *Hickel*, 846 P.2d at 46.

<sup>456</sup> *Hickel*, 846 P.2d at 46 (quoting 3 PACC 1873 (Jan. 12, 1956)).

<sup>457</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1361).

existing and proposed districts as well as principal alternative districts to determine whether socio-economic links are sufficient.”<sup>458</sup>

335. The longstanding socio-economic links between Skagway, Haines, and Downtown Juneau were recognized in the 1974 case *Groh v. Egan*:

There are close transportation ties between Juneau, Haines and Skagway by daily scheduled air flights and frequent ferry service; a Juneau-Haines highway connection has been planned. The district is quite distinct from the rest of the Southeast region by virtue of the nature of its development and the fact that it is almost entirely composed of portions of the mainland, rather than the islands of the archipelago; historically the three communities have always been closely linked, with Juneau serving as an economic hub for Haines and Skagway.<sup>459</sup>

336. Since the time of *Groh*, the relative socio-economic integration between Skagway, Haines, Gustavus and Downtown Juneau has increased with regard to the specific factual characteristics evidenced at trial, including common major economic activity, land management, historical links, and transportation. Conversely, these characteristics demonstrate the almost complete lack of socio-economic integration between Skagway and the Mendenhall Valley.

337. Board Member Simpson expressed unawareness of the socio-economic factors that shape Skagway and integrate it so closely with Downtown Juneau, as detailed below. He has spent only one night in the Skagway area since the 1980s and that was at the lodge of the Republican Chairman for District 3 that is the only Skagway resident to share

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<sup>458</sup> *Hickel*, 846 P.2d at 46-47.

<sup>459</sup> *Groh*, 526 P.2d at 879.

any of his redistricting views.<sup>460</sup> He was unaware of the largest employer in Skagway,<sup>461</sup> the potential catastrophic impact to Skagway from the road from Juneau to Skagway he and his wife strongly support,<sup>462</sup> or the potential negative impact to Skagway's right to effective representation if it is actually in a district dominated by residents of the upper Mendenhall Valley that support the road from Juneau to Skagway and lack understanding of the major industry or common concerns that dominate a port city like Skagway.<sup>463</sup>

### **1. Integration via Common Major Economic Activity.**

338. Downtown Juneau and Skagway are socio-economically integrated by their common major economic activity in the cruise ship industry.<sup>464</sup> In 1983, Skagway's arrivals included 48,066 via cruise ship; 25,288 via ferry; and 72,384 via highway. By 2019, these numbers had shifted to 983,917 via cruise ship; 9,640 via ferry; and 113,253 via highway.<sup>465</sup> Further demonstrating the importance of the cruise ship industry in Skagway, Carnival Corporation recently purchased the White Pass & Yukon Route Railway, Skagway's largest single employer, for \$290 million.<sup>466</sup>

339. Downtown Juneau and especially Skagway depend upon the cruise ship industry and were harmed by the recent pandemic-caused shutdown of cruises. As shown

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<sup>460</sup> Trial Tr. 1736:1-19, 1785:16 – 1786:1 (Simpson).

<sup>461</sup> Trial Tr. 1731:23 – 1732:5 (Simpson).

<sup>462</sup> Trial Tr. 1752:17 – 1760:4 (Simpson).

<sup>463</sup> Trial Tr. 1764:5 – 1766:5 (Simpson).

<sup>464</sup> Ex. SGY-2000 at 5-9 (Ryan); Ex. SGY-2001 at 6-11 (Cremata); Ex. SGY-2002 at 8-13 (Wrentmore); Ex. SGY-2003 at 6-11 (Walsh).

<sup>465</sup> Ex. SGY-2000 at 30.

<sup>466</sup> Ex. SGY-2000 at 40-43.

in the State of Alaska report issued in April 2021 entitled “Impacts to Alaska from 2020/2021 Cruise Ship Season Cancellation,”<sup>467</sup> Juneau lost \$33,706,844 for a single year under a no-sail order, while Skagway lost \$13,233,250, an amount exceeding 100 percent of Skagway’s annual operating budget.<sup>468</sup> These impacts demonstrate the common socio-economic interests of Skagway and Downtown Juneau with regard to their common major economic activity.

340. With Juneau as Alaska’s most-visited port and Skagway as the third-most visited port, the two communities also share an interest in receiving funding from the State of Alaska based on the Commercial Passenger Vessel (“CPV”) excise tax that is distributed to the top seven ports of call.<sup>469</sup> At approximately \$5 million annually, this funding is integral to Skagway’s community and further shows its political interest in coordinating with downtown Juneau on legislation and port-related policy. The CPV funding to Juneau and Skagway reflects the seasonal infrastructure impacts of this common major economic activity, as shown in a 2019 study of cruise ship presence in Skagway:

Skagway’s population temporarily, but dramatically, increases each year as businesses and government agencies gear up to provide services, facilities and products to meet the demands of upwards of 1.5 million visitors. Each year, the expansion of the local labor pool “more than doubles,” perhaps triples, the year-round population of Skagway. Those estimates may actually understate the actual increase; because many of these individuals are accompanied by families, partners and others, not all of whom are counted in official employment data. In any event, while the annual seasonal influx of temporary residents represents an understandable response to a thriving but seasonal visitor industry, the fact remains that the Municipality must be prepared to

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<sup>467</sup> Ex. SGY-2000 at 31-39.

<sup>468</sup> Ex. SGY-2000 at 34-35.

<sup>469</sup> Ex. SGY-2000 at 50-52.

accommodate a doubling or tripling of the “resident” population for 40-50% of the year, every year, on its public facilities and services.<sup>470</sup>

341. The cruise ships bring many shared opportunities and challenges to downtown Juneau and Skagway. A prime example of this cooperation is when Skagway joined Ketchikan in pledging \$100,000 in support of Juneau’s litigation against the cruise ship industry regarding the use of head taxes and passenger fees.<sup>471</sup> Skagway businesswoman Jan Wrentmore testified to the need for the local governments and businesses to support each other as much as possible when dealing with the global corporations of the industry.<sup>472</sup>

342. Skagway officials often look to the regulations, taxes, tariffs, and personnel of the Juneau port in determining Skagway’s port policies, especially now that Skagway is reassuming control of its port and establishing its own structure that should be consistent and congruent with other Alaska ports.<sup>473</sup> Particular projects and policies that tie Skagway to the Juneau port include port electrification, a possible electrical intertie, a cruise ship excise tax, and cruise ship scheduling.<sup>474</sup> Skagway officials often travel to downtown Juneau to confer with state and local officials on these topics and other matters.<sup>475</sup> Skagway Borough Manager Brad Ryan testified to his experience of many of the same socio-economic links between Haines and downtown Juneau during his time there.<sup>476</sup>

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<sup>470</sup> Ex. SGY-2000 at 98.

<sup>471</sup> Ex. SGY-2000 at 373.

<sup>472</sup> Trial Tr. 1896:13 – 1897:16 (Wrentmore).

<sup>473</sup> Ex. SGY-2000 at 7 (Ryan).

<sup>474</sup> Ex. SGY-2000 at 7 (Ryan); Trial Tr. 1637:18–1638:9 (Ryan).

<sup>475</sup> Ex. SGY-2000 at 7 (Ryan).

<sup>476</sup> Trial Tr. 1640:5–1641:5 (Ryan).



343. Skagway Mayor Andrew Cremata testified about his good relationship with the Juneau City Manager and how important that dynamic will be as Skagway looks to take control of its port for the first time in its history while learning from and cooperating with Juneau on their shared port issues related to infrastructure and traffic.<sup>477</sup>

344. Beyond the cruise ship industry and port management connections, tourist-related businesses operate in both Skagway and downtown Juneau as reflected by the more than 20 businesses with Skagway business licenses that list their principal address in Juneau.<sup>478</sup> It is common for tour operators to offer combination booking of activities in both communities, for example, whale watching in Juneau combined with riding the train in Skagway.<sup>479</sup>

345. The COVID-19 pandemic and its severe economic impact on Skagway further joined it with downtown Juneau as both communities sought federal assistance to mitigate the loss of the cruise ships with federal Coronavirus Aid, Relief, and Economic Security (“CARES”) and American Rescue Plan Act (“ARPA”) funds. Skagway suffered a 99.68 percent reduction of arrival numbers in 2020 due to the COVID-19 pandemic, with total losses estimated at over \$300 million in revenue within the borough and \$26.6 million in

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<sup>477</sup> Trial Tr. 1603:13 – 1605:3 (Cremata); *see also*, Trial Tr. 1619:3 – 1620:3 (Cremata) (“Q: Is part of the—is part of the policy and infrastructure challenges that Skagway faces in taking over its own dock, its desire to expand its dock capacity so it can stay in sync with downtown Juneau? A: Absolutely. And it’s critical. Because what the cruise ship industry has done is, they don’t just continue to bring the same ships year after year. They bring in larger ships . . . exact same issues that downtown Juneau has to go through[.]”).

<sup>478</sup> Ex. SGY-2000 at 375.

<sup>479</sup> Ex. SGY-2000 at 383-89.

taxes.<sup>480</sup> Like downtown Juneau, Skagway received millions of dollars in federal aid as a major cruise ship industry port of call, but Skagway remains under a declaration of financial emergency due to the economic impacts of the COVID-19 pandemic.<sup>481</sup>

346. The economic ties between Skagway, Juneau, and the cruise ship industry were further underscored when Norwegian Cruise Line announced a \$10 million donation to six Alaska port cities including Juneau and Skagway to assist with the loss of tourism.<sup>482</sup> The unprecedented strain and uncertainty of the COVID-19 pandemic demonstrates the shared interests of Skagway and downtown Juneau as socio-economic partners through their common major economic activity of attracting and managing cruise ship tourism.

347. Working to mitigate the impacts of the COVID-19 pandemic has required constant coordination with Skagway’s state and federal legislators on cruise ship issues, for example, supporting the federal exemption for certain cruise ships sailing to Alaska from the provisions in the Passenger Vessel Services Act (“PVSA”).<sup>483</sup> Mayor Cremata testified to the coordination necessary between Alaska port communities, their state representatives, and their federal delegation to create a moratorium for the PVSA that was preventing cruise ships from reaching Alaska:

We started a grassroots movement in our port group meeting—it was Juneau, Skagway, and Ketchikan -- and we were able to bring that recommendation to create a moratorium for the PVSA to our representatives. Jesse Kiehl brought

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<sup>480</sup> Ex. SGY-2000 at 391-94.

<sup>481</sup> Ex. SGY-2000 at 401-03.

<sup>482</sup> Ex. SGY-2000 at 404-05.

<sup>483</sup> Ex. SGY-2000 at 413.

it to the legislature floor. That went on to the federal government, and our representatives, Sullivan, Murkowski, and Young, supported it.

People said it would never be done. There is no way they could get the PVSA moratorium done. But they did. And we were able to get cruise ships last year. And it saved us.

So that's the value of having these relationships with these people who understand our industry.<sup>484</sup>

348. The Mendenhall Valley has not faced the same economic impacts from the COVID-19 pandemic as Skagway has. Just as the presence of a cruise ship port with common major economic activity makes Downtown Juneau critically relevant to Skagway, the absence of such a port in the Mendenhall Valley make largely irrelevant to Skagway from a socio-economic standpoint. At worst, such differently interested areas seem more likely to support local efforts to limit cruise ship activity such as the recent "Cruise Control" initiatives.<sup>485</sup> While Skagway officials are regularly in contact with all levels of government in downtown Juneau, they have no cause to travel to or otherwise confer with the Mendenhall Valley on any substantial policy matters.<sup>486</sup>

349. Mayor Cremata emphasized his concern with being redistricted away from downtown Juneau and instead placed with more than 10,000 residents of the upper Mendenhall Valley:

So the issues that those folks are dealing with are very different than the issues that we are dealing with in Skagway. What we deal with in Skagway, as I just mentioned, are the same issues they deal with in downtown Juneau.

My concern is, is that we need representation that understands the unique issues we face as a town of a thousand that also happens to be the 18th

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<sup>484</sup> Trial Tr. 1614:17 – 1615:6 (Cremata).

<sup>485</sup> Ex. SGY-2000 at 23-27.

<sup>486</sup> Ex. SGY-2000 at 9 (Ryan).

most visited cruise port in the world. My fear is that if we become diluted, if our population becomes diluted by people who don't understand those particular issues, it could be detrimental to our future growth.

That's at the heart of that socioeconomic integration. We should be integrated with people and with a portion of the community that understands the challenges we're dealing with. If not, then we lose that fair and effective representation, or at least we're at risk of losing it. And I'd rather not risk it.<sup>487</sup>

350. Mr. John Walsh, Skagway's lobbyist for the last 20 years, also described this risk in representation in response to this Court's questions at trial:

THE COURT: Is it the—is it part of the assumption that the legislator who is more in tune with the Mendenhall Valley, if you will, would be against the cruise industry or simply not as in touch with the cruise industry as Skagway would like?

MR. WALSH: I think it's the latter. The chances are that they would be less -- I mean, think about -- there's attorneys on the screen here. You go to a specialist attorney when you have a specialty need. You don't -- I mean, you would zero in on -- and I would venture to say that the downtown Juneau legislator is going to be very attuned to that -- to the -- to the epicenter issues related to this industry. That, we have in common.

The Valley -- the western portion of the Valley needn't spend any time on that. They don't need to worry about vessel -- they could be interested in it but they don't have to think about, you know, the impacts that this has. Someone else is dealing with that on their behalf. They get the benefits, but they don't need to become subject matter experts. And we would rather be affiliated with subject matter experts, for obvious reasons.<sup>488</sup>

351. Mr. Walsh emphasized that this risk to Skagway's representation posed by the Board is unnecessary:

If you attach the community of Skagway to a district that does not share similar interests, needs, provides no socioeconomic, you know, equivalent of what downtown Juneau offers our community -- and so we're almost derailed,

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<sup>487</sup> Trial Tr. 1607:3-23 (Cremata).

<sup>488</sup> Trial Tr. 1697:14 – 1698:11 (Walsh).

if you will, from, you know, as we -- in my opinion, as we attempt to express ourselves.

So -- and if that was the only situation, I suppose we'd be stuck. But our district as it is right now allows us that voice. We participate with the community. Our residents participate socioeconomically in the community they're paired with, and the population census does not require that -- I mean, the numbers are relatively similar.

So it's fixable and we're asking the Court to examine the board's action and, you know, simply fix it, basically. There is a remedy available that would strengthen our voice and allow full expression of our socioeconomic activity within our district.<sup>489</sup>

352. When asked about the facts regarding Skagway and Juneau's cruise ship integration in his deposition, Board Member Simpson was unaware of many of them but did not dispute any of them, acknowledging it was the primary reason for the testimony he received for maintaining the current district connection:

Q: Okay. So you said: The reason it's been given is that they both have cruise ships going to them. I mean, every place in southeast has cruise ships going to it. So you're dismissing the connection between Skagway and Haines' in Downtown Juneau cruise ship connection, because, I quote, every place in southeast has cruise ships going to it; is that correct?

A: Not dismissing it, but that was the primary reason that we heard over and over again for that connection between Skagway and Downtown Juneau, over and over again, that was the testimony. People did not talk about the hospital or going to visit their representative. They talked about the cruise connection and the -- that that was the business that -- that they were in.

Q: Do you know what percentage of Skagway's economy is the cruise ship connection?

A: I would guess a substantial majority, nearly all.

Q: Do you know who the largest employer in Skagway is?

A: No.

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<sup>489</sup> Trial Tr. 1703:2-21 (Walsh).

Q: Okay. But -- so -- but you're -- you're saying every place in southeastern has cruise ships going to it. You seem to be suggesting, by that, that that's a reason to discount the reason that's been given; is that your opinion?

A: I'm not trying to discount it. I'm simply saying that it's not unique to those two locations. It is a fact that both of them have cruise ships going to them, but what I give less credence to is the concept that that ties Skagway to downtown more than it ties them to the whole community of Juneau. So, you know, all of Juneau deals with the cruise ships, whether positively or negatively, and it's a unified borough. So I didn't mean to minimize the impact of cruise ships on Skagway. I'm simply saying that it's not unique to those two places.

Q: But we're discussing it within the context of whether Skagway should -- and Haines should be linked to the Mendenhall Valley or to Downtown Juneau, correct, that's the context of this conversation?

Right. That's why the concept of cruise ships was brought up.<sup>490</sup>

353. Board Member Borromeo was also unaware of many of Skagway's socio-economic facts but agreed that "the vast majority of commercial economic activity between Skagway and Haines is ... with Downtown Juneau and that district[.]"<sup>491</sup>

354. Board Member Simpson also asserted that the government presence in downtown Juneau was somehow contrary to socio-economic integration with Skagway: "Seasonally, cruise ships moor in Downtown Juneau, but the primary economic and employment drivers for the district are government entities."<sup>492</sup> In his deposition, however, Board Member Simpson acknowledged that such government presence only indicates further socio-economic integration between downtown Juneau and Skagway:

I'm asking about your point in your testimony that the anchor in Downtown Juneau is government. You're aware that Skagway has to coordinate

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<sup>490</sup> Simpson Depo. Tr. 68:6 - 70:7.

<sup>491</sup> Borromeo Depo. Tr. 72:3-7.

<sup>492</sup> Simpson Aff. at 9, ¶ 19.

municipality to municipality with Juneau, to do that they have to go to Downtown Juneau; correct?

A: Yes.

Q: Okay. You're aware that Skagway has to integrate with the state legislatures, and to do that it goes to Downtown Juneau; correct?

A: Yes.

Q: Okay. You're aware that Skagway has to integrate with federal agencies and governments, and that they are located predominantly in Downtown Juneau; correct?

A: Correct.

Q: Okay. Now -- so the fact that Downtown Juneau is the seat of government, which Skagway and Haines has to access, is a point in favor of their socio-economic integration and not against; correct?

A: It -- yes, it has an impact on socio-economic integration, I would agree with that.

Q: Okay. Now, you're aware that the lobbyists for Skagway indicated that decades that he's been representing Skagway he's never had a meeting in the Mendenhall Valley; right?

A: I -- I don't recall --

Q: Okay.

A: -- him saying that, but it's possible.

Q: Okay. So next, white-collar office workers versus fisherman and cement plant workers, okay, that goes to the similarity of the communities, not to their integration; correct?

A: Yes, throughout the state, though, we've looked at the types of economies that are in communities that we were considering for inclusion in -- in the same district. So the type of industries is -- is relevant to that.

Q: Okay. And you think that cement plant workers trumps tourism as a socio-economic integrator between Skagway -- let me say this, this way: You think the cement workers between the Valley or part of the Valley that you designated in 3 in Skagway is a greater socio-economic link than the cruise industry?

A: No. And that's not my intent by that statement. I'm simply saying that the Valley, Mendenhall Valley area and out the road, it was -- it is not a site of the white-collar government workers and neither are Haines and Skagway.<sup>493</sup>

355. In the above statement, Board Member Simpson appeared to confuse the similarity or homogeneity of the communities rather than their actual interaction and integration. To satisfy the constitutional requirement of socio-economic integration, there must be "sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction, and interconnectedness rather than mere homogeneity."<sup>494</sup> In his concurring opinion in *Carpenter*, Justice Matthews explained that "[i]ntegration connotes interaction and connectedness, while homogeneity refers to similarity or uniformity."<sup>495</sup>

356. Board Member Borromeo also recognized that the government presence in Downtown Juneau furthered its socio-economic links to Skagway:

Q: Okay. So, yes. So the fact that Downtown Juneau is the seat of government, is a socio-economic factor that suggests linking Skagway and Haines to Downtown Juneau should be done; right?

A: Yes. It's a factor to consider.

...

Q: Okay. The fact that Downtown Juneau is the seat of government –

A: Yes.

Q: -- suggests greater, not less socio-economic integration with Skagway and Haines; correct?

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<sup>493</sup> Simpson Depo. Tr. 81:20 – 84:1.

<sup>494</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

<sup>495</sup> *Carpenter*, 667 P.2d at 1218.



A: Yes.<sup>496</sup>

357. Board Member Borrromeo agreed that the presence of blue-collar or white-collar workers goes to similarity or homogeneity, not integration, and that Board Member Simpson's line between Districts 3 and 4 is in an unnatural place for those familiar with the Mendenhall Valley:

Q: Assuming that Member Simpson is correct that there's blue-collar workers in the Valley and white-collar workers in Downtown Juneau and there's also blue-collar workers in Skagway and Haines, then does that say anything at all about the socio-economic integration of those communities, or does that go to the similarity of those communities?

A: I would say the latter, similarity.

Q: Okay. Now, if everybody's blue-collar in Haines and Skagway, then where do they need to go for their professional services if not Downtown Juneau; right?

A: Yes.

...

BY MR. BRENA:

Q: Do you know whether or not the Tlingit & Haida community in the Valley is in District 3 or District 4?

A: They have offices and space in -- in both districts.

Q: Do you know where they're headquartered, in District 3 or District 4?

A: They're headquartered in --

THE WITNESS: Can I actually see the map?

Let me just verify before I give you an answer.

THE WITNESS: Okay. What was your question, Mr. Brena?

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<sup>496</sup> Borrromeo Depo. Tr. 86:6-10.

BY MR. BRENA:

Q: You mentioned people traveling, perhaps, from the Haines Native community. I assume you meant the Village Corporation of Klukwan, to -- to -- to the Valley because there was -- because there was a Native community headquarters in the Valley, and I asked you: Is that Native community headquarters in District 3 or 4?

...

A: But, yes, on -- on the map, how it's broken down, Tlingit & Haida's headquarters are going to be in District 4. *Where we're experiencing a little bit of, I think, confusion, is I generally, and I think several Alaskans, refer to anything kind of past Lemon Creek as the Valley.*

Q: Well, and -- and one of the things that the final map does is not only separate Skagway and Haines from downtown and the airport, but it also splits the Valley in half; right?

A: Yes.<sup>497</sup>

358. Board Member Borromeo next agreed that dividing the Valley was necessary in terms of population if Skagway and Haines were to be included in District 3.<sup>498</sup>

359. The evidence before this Court regarding the socio-economic characteristic of a common major economic activity strongly supports districting Skagway with Downtown Juneau and not with the Mendenhall Valley.

## 2. Integration via Land Management and Historical Links.

360. Skagway and downtown Juneau feature small, densely-populated business districts centered around their cruise ports with a socio-economic culture concentrated on historic tourist attractions, entertainment, restaurants, and the performing arts with small unique storefronts and individually-owned businesses catering to visitors. Along with these

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<sup>497</sup> Borromeo Depo. Tr. 87:7 – 90:21 (emphasis added).

<sup>498</sup> Borromeo Depo. Tr. 92:22-24.

obvious common features and activities, the communities are linked by the same public safety concerns regarding terrain and weather events, as well as managing the street crowding that comes with the cruise ships they share.<sup>499</sup> Board Member Simpson acknowledged at trial that Skagway and downtown Juneau have more than 100 years of shared history, and the preservation of that history is the basis for their current status as tourist destinations.<sup>500</sup>

361. Unlike downtown Juneau, the Mendenhall Valley is a newly developed suburb residential area lacking the historical foundation, longstanding businesses, and tourism focus that links downtown Juneau with Skagway.<sup>501</sup>

362. The factual characteristics supporting the socio-economic integration of Skagway and downtown Juneau and continuing their shared representation in the Legislature are also reasons against joining Skagway with the Mendenhall Valley. A representative trying to represent the majority interest of the new District 3 would likely have reason to give Skagway's interests lower priority if they ran counter to the different interests of the Mendenhall Valley where the majority of constituents would reside.

363. Evidence was presented that the residents of the Mendenhall Valley have demonstrated contrary interests to those of Skagway in the past. During the Board's deliberations, Board Member Simpson referred to the possibility of a future road up the

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<sup>499</sup> Ex. SGY-2000 at 9 (Ryan); Ex. SGY-2001 at 11 (Cremata); Ex. SGY-2002 at 2-3 (Wrentmore); Ex. SGY-2003 at 11 (Walsh).

<sup>500</sup> Trial Tr. 1809:9-18 (Simpson).

<sup>501</sup> Ex. SGY-2000 at 10 (Ryan); Ex. SGY-2001 at 12-13 (Cremata); Ex. SGY-2002 at 3-4 (Wrentmore); Ex. SGY-2003 at 12 (Walsh).

Lynn Canal,<sup>502</sup> which his wife has been a long-time advocate for developing,<sup>503</sup> and which he also personally supports.<sup>504</sup> In an advisory vote taken in the year 2000, Juneau voters narrowly chose improving access to Juneau via expanded ferry service over a road, with voters in the downtown area more in favor of a ferry and voters in the Mendenhall Valley the most in favor of a road.<sup>505</sup> In an identical advisory vote taken in 2004, Skagway voters chose improved ferry service over a Juneau Road by 62 percent to 37 percent.<sup>506</sup>

364. When asked about the Skagway vote at trial, Board Member Simpson answered, “It’s pretty much beyond me why anybody would oppose that.”<sup>507</sup> He was unaware of a Skagway resolution in 2003 that stated multiple concerns including job losses in transportation and small local businesses, the end of freight shipment and ferry service, and diminished cruise ship arrivals.<sup>508</sup> Skagway businesswoman Jan Wrentmore testified that when she expressed such concerns to an Anchorage representative, he told her he would

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<sup>502</sup> Board Meeting Tr. 121:19-25 (Nov. 2, 2021) (“BOARD MEMBER SIMPSON: Important to me is that the main transportation links there are lengthen our ferry routes – . . . that go out of the north end of Auke Bay. So that, you know, if there was a road --”) [ARB008818].

<sup>503</sup> Trial Tr. 1745:13 – 1750:3 (Simpson); Ex. SGY-2026; Ex. SGY-2027.

<sup>504</sup> Trial Tr. 1748:1-9 (Simpson).

<sup>505</sup> Ex. SGY-2013 at 2, 7

<sup>506</sup> Ex. SGY-2015.

<sup>507</sup> Trial Tr. 1752:20-21 (Simpson).

<sup>508</sup> Ex. SGY-2014; Trial Tr. 1752:23 – 1761:4 (Simpson); *see also* Ex. SGY-2016 (2005 letter from Skagway Mayor Bourcy regarding Skagway’s position on Juneau Access); *see also*, Trial Tr. 1901:7 – 1902:2 (Wrentmore) (discussing decreased cruise activity in Sitka and the industry’s focus on optimizing profit); Trial Tr. 1878:22 – 1880:16 (Ryan) (discussing risks of a Juneau road for Skagway’s port potential for freight and ore).

not interfere with capital projects in other legislators' districts as a matter of courtesy,<sup>509</sup> suggesting that Skagway cannot rely on legislators outside its district to represent its socio-economic interests.

365. Skagway expert witness Mr. Brace analyzed the Juneau election results and presented a map showing the concentration of support for the road in the Mendenhall Valley:<sup>510</sup>

And what you have is a classic case of taking those voters and dividing them between two districts, District 3 and District 4, so that in traditional political science standpoint, you know that suburban voters tend to vote more than rural voters, and so with a higher potential of votes coming out of the Valley, you can take two pieces of the Valley and basically control both of these seats by using this technique.

Q: Okay. So does this suggest -- what does -- what does this suggest to you with regard to how Skagway and Haines and Gustavus should be districted with Juneau?

A: Well, it suggests certainly from the standpoint of -- of this particular controversy -- and the thing to keep in mind is that this vote -- yes, it was 20 years ago, but it was very, very close. Out of 10,000 votes, it was only 80-vote difference between the roads and the ferry.

And so what is important is to understand the dimensions of these results and how they can be looked at from the standpoint of drawing districts, which is what we do all the time, looking at combining election data and census data, all that sort of thing.

And you can see this pattern of how they did it and how they ended up drawing that boundary to basically take this core of people that are in favor of the road and spreading them into two districts, given the closeness of the vote, in hopes of then being able to control both districts.<sup>511</sup>

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<sup>509</sup> Trial Tr. 1898:14 – 1900:1 (Wrentmore).

<sup>510</sup> Ex. SGY-2028.

<sup>511</sup> Trial Tr. 1937:10 – 1938:15 (Brace).

366. The evidence before this Court regarding the socio-economic characteristics of land management and historical links strongly supports districting Skagway with downtown Juneau and not with the Mendenhall Valley.

### **3. Integration via Transportation.**

367. According to the Skagway witnesses, when they travel to Juneau via plane or ferry, their destination is downtown Juneau. The primary shopping and hospitality options are present in what the Board has drawn as District 4, which also contains Bartlett Regional Hospital which serves as the local hospital for the people of Skagway.<sup>512</sup>

368. Mayor Cremata of Skagway testified to his experience that the ferry system integrates Skagway with District 4 and not District 3: “In 27 years of traveling to Juneau, I have only ever been in what’s being designated as area 3 one time.”<sup>513</sup> Downtown is “where the stores are . . . where the government seats are . . . where the cruise ship industry has the major impacts, so that’s the destination.”<sup>514</sup> In addition to the hospital, doctors’ offices, dentists, shopping, and legislative offices, he also noted that several businesses operate in both downtown Juneau and also in Skagway and that all the hotels are in the downtown district, as is the only commercial airport.<sup>515</sup>

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<sup>512</sup> Ex. SGY-2000 at 10-11 (Ryan); Ex. SGY-2001 at 12-13 (Cremata); Ex. SGY-2002 at 14-16 (Wrentmore); Ex. SGY-2003 at 12-13 (Walsh).

<sup>513</sup> Trial Tr. 1598:10-12 (Cremata).

<sup>514</sup> Trial Tr. 1599:24 – 1600:2 (Cremata).

<sup>515</sup> Trial Tr. 1601:11 – 1603:2 (Cremata); *see also*, Trial Tr. 1664:6 – 1671:13 (Walsh) (discussing healthcare facilities, Costco, professional services, the convention center, music festivals, the capitol building, the maritime business community, businesses that operate in both communities, sports events, and the airport).

369. The ferry terminal at Auke Bay is not a meaningful socio-economic connection between Skagway and the Mendenhall Valley because passengers from Skagway travel the few miles out of District 3 toward downtown Juneau in District 4. The ferry system has become increasingly unreliable and was essentially shut down during the month of January 2022.<sup>516</sup> Comparing the sailing schedule and passenger numbers of the ferry to those of the scheduled cruise ship visits in 2022, the overwhelming importance of the cruise ships to Skagway is readily apparent, particularly when ferry arrivals have decreased nearly 62 percent while cruise arrivals have increased nearly 2,500 percent.<sup>517</sup>

370. Despite these facts, Board Member Simpson placed primary emphasis on the ferry connection between Auke Bay and Skagway: “Of particular importance to me was that District 3 contains the Alaska Marine Highway terminals for all four of these communities, as the ferry system is the primary transportation link between each of the communities in District 3.”<sup>518</sup> However, Board Member Simpson also acknowledged this transportation link is at least as connected to District 4:

Q: Okay. So I’m -- I’m curious if -- if the ferry system is used as a destination point for locations in District 3 and District 4 why the location of the actual terminal weighs in favor of Skagway being linked to District 3 or District 4?

A: *Well, the location of the terminal isn’t -- isn’t really the key feature. It is the fact that the ferry system, even though it’s diminished over the years, is still the major transportation link for the northern panhandle and the Lynn Canal communities. Auke Bay is a Lynn Canal community. Auke Bay, as well as the Mendenhall Valley, are simply part of Juneau. And, you know, all this discussion about, you know, where Fred Meyer is located or whatever, just seems irrelevant to me. People come in to Juneau to shop, but Juneau’s a*

<sup>516</sup> Ex. SGY-2000 at 414-416.

<sup>517</sup> Ex. SGY-2000 at 30, 419-22.

<sup>518</sup> Simpson Aff. at 7, ¶ 17.

unified borough. It's all one and the same. So the ferry's on the north end, so yeah, it's not about where the terminal is located, it's about the fact that that transportation network ties in all of the Lynn Canal communities.

Q: Well, it ties Skagway and Haines to Downtown Juneau, as well, doesn't it?

A: Yes, that's the transportation link or hub for all the communities.

Q: Okay. *And if the majority of the people using that transportation link are destined to District 4, then it is -- the ferry system is a transportation link to District 4, as well, is it not?*

A: *Yes, it is.*

Q: And I'm not sure if we're agreeing or disagreeing. It's my statement, would you agree or disagree, that most of the people visiting from Skagway and Haines, that enter through the Auke Bay terminal, are headed to locations in District 4; do you agree or disagree with that?

A: I do not know where those people are headed. I'm certain there are many of them coming to visit friends and relatives that live in the residential areas and not just to shop. I do agree with you that a number of the shopping locations, hospital and government offices are located in District 4.<sup>519</sup>

371. Board Member Borrromeo also agreed that ferry service supported connection with Downtown Juneau:

Q: If the actual socio-economic integration is that the people from Skagway and Haines are predominantly using the ferry system to access Downtown Juneau, then the ferry system is a factor that weighs in favor of integrating Skagway and Haines and Downtown Juneau; correct?

A: Yes.<sup>520</sup>

372. The evidence before this Court regarding the socio-economic characteristic of transportation strongly supports districting Skagway with downtown Juneau and not with the Mendenhall Valley.

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<sup>519</sup> Simpson Depo. Tr. 60:23 – 62:21 (emphasis added).

<sup>520</sup> Borrromeo Depo. Tr. 81:5-11.



#### 4. Division of the Mendenhall Valley.

373. Board Member Borromeo agreed that the pieces of the Mendenhall Valley that District 3 divides are more integrated with each other than with Skagway and Haines:

Q: The people on the left side of Riverside Drive are more socio-economically integrated with the people in the Valley on the right side of Riverside Drive than they are with the residents of Skagway and Haines and Gustavus. Would you agree to that?

A: Yes.<sup>521</sup>

She also stated her personal belief that Skagway and Haines have greater socio-economic integration with District 4 than with the rest of District 3:

Q: Did you personally believe that Skagway and Haines have -- have a greater socio-economic integration with Downtown Juneau in District 4 than District -- than-- than the left half of Mendenhall?

A: Yes. I think they had a strong connection to 4, stronger than 3, which is why I presented it that way in draft form for the public to react to. I did not believe, though, that they had no socio-economic connection to 3.<sup>522</sup>

374. Contrary to the weight of public testimony, Board Member Simpson stated his belief that the Mendenhall Valley “isn’t a thing” because it is part of the Juneau borough.<sup>523</sup> He acknowledged he could have drawn the line between Districts 3 and 4 to keep the Mendenhall Valley whole in accord with public sentiment if he had not disconnected Skagway, Haines, and Gustavus from downtown Juneau,<sup>524</sup> which was demonstrated by the line used in the Skagway Alternatives presented by Mr. Brace.<sup>525</sup>

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<sup>521</sup> Borromeo Depo. Tr. 101:6-12.

<sup>522</sup> Borromeo Depo. Tr. 107:5-13.

<sup>523</sup> Simpson Depo. Tr. 101:18-19.

<sup>524</sup> Trial Tr. 1798:10 – 1799:10 (Simpson).

<sup>525</sup> Ex. SGY-2023; Trial Tr. 1941:6 – 1943:10 (Brace).

Borough Manager Ryan noted that based on the public sentiments from Skagway, downtown Juneau, and the Mendenhall Valley, “everybody wins and nobody loses” if either of Skagway’s alternative maps is used.<sup>526</sup>

375. While Board Member Simpson did ask Mr. Torkelson about how to possibly “shift the Mend. Valley boundary a bit more south,”<sup>527</sup> there is no indication the public testimony had any meaningful effect on the Board’s decisions for Skagway and Juneau.

376. By deferring to Board Member Simpson’s preconception of how the districts should be designed, the Board focused only on his view of compactness and simply assumed relative socio-economic integration to the degree practicable, without due regard to the weight of testimony and facts. As discussed below, the Board’s disregard for the relative socio-economic integration of Skagway and downtown Juneau stems from an overbroad interpretation of the holding that “a borough is by definition socio-economically integrated.”<sup>528</sup>

## 5. Integration of a Borough.

377. Article VI, section 6 does not require that districts be drawn along municipal boundaries, but “local boundaries are significant in determining whether an area is relatively socio-economically integrated.”<sup>529</sup> In addition, the court in *Hickel* ruled that “relatively” in this context “means that we compare proposed districts to other previously existing and

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<sup>526</sup> Trial Tr. 1882:21 – 1884:23 (Ryan); *see also*, Trial Tr. 1912:17 – 1913:13 (Wrentmore).

<sup>527</sup> Ex. SGY-2007.

<sup>528</sup> *Hickel*, 846 P.2d at 52.

<sup>529</sup> *Hickel*, 846 P.2d at 51.

proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient.”<sup>530</sup> The court added that “relatively” does not mean “minimally,” and it does not weaken the constitutional requirement of socio-economic integration.<sup>531</sup> On the contrary, the superior court in *Hickel* noted that it “found that the Alaska constitution requires maximizing socio-economic integration, and the supreme court agreed.”<sup>532</sup> The prior cases demonstrate this comparative analysis of socio-economic characteristics inherently fact-based and dependent on the facts before the court.

378. But in the Board’s view of the law, no analysis whatsoever is needed with regard to Skagway and Juneau, as articulated in Chairman Binkley’s affidavit:

It is my understanding that the Alaska Supreme Court has traditionally instructed that all neighborhoods within a municipality or borough are considered socio-economically integrated with other neighborhoods within the same local government unit. Thus, if Skagway is socio-economically integrated with the City and Borough of Juneau, which nobody seems to seriously question, then it is not the role of the Board to debate which Juneau neighborhood is more socio-economically similar to Skagway, since Juneau is a single unit for purposes of evaluating socio-economic integration. Given this rule, I believe, when combining communities with clear socio-economic ties, our priority should be on drawing compact, contiguous districts with roughly equal population, and that we accomplished this task with House Districts 3 and 4. The approach that Skagway prefers would require drafting a less-compact District 3.<sup>533</sup>

379. Board Member Simpson restated this view at trial:

Q: Mr. Simpson, my question wasn’t whether you have to draw a line through a neighborhood once in a while. That wasn’t my question.

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<sup>530</sup> *Hickel*, 846 P.2d at 47.

<sup>531</sup> *Hickel*, 846 P.2d at 47.

<sup>532</sup> *Hickel*, 846 P.2d at 70.

<sup>533</sup> Binkley Aff. at 8, ¶ 22.

My question was: Isn't it true that the neighbors on one side of Riverside -- Riverside Drive are more socioeconomically integrated with their neighbors across the street than they are with folks miles away downtown Juneau?

A: And I answered that, and I said, no, it is not true, that is my understanding of the law that -- and --

Q: Mr. Simpson --

A: -- the borough is socioeconomically integrated.

Q: Okay. All right. So -- so you get to draw the lines within the borough wherever you want, without regard to what neighborhoods you split up; is that your understanding of the law, Mr. Simpson --

A: Yes, more or less.

Q: -- for the borough?

A: More or less.

Q: And is it also your understanding that you get to connect other boroughs anywhere within the borough without regard to whether they're socioeconomically integrated or not?

A: No, that is not my understanding.<sup>534</sup>

380. This legal understanding overstates both the importance of relative compactness and the Alaska Supreme Court's holdings regarding the integration of a borough both within itself and with outside areas. The proposition the Board now relies upon—to effectively abdicate its duty to consider relative socio-economic integration between alternatives—has its origin in *Kenai Peninsula Borough v. State*,<sup>535</sup> where the Court held that “interaction between the communities comprising House District 7 and

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<sup>534</sup> Trial Tr. 1822:2 – 1823:2 (Simpson).

<sup>535</sup> *Kenai*, 743 P.2d 1352 (1987).

communities outside the district but within a common region sufficiently demonstrates the requisite interconnectedness and interaction mandated by article VI, section 6.”<sup>536</sup>

Specifically, the Court decided:

The sufficiency of the contacts between the communities involved here can be determined by way of comparison with districts which we have previously upheld. Unlike the district linking Cordova and the Southeast which we invalidated in *Carpenter*, the communities of North Kenai and South Anchorage are relatively close geographically. Like the Juneau District upheld in *Groh*, which included Skagway and Haines, the communities here are connected by daily airline flights (and by highway transportation, whereas the Juneau communities used ferry service); both are linked to the hub of Anchorage, although North Kenai obviously has greater links to Kenai. We think Kenai draws too fine a distinction between the interaction of North Kenai with Anchorage and that of North Kenai with South Anchorage. We find no error in the superior court’s decision to uphold House District 7.<sup>537</sup>

381. The Board seeks to mechanically apply only part of the logic of *Kenai* by slotting in Skagway for North Kenai and the Mendenhall Valley for South Anchorage, reasoning that Skagway’s integration with any part of Juneau is sufficient to district it with any other part of Juneau. But this oversimplifies the precedent, ignoring the context in which the North Kenai linkage to South Anchorage was upheld:

The state argues that *no constitutionally permissible alternative to joining North Kenai with South Anchorage existed*. Based on its calculation that the Kenai Peninsula Borough alone supports approximately two and three-quarters house seats and the Prince William Sound communities of Cordova, Valdez, and Seward together cannot support a single seat, and that the two areas combined are too populated to support three seats but not sufficiently populated to support four seats, the state asserts that it could not form districts of nearly equal population without linking some portion of the Kenai Peninsula with South Anchorage. Furthermore, the state contends that including Nikiski in the Kenai district or in a three-seat regional district would result in overrepresentation of the district by 10.2% and a total (statewide)

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<sup>536</sup> *Kenai*, 743 P.2d at 1363 (1987).

<sup>537</sup> *Kenai*, 743 P.2d at 1363.

deviation in excess of the 16.4% maximum deviation permitted under the Federal Constitution. According to the state, the other alternative considered by the Board, a three-member regional district excluding Valdez and Cordova, would have required those communities' inclusion in District 17 and thereby triggered a domino effect, causing strained district configurations throughout rural Alaska. The state contends that the Board could not both maintain a unified Juneau District and establish a three-member district composed of the Kenai Peninsula and Prince William Sound.<sup>538</sup>

382. The Alaska Supreme Court accepted the socio-economic integration of North Kenai and South Anchorage as sufficient in the context of the State's demonstrating it had no alternative due to population constraints. That is far from the case of Skagway and Juneau before this Court now; indeed, the status quo map could be maintained with minimal adjustment for population shifts, and there were several permissible alternatives available to the Board that would better reflect the socio-economic reality of these communities than the districts it adopted.

383. Likewise, in the subsequent decision *In re 2001 Redistricting Cases*,<sup>539</sup> the Court held:

The Luper appellants also argue that the natural and local government boundaries of the Eagle River-Chugiak area should have been "recognized." But the plain language of the Alaska Constitution indicates that respecting local government boundaries is discretionary. Further, the appellants have not demonstrated that any failure by the board to follow natural boundaries violates article VI, section 6. As Judge Rindner observed, "respect for neighborhood boundaries is an admirable goal," but "it is not constitutionally required and must give way to other legal requirements." Therefore, the districts containing the Eagle River area are not unconstitutional in any respect.<sup>540</sup>

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<sup>538</sup> *Kenai*, 743 P.2d at 1362 (emphasis added).

<sup>539</sup> *In re 2001 Redistricting Cases*, 47 P.3d 1089 (2002).

<sup>540</sup> *In re 2001 Redistricting Cases*, 47 P.3d at 1090-91 (2002) (citations omitted).

384. This holding also demonstrates the Board’s error in ignoring the socio-economic realities of Skagway, Downtown Juneau, and the Mendenhall Valley. Although respect for natural and neighborhood boundaries is discretionary, it remains at minimum an admirable goal; and, if there are no other legal requirements that must be given way—the many alternatives here are all sufficiently contiguous, compact, and within acceptable population deviations—the Board should not then draw whatever line it likes without regard to socio-economic characteristics. Such disregard departs from reasoned decision-making and becomes an abuse of discretion.

385. The holding of *Kenai Peninsula Borough* should not be stretched so far as to permit the disregard of constitutional considerations. The court there reiterated that “[t]he state must consistently enforce the constitutional article VI, section 6 requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting”<sup>541</sup> and looked to the specific socio-economic facts in the record to conclude that “Kenai draws too fine a distinction between the interaction of North Kenai with Anchorage and that of North Kenai with South Anchorage.”<sup>542</sup> But here, the record shows the distinction between Downtown Juneau and the Mendenhall Valley is not fine at all for Skagway. On the contrary, it is a fundamental distinction that goes to the heart of Skagway’s socio-economic activity, as the Board was told over and over again.

386. As a touchstone, this Court maintains the focus directed by *Hickel*:

[W]e should not lose sight of the fundamental principle involved in reapportionment – truly representative government where the interests of the

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<sup>541</sup> *Kenai*, 743 P.2d at 1360.

<sup>542</sup> *Kenai*, 743 P.2d at 1362.

people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.<sup>543</sup>

387. The evidence presented at trial demonstrates that the Board’s disregard for the relative socio-economic integration of Skagway and downtown Juneau, as well as its unnecessary division of the Mendenhall Valley neighborhood, violates “the fundamental principle involved in reapportionment” by failing to assure that these areas of the state sharing significant common interests are able to elect legislators representing those interests. This Court finds the Board’s Districts 3 and 4 violate the requirements of article VI, section 6 of the Alaska Constitution because they do not contain “as nearly as practicable a relatively integrated socio-economic area.” Like the Southeast districts struck down in *Hickel* thirty years ago, Districts 3 and 4 “are not ‘socioeconomically integrated and they easily could have been.’”<sup>544</sup>

## 6. Consideration of Skagway Alternatives

388. During his trial testimony, Board Member Simpson stated he had not reviewed the alternative maps presented by Skagway in its case.<sup>545</sup>

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<sup>543</sup> *Hickel*, 846 P.2d at 46 (citing *Groh*, 526 P.2d at 890).

<sup>544</sup> *Hickel*, 846 P.2d at 57.

<sup>545</sup> Trial Tr. 1824:17 – 1825:5 (Simpson).



389. Having not been cross-examined on his direct testimony, Skagway expert witness Mr. Brace presented his alternative maps<sup>546</sup> during rebuttal testimony at trial, demonstrating both maps keep Skagway and Haines and Gustavus with downtown Juneau while maintaining sufficient compactness, contiguity, and population deviations.<sup>547</sup>

390. Upon consideration of the evidence, Skagway Alternatives A and B meet the constitutional standards for compactness and contiguity. Both alternatives permit Skagway and Haines to be in the same district as downtown Juneau to which they are most highly socio-economically integrated. Both alternatives permit downtown Juneau to be separated from the Mendenhall Valley and permit the Mendenhall Valley community to be maintained as a whole community, rather than divided between the districts. Both alternatives are also consistent with the majority of the public comment to the Board from both the Juneau and Skagway public meetings, the unanimous opinion of the elected representatives of Skagway, the opinions of the former elected legislators, the map proposed by the coalition that included Sealaska (the ANCSA regional corporation for Southeastern Alaska), the borough manager of Skagway, and the unanimous resolution of the Borough.

391. Either of the Skagway alternative maps present a viable constitutional alternative to the Board's Districts 3 and 4, which were drawn based on one Board Member's view of compactness without regard to the evidence presented on socio-economic

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<sup>546</sup> Ex. SGY-2004 at 2690, 2698.

<sup>547</sup> Trial Tr. 1948:23 – 1953:15 (Brace).

integration by the people of Skagway and Juneau and do not satisfy the requirement to maximize the relative socio-economic integration of the districts as nearly as practicable.<sup>548</sup>

**F. Fair and Effective Representation.**

392. The Board’s failure to satisfy the socio-economic integration requirement implicates fair and effective representation for the citizens residing with Districts 3 and 4. “In 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.”<sup>549</sup>

393. The state equal protection clause guarantees the right to proportional geographic representation.<sup>550</sup> The Alaska Supreme Court “consider[s] a voter’s right to an equally geographically effective or powerful vote, while not a fundamental right, to represent a significant constitutional interest.”<sup>551</sup>

394. 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.”<sup>552</sup>

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<sup>548</sup> *Hickel*, 846 P.2d at 70 (“This court found that the Alaska constitution requires maximizing socio-economic integration, and the supreme court agreed.”).

<sup>549</sup> *Hickel*, 846 P.2d at 46.

<sup>550</sup> *Hickel*, 846 P.2d at 52.

<sup>551</sup> *Kenai*, 743 P.2d at 1372.

<sup>552</sup> *Hickel*, 846 P.2d at 49 (citing *Kenai*, 743 P.2d at 1372).

395. The supreme court does not require a showing of a pattern of discrimination, nor does the court consider any effect of disproportionality *de minimis* when determining the legitimacy of the Board’s purpose.<sup>553</sup> More specifically:

The legitimacy of this purpose hinges on whether the Board intentionally sought to dilute the voting power of Anchorage voters disproportionately. Thus, if the Board sought to denigrate the voting power of Anchorage voters systematically by reducing their senate representation below their relative strength in the state’s population, then such a purpose would be illegitimate.<sup>554</sup>

396. Based upon the principle for fair and effective representation, “certain mathematically palatable apportionment schemes will be overturned because they systematically circumscribe the voting impact of specific population groups.”<sup>555</sup> The question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.<sup>556</sup>

**1. The Board’s District 3 Deprives Skagway of Fair and Effective Representation.**

397. Under Alaska law, the citizens of Skagway are legally entitled to “‘fair and effective representation’—the right to group effectiveness or an equally powerful vote.”<sup>557</sup> District 3 fails to provide fair and effective representation for the citizens of Skagway Citizens of the Mendenhall Valley, with which Skagway lacks sufficient socio-economic

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<sup>553</sup> *Hickel*, 846 P.2d at 49 (citing *Kenai*, 743 P.2d at 1372).

<sup>554</sup> *Kenai*, 743 P.2d at 1372.

<sup>555</sup> *Hickel*, 846 P.2d at 49.

<sup>556</sup> *Kenai*, 743 P.2d at 1368.

<sup>557</sup> *Hickel*, 846 P.2d at 47, *as modified on reh’g* (Mar. 12, 1993) (quoting, *Kenai*, 743 P.2d at 1363).

integration and in past has had direct conflicting issues on fundamental issues such as a Skagway-Juneau road, dominate the population of the district.

398. District 3 in the 2021 Final Plan ensures that Skagway will receive diminished representation in the House, purely on the basis of its geographic location and how the Board chose to draw its Juneau districts while ignoring other viable options that reflected the socio-economic characteristics of these communities.

399. Fair representation, including the right to group effectiveness and an equally powerful vote, is required under Alaska law. “In 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.”<sup>558</sup> Placing Skagway in a district that is utterly dominated by citizens residing in the Mendenhall Valley will deprive citizens of Skagway of an equally powerful vote and violate the fundamental goal of assuring “representation of those areas of the state having common interests.”<sup>559</sup>

400. The Board’s actions with regard to Districts 3 and 4 not only violate article VI, section 6 of the Alaska constitution with regard to the requirement of relative socio-economic integration, but by disregarding this requirement it has also violated the equal protection requirement of fair and effective representation by redistricting Skagway away from its common interests with Downtown Juneau when there was no need to do so.

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<sup>558</sup> *Hickel*, 846 P.2d at 46.

<sup>559</sup> *Hickel*, 846 P.2d at 46 (citing *Groh*, 526 P.2d at 890).

## **XI. CONCLUSION**

401. The Final Plan's formulation of Districts 3 and 4 violates article VI, section 6 of the Alaska constitution because these Districts are not socioeconomically integrated when they easily could have been. The Board failed to engage in reasoned decision making and has provided insufficient evidence to support its decision to diminish the constitutional criteria of socio-economic integration and in Districts 3 and 4.

402. The Court finds that the Board's process was flawed in several regards. The Board failed to adequately prepare for the redistricting process and unnecessarily limited the amount of time the Board spent mapping together. Individual mapping exercises appear to have dominated the redistricting process. This facilitated the ability of individual Board members to advance their priorities to the detriment of the constitutional redistricting criteria set forth in article VI, Section 6.

403. The Court finds that the Board improperly advanced policies unrelated to the constitutional redistricting criteria. These policies resulted in a Final Plan that fails to maximize compliance with the constitutional criteria of compactness and socio-economic integration. Further, the Board's improper motivations in creating the Final Plan constrained the range of viable alternatives considered by the Board.

404. Specifically, the Board improperly disregarded the relative socio-economic integration of Skagway with Downtown Juneau by redistricting Skagway with a portion of the Mendenhall Valley, and redistricting the other portion of the Mendenhall Valley with Downtown Juneau.

405. The Board violated article VI, section 10 by adopting proposed plans outside of the 30-day period set forth in the constitution. This unduly limited the opportunity for public comment on the proposed plans and created confusion among the public. These procedural defects implicate due process as does the Board's violation of the OMA.

406. The record establishes that the Board repeatedly violated the OMA and reached consensus on critical redistricting decisions in executive session when such decisions must be the subject of public deliberation and decision making. This alone is grounds for voiding the Final Plan.

407. The Board also inconsistently applied redistricting criteria in a manner that resulted in unfair treatment of some geographic areas for the benefit of other geographic areas. The constitutional redistricting criteria must be applied consistently in order to effectuate their underlying purpose of preventing gerrymandering and ensuring that voters are not denied their right to an equally powerful vote.<sup>560</sup>

408. The Board improperly foreclosed consideration of viable redistricting alternatives that otherwise could have been considered based upon a misunderstanding or misapplication of Alaska law regarding the proportionality doctrine and the use of ANCSA regional corporation boundaries in the redistricting process.

409. The Board's practice of prioritizing policies unrelated to the constitutional redistricting criteria, making critical redistricting decisions in executive session or otherwise outside of the public eye, inconsistently applying redistricting criteria, and misapplication

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<sup>560</sup> *Kenai*, 743 P.2d at 1372.

of Alaska law violated article I, Section 7 of the constitution by depriving interested parties of due process.

410. The result of the Board’s improper motivations and flawed process is a Final Plan that not only fails to satisfy article VI, section 6 but also violates article I, section 1, which ensures equal and fair representation among geographical areas. By failing to satisfy the socio-economic integration requirement in Districts 3 and 4, the Board created districts that unnecessarily dilute the vote of communities included in those districts including the Municipality of Skagway Borough.

411. The Board was presented with redistricting alternatives that better satisfy the constitutional redistricting criteria and easily could have created a Final Plan that complies with the Board’s constitutional mandate. The Board’s improper motivations and misapplication of Alaska law appears to have constrained the range of redistricting alternatives the Board considered.

412. The Court orders that the 2021 proclamation be remanded to the Board for reformulation consistent with this Order.

DATED this 9<sup>th</sup> day of February, 2022.

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**Certificate of Service**

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