IN THE SUPREME COURT OF WISCONSIN

No. _____

STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,
Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,
Respondents.

PETITIONERS' APPENDIX

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CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Electronically signed by Sarah A. Zylstra
Sarah A. Zylstra

Republican Party of New Mexico v. Oliver

1

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 5, 2023

NO. S-1-SC-39481

MICHELLE LUJAN GRISHAM in her official capacity as Governor of the New Mexico, HOWIE MORALES, in his official capacity as New Mexico Lieutenant Governor and President of New Mexico Senate, MIMI STEWART, in her official capacity as President Pro Tempore of the New Mexico Senate, and JAVIER MARTINEZ, in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners,

v.

HON. FRED VAN SOELEN, District Court Judge, Fifth Judicial District Court,

Respondent,

and

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES JR., BOBBY and DEE ANN KIMBRO, and PEARL GARCIA,

Real Parties in Interest,

and

MAGGIE TOULOUSE OLIVER,

Defendant-Real Party in Interest.

ORDER

WHEREAS, this matter initially came on for consideration by the Court upon *verified petition for writ of superintending control and request for stay* and responses thereto;

WHEREAS, this Court granted the request for stay in D-506-CV-2022-00041 on October 14, 2022, and ordered the parties to file briefs on the issues presented in the *verified petition for writ of superintending control*;

WHEREAS, this Court heard arguments in this matter on January 9, 2023, and thereafter ordered the parties to file supplemental briefs addressing the issue of whether the New Mexico Constitution provides greater protection than the United States Constitution against partisan gerrymandering;

WHEREAS, this matter now comes before the Court upon the parties' supplemental briefs and motion to substitute public officer and amend caption;

WHEREAS, the Court having considered the foregoing and being sufficiently advised, Chief Justice C. Shannon Bacon, Justice Michael E. Vigil, Justice David K. Thomson, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED that the motion to substitute is GRANTED, and Javier Martinez shall be substituted for Brian Egolf as Speaker of the House;

IT IS FURTHER ORDERED that the caption on any further pleadings filed in this proceeding, if any, shall conform to the caption of this order;

IT IS FURTHER ORDERED that the *verified petition for writ of superintending control* is GRANTED with respect to Petitioners' request that this Court provide the district court guidance for resolving a partisan gerrymandering claim;

IT IS FURTHER ORDERED that the stay in D-506-CV-2022-00041 is hereby VACATED, and the district court shall take all actions necessary to resolve this matter **no later than October 1, 2023**;

IT IS FURTHER ORDERED that as a threshold matter, the district court shall conduct a standing analysis for all parties;

IT IS FURTHER ORDERED that in resolving this matter, the district court shall act in accordance with and apply the following holdings and standards as determined herein:

1. A partisan gerrymandering claim is justiciable under Article II, Section 18 of the New Mexico Constitution;

2. A partisan gerrymandering claim under the New Mexico Constitution is subject to the three-part test articulated by Justice Kagan in her dissent in *Rucho v. Common Cause*, 139 S.Ct. 2484, 2516 (2019);

3. Clearly, a district drawn without taking partisan interests into account would not present a partisan gerrymander. *Cf.* N.M. Const. art. II, §§ 2, 3, 4. However, as with partisan gerrymandering under the Fourteenth Amendment, some degree of partisan gerrymandering is

permissible under Article II, Section 18 of the New Mexico Constitution. *Accord Rucho*, 139 S.Ct. at 2497. At this stage in the proceedings, it is unnecessary to determine the precise degree that is permissible so long as the degree is not egregious in intent and effect;

4. Intermediate scrutiny is the proper level of scrutiny for adjudication of a partisan gerrymandering claim under Article II, Section 18 of the New Mexico Constitution. *See Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶¶ 11-15, 30-32, 138 N.M. 331, 120 P.3d 413;

5. Under one-person, one-vote jurisprudence, some mathematical deviation from an ideal district population may be permissible as "practicable." *Cf. Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 258-59 (2016) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)) ("The Constitution . . . does not demand mathematical perfection. In determining what is 'practicable,' we have recognized that the Constitution permits deviation when it is justified by 'legitimate considerations incident to the effectuation of a rational state policy.'");

6. In the context of a partisan gerrymandering claim, a reasonable degree of partisan gerrymandering—taking into account the inherently political nature of redistricting—is likewise permissible under Article II, Section 18 and the Fourteenth Amendment;

7. In evaluating the degree of partisan gerrymandering in this case, if any, the district court shall consider and address evidence comparing the relevant congressional district's voter registration percentage/data, regarding the individual plaintiffs' party affiliation under the challenged congressional maps, as well as the same source of data under the prior maps. The district court shall also consider any other evidence relevant to the district court's application of the test referenced in paragraph 2 of this order.

IT IS FURTHER ORDERED that a writ of superintending control shall issue contemporaneously with this order; and

IT IS FURTHER ORDERED that an opinion in this matter shall follow.

IT IS SO ORDERED.

WITNESS, the Honorable C. Shannon Bacon, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 5th day of July, 2023.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

By _____
Chief Deputy Clerk of Court

I CERTIFY AND ATTEST:
A true copy was served on all parties
or their counsel of record on date filed.
Lynette Romero Córdova
Chief Deputy Clerk of the Supreme Court
of the State of New Mexico

In re the 2021 Redistricting Cases (Alaska)

1

THE SUPREME COURT OF THE STATE OF ALASKA

IN THE MATTER OF THE 2021 REDISTRICTING CASES (Matanuska-Susitna Borough, S-18328) (City of Valdez, S-18329) (Municipality of Skagway, S-18330) (Alaska Redistricting Board, S-18332) (Alaska Redistricting Board, S-18419)	)	Supreme Court Nos. 18332/18419 (Consolidated)
	)	Superior Court No. 3AN-21-08869 CI
	)	O P I N I O N
	)	No. 7646 – April 21, 2023

Petitions for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Thomas A. Matthews, Judge.

Appearances: Matthew Singer, Lee C. Baxter, and Kayla J. F. Tanner, Schwabe, Williamson & Wyatt, P.C., Anchorage, for Petitioner/Respondent Alaska Redistricting Board. Robin O. Brena and Jon S. Wakeland, Brena, Bell & Walker, P.C., Anchorage, for Petitioners/Respondents Municipality of Skagway Borough and Brad Ryan. Robin O. Brena, Jake W. Staser, Jon S. Wakeland, and Laura S. Gould, Brena, Bell & Walker, P.C., Anchorage, for Petitioners/Respondents City of Valdez and Mark Detter. Stacey C. Stone, Holmes Weddle & Barcott, P.C., Anchorage, for Petitioners/Respondents Matanuska-Susitna Borough and Michael Brown. Holly C. Wells, Mara E. Michaletz, and Zoe A. Danner, Birch Horton Bittner & Cherot, Anchorage, for Respondents Felisa Wilson, George Martinez, and Yarrow Silvers. Eva R. Gardner, Michael S. Schechter, and Benjamin J. Farkash, Ashburn & Mason, P.C., Anchorage, for Respondents Calista Corporation, William Naneng, and Harley Sundown in No. S-18332 and for Respondents Louis Theiss, Ken Waugh, and Jennifer

Wingard in No. S-18419. Nathaniel H. Amdur-Clark and Whitney A. Leonard, Sonosky, Chambers, Sachse, Miller & Monkman, LLP, Anchorage, for Intervenor Respondents Doyon Limited; Tanana Chiefs Conference; Fairbanks Native Association; Ahtna, Inc.; Sealaska Corporation; Donald Charlie, Sr.; Rhonda Pitka; Cherise Beatus; and Gordon Carlson in No. S-18332. Susan Orlansky and Richard Curtner, American Civil Liberties Union of Alaska Foundation, Anchorage, for Amici Curiae Alaska Black Caucus; National Association for the Advancement of Colored People Anchorage, Alaska Branch #1000; Enclaces; The Korean American Community of Anchorage, Inc.; Native Movement; and First Alaskans Institute in No. S-18332.

Before: Winfree, Chief Justice, Borghesan and Henderson, Justices, and Matthews and Eastaugh, Senior Justices.[*] [Maassen and Carney, Justices, not participating.]

WINFREE, Chief Justice.
EASTAUGH, Senior Justice, concurring.

I. INTRODUCTION

Alaska's legislative redistricting occurs every decade shortly after the United States decennial census is released, governed primarily by the Alaska Constitution. The most recent redistricting efforts began in earnest in August 2021, shortly after the 2020 census information was received. On November 10 the Alaska Redistricting Board adopted a final redistricting plan for 40 House of Representative districts and 20 Senate districts (each composed of 2 House districts). Five separate challenges to the final plan were filed in superior court. In mid-February 2022 the superior court concluded that two House districts were unconstitutional on due-process-

[*] Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

related grounds and that one unrelated Senate district was unconstitutional on gerrymander grounds. The superior court directed further redistricting efforts.

Four petitions for our review quickly were filed, and we granted review. The primary competing claims were that the superior court erred (1) by concluding that the two House districts and the Senate district were unconstitutional, and (2) by *not* concluding that (a) the two House districts were unconstitutional for additional reasons and (b) other House districts also were unconstitutional. In an expedited summary order we reversed the superior court's ruling regarding the two House districts, affirmed the superior court's ruling regarding the Senate district, and, with one limited exception, affirmed the superior court's ruling that the remaining disputed House districts satisfied constitutional requirements. We remanded for further redistricting efforts consistent with our order.

The Board adopted an amended final plan in mid-April 2022 and another challenge was filed in superior court; in mid-May the superior court concluded that the amended plan's revision for the previously unconstitutional Senate district also was an unconstitutional gerrymander. The superior court directed that an alternative amended plan, previously considered by the Board but not adopted as the amended final plan, be used as an interim plan for the November 2022 elections and that further redistricting efforts be undertaken for a second amended final plan for the rest of the decade. A petition for our review quickly was filed, challenging the superior court's rulings on the merits of the amended plan and contending that using the interim plan was erroneous. We granted review and stayed the superior court's order pending our ruling; in an expedited summary order we affirmed the superior court's conclusion that the relevant Senate district pairings were an unconstitutional gerrymander, affirmed the superior court's order for the interim redistricting plan, and lifted the stay except for the stay of further redistricting efforts pending our formal written decision.

We now explain the reasoning behind our summary orders. For context we start with Alaska's constitutional framework for redistricting. We then detail the parties' arguments in the first round of petitions for review and explain our first summary order. We next detail the parties' arguments in the final petition for review and explain our second summary order, including the implementation of an interim redistricting plan for the November 2022 election cycle. Finally, we lift the stay on further redistricting efforts and explain what must be accomplished to successfully implement a final redistricting plan for the remainder of the decade.

II. CONSTITUTIONAL BACKDROP

A. Article VI, Section 6: Substantive Standards; Gerrymandering Concerns

Article VI, section 6 sets out House and Senate district requirements.[1] A House district shall "contain a population as near as practicable" to 1/40th of the State's total population.[2] House districts must be contiguous and compact and must "contain[] as nearly as practicable a relatively integrated socio-economic area."[3] We have explained that a House district is contiguous if it is not split into separate parts.[4] But, of course: "Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain some amount

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[1] Article VI, § 4 provides for 40 House districts and 20 Senate districts composed of 2 House districts each. *Cf.* article VI, § 6 (stating that Senate district "shall be composed *as near as practicable* of two contiguous [H]ouse districts" (emphasis added)).

[2] Alaska Const. art. VI, § 6.

[3] *Id.*

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

of open sea."[5]

Compactness and socioeconomic integration are important constraints on technically contiguous House districts stretching to Alaska's distant regions.[6] A House district is more compact when its perimeter is small relative to its area;[7] although irregular shapes are expected because of Alaska's geography, oddly placed corridors and appendages are suspect.[8] Socioeconomic integration is a more nebulous concept. We have explained that, in general, the constitutional convention delegates intended House districts to group people living in neighboring areas and following "similar economic pursuits."[9] Although the Constitution uses flexible language, such as "as nearly as practicable" and "relatively," to describe the socioeconomic integration requirement, we have said that socioeconomic integration may be sacrificed "only to maximize the other constitutional requirements of contiguity and compactness."[10] A House district contained entirely within a borough by definition meets the socioeconomic integration requirement.[11] But socioeconomic integration otherwise generally requires "proof of

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[5] *Id.*

[6] *Id.* at 45-46.

[7] *Id.* at 45.

[8] *Id*. at 45-46.

[9] *Id.* at 46-47.

[10] *Id.* at 45 n.10.

[11] *In re 2001 Redistricting Cases* (*2001 Redistricting I*), 44 P.3d 141, 146 (Alaska 2002) (referring to Anchorage, a consolidated city and borough, as "by definition socio-economically integrated"); *Hickel*, 846 P.2d at 51 ("By statute, a borough must have a population which 'is interrelated and integrated as to its social, cultural, and economic activities.' " (quoting AS 29.05.031)). *Cf. id.* at 51 n.20 (stating (continued...)

actual interaction and interconnectedness rather than mere homogeneity."[12]

A "[S]enate district shall be composed as near as practicable of two contiguous [H]ouse districts,"[13] meaning that the two House districts comprising a Senate district must share a border. Compactness and relative socioeconomic integration requirements do not explicitly apply to Senate districts.[14] But local government boundaries may be given consideration when creating election districts,[15] and, when describing election district boundaries, "[d]rainage and other geographic features shall be used."[16] These factors — contiguity, adherence to local boundaries, and reliance on geographic features — reflect a desired measure of interconnectedness between the

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[11] (...continued)
that splitting "a borough which otherwise [could] support an election district will be an indication of gerrymandering . . . for not preserving the government boundaries").

[12] *Hickel*, 846 P.2d at 46 (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1363 (Alaska 1987)).

[13] Alaska Const. art. VI, § 6.

[14] *Cf. id.* (expressly requiring consideration of compactness and socioeconomic integration only for House districts); *see also Kenai Peninsula*, 743 P.2d at 1365 & n.21 (explaining, under former article VI, § 6, that "provisions of article VI, section 6 which set forth socio-economic integration, compactness and contiguity requirements are inapplicable to redistricting and reapportionment of [S]enate districts" but also noting that "[S]enate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska equal protection clause"); *Braun v. Denali Borough*, 193 P.3d 719, 730 (Alaska 2008) (noting we have declined to extend socioeconomic integration requirement to Senate districts (citing *Kenai Peninsula*, 743 P.2d at 1365)).

[15] Alaska Const. art. VI, § 6; *cf. Hickel*, 846 P.2d at 51 n.20 (stating that splitting "a borough which otherwise [could] support an election district will be an indication of gerrymandering for not preserving the government boundaries").

[16] Alaska Const. art. VI, § 6.

House districts that are combined to form a Senate district.

Ample evidence illustrates the constitutional convention delegates' intent to protect against gerrymandering when they drafted article VI, section 6.[17] As adopted, section 6 contained guiding language for constructing House districts nearly identical to its current text: "Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population at least equal to the quotient obtained by dividing the total civilian population by [40]."[18] Delegate John Hellenthal, chair of the Committee on Suffrage, Elections, and Apportionment, explained that the committee's proposed

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[17] *See generally* Gordon S. Harrison, Comment, *The Aftermath of* In Re 2001 Redistricting Cases: *The Need for a New Constitutional Scheme for Legislative Redistricting in Alaska*, 23 ALASKA L. REV. 51, 55-57 (2006) (discussing constitutional convention proceedings in which delegates explained desire to prevent gerrymandering and how proposed provisions would prevent such practices). Although the delegates usually referred to "gerrymandering" in general, without specifying concerns about partisan gerrymandering in particular, context clues discussed next plainly demonstrate that partisan gerrymandering was at the front of their minds. Furthermore, the delegates likely used "gerrymander" in accordance with its contemporaneous legal usage:

> A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish a sinister or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines . . . .

Gerrymander, BLACK'S LAW DICTIONARY (4th ed. 1951).

[18] Former Alaska Const. art. VI, § 6 (1956). In *Egan v. Hammond* we struck down the language specifying that reapportionment be based on the "civilian population," excluding military personnel as a class, under the U.S. Constitution. 502 P.2d 856, 869 (Alaska 1972).

contiguity, compactness, socioeconomic integration, and population quotient requirements acted together to "prohibit[] gerrymandering which would . . . take place were 40 districts arbitrarily set up by the [redistricting entity]."[19] As we discuss below, he expressed similar gerrymandering concerns when discussing who would apply these standards.

In *Hickel v. Southeast Conference* we expressly noted that "[t]he requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering."[20] We also pointed to both *Carpenter v. Hammond* and Black's Law Dictionary when defining gerrymandering broadly as "the dividing of an area into political units 'in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others.' "[21]

Gerrymandering often takes one of two forms, "packing" or "cracking."[22]

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[19] 3 Proceedings of the Alaska Constitutional Convention (PACC) 1846 (Jan. 11, 1956) (statement of Del. John S. Hellenthal); *see* Harrison, *supra* note 17 at 56 (providing Delegate Hellenthal's title).

[20] 846 P.2d at 45; *see also Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1367-68 (Alaska 1987) (discussing how gerrymandering that purposefully "exclude[s] a certain group from political participation" may violate right to fair and effective representation under equal protection analysis).

[21] *Hickel*, 846 P.2d at 45 & n.11 (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1220 (Alaska 1983) (Matthews, J., concurring) and citing BLACK'S LAW DICTIONARY (6th ed. 1990)). We understand the words "natural" and "unnatural" in the definitions of gerrymandering (*see* text above and *supra* note 17) to be relative terms denoting the extent to which districts comply with or depart from traditional redistricting principles such as those set out in article VI, § 6 of the Constitution.

[22] Royce Crocker, *Congressional Redistricting: An Overview*, CONGRESSIONAL RESEARCH SERVICE 15 (Nov. 21, 2012).

"Packing" occurs when groups of voters of similar expected voting behavior are unnaturally concentrated in a single district; this may create a "wasted" excess of votes that otherwise might have influenced candidate selection in one or more other districts.[23] "Cracking" occurs when like-minded voters are unnaturally divided into two or more districts; this often is done to reduce the split group's ability to elect a candidate of its choice.[24] But if a group constitutes a supermajority, splitting it into two districts also may enhance its power by enabling it to elect candidates in both districts. Another form is incumbent gerrymandering: "a redistricting plan that favors incumbents, often without regard for their partisan affiliation, and aims to maintain the status quo with respect to the parties' distribution of seats within a state and to protect incumbents."[25]

B. Article VI, Sections 3 And 8: Redistricting Entity; Gerrymandering Concerns

The Constitution originally placed redistricting powers with the governor, who was to appoint an independent advisory board to assist in the redistricting process.[26] The advisory board was to consist of five members.[27] At least one member was to be selected from each of four specified areas of the state, none could be a public employee

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[23] *Id.*

[24] *Id.* at 5, 15.

[25] *Id.* at 6.

[26] Former Alaska Const. art. VI, §§ 3, 8 (1956); *see Carpenter*, 667 P.2d at 1206 & n.1 (discussing process for 1980 redistricting cycle; noting article VI, § 3 authorizing governor to conduct redistricting and article VI, § 8 directing governor to appoint advisory redistricting board).

[27] Former Alaska Const. art. VI, § 8.

or official, and all were to be appointed "without regard to political affiliation."[28] Delegate Hellenthal explained that a governor's reliance on the advisory board's advice and compliance with article VI, section 6 would limit gerrymandering.[29] He also focused on limiting gerrymandering when discussing nuances of proposed terminology for article VI, section 8.[30] He unsuccessfully advocated for the use of the word "nonpartisan" in section 8's description of advisory board members, explaining that "the whole purpose of this article [was] to de-emphasize politics."[31] But he successfully advocated for a prohibition against board members also simultaneously serving as public officials or employees, reasoning that "a public official was too politically inclined" and that public employees "likewise would be subject to political pressures."[32]

When Delegate Hellenthall presented his committee's proposal for constitutional redistricting provisions, he said:

> [T]he goal of all apportionment plans is simple[.] [T]he goal is adequate and true representation by the people in their elected legislature[:] true, just, and fair representation. And in deciding and in weighing this plan, never lose sight of that

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[28] *Id.*

[29] 3 PACC 1846 (Jan. 11, 1956) (statement of Del. John S. Hellenthal).

[30] 3 PACC 1846 (Jan. 11, 1956) (statement of Del. John S. Hellenthal).

[31] 3 PACC 1958-60 (Jan. 12, 1956) (statement of Del. John S. Hellenthal and ensuing debate).

[32] 3 PACC 1955 (Jan. 12, 1956) (statement of Del. John S. Hellenthal); *see also* 3 PACC 1956-57 (Jan. 12, 1956) (statement of Del. Steve McCutcheon) (expressing concerns about special interest groups influencing redistricting and supporting prohibition against public officials serving as Board members because "[i]t is one small board that sits once every 10 years and certainly we should be able to find five or six people out of the whole of Alaska [who] would qualify . . . and who will be objective in their consideration").

> goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government.[33]

Delegate Hellenthall clearly believed the end result was a "modern and progressive" framework for true, just, and fair legislative representation for all Alaskans.[34] But litigation during the first three redistricting cycles after statehood[35] led to 1999 constitutional amendments removing redistricting from the governor's control and

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[33] 3 PACC 1835 (Jan. 11, 1956) (statement of Del. John S. Hellenthal).

[34] John S. Hellenthal, *Alaska's Heralded Constitution: The Forty-Ninth State Sets an Example*, 44 A.B.A. J. 1447, 1148-49 (1958) (describing one of several "modern and progressive features" of Alaska Constitution as creating "truly representative legislature" and "[a]utomatic reapportionment every ten years by the governor acting on the advice of an *independent* board" (emphasis added)).

[35] *See generally* Harrison, *supra* note 17, at 58-60 (describing redistricting litigation in 1990, 1980, and 1970 redistricting cycles when governors controlled process). As the Comment reflects, we resolved challenges in those redistricting cycles by twice agreeing with challenges (one led by future Republican Governor Jay Hammond and one by Republican Senator Cliff Groh) to Democrat Governor William Egan's redistricting efforts; agreeing with challenges to Republican Governor Jay Hammond's redistricting efforts; agreeing with challenges to Democrat Governor William Sheffield's redistricting efforts (in redistricting efforts begun by Republican Governor Jay Hammond); and agreeing with challenges to Alaskan Independence Party Governor Walter Hickel's redistricting efforts. *Id.*; *see also Hickel v. Se. Conf.*, 846 P.2d 38, 57 (Alaska 1992) (holding plan unconstitutional for several article VI, section 6 violations); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1373 (Alaska 1987) (holding Senate district unconstitutional due to discriminatory intent and disproportionality though not remanding due to de minimis effect); *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983) (holding plan unconstitutional due to record "devoid of evidence of" socioeconomic integration within the House district at issue); *Groh v. Egan*, 526 P.2d 863, 882 (Alaska 1974) (holding plan unconstitutional due to unjustifiable population variances); *Egan v. Hammond*, 502 P.2d 856, 866-68 (Alaska 1972) (same).

placing it in the hands of a constitutionally created Redistricting Board, while preserving essentially the same redistricting standards.[36] The existing board member qualifications remained,[37] but a new appointment process was put in place.[38] Appointments now are made in the following order: the governor appoints two members, the presiding officer of the Senate appoints a member, the presiding officer of the House of Representatives appoints a member, and the Chief Justice of the Alaska Supreme Court appoints the final member.[39] There must be at least one member from each of the four state judicial districts.[40] The members serve until all redistricting plan challenges have been resolved and a final redistricting plan has been implemented.[41] No member may be a legislative candidate in the general election following the final redistricting plan's implementation.[42]

Legislative history and information presented to those voting on the amendments reflect considerable focus on limiting gerrymandering. Representative

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[36] *Compare* former Alaska Const. art. VI, §§ 6, 8 (instructing governor to appoint each member of board, which serves in advisory role to governor, and to redistrict according to contiguity, compactness, socioeconomic integration, and population quotient requirements), *with* Alaska Const. art. VI, §§ 6, 8 (expanding board member appointment authority to other government officials, removing limitation that board serve in advisory capacity, and maintaining substantive redistricting requirements).

[37] Alaska Const. art. VI, § 8(a) (providing appointments shall be made without regard to political affiliation and members may not be public officials or employees while serving on board); Alaska Const. art. VI § 8(b) (providing for geographic representation).

[38] Alaska Const. art. VI, § 8(b).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Alaska Const. art. VI, § 8(c).

Brian Porter, a legislative sponsor of the constitutional amendment resolution, repeatedly emphasized the intent to have a more objective and non-partisan redistricting process.[43] Representative Jeannette James supported the goal of eliminating gerrymandering because "to make [redistricting] be an advantage for one party or the other, no matter which it is," did not serve the public.[44] Representative Ethan Berkowitz recognized the need to reduce historical gerrymandering,[45] while Representative Con Bunde also noted the judiciary's check against gerrymandering.[46] State senators similarly indicated an intent to deter partisan politics during the redistricting process,[47]

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[43] Testimony of Brian Porter, Representative, Resolution Sponsor, Tape 98-44, Side B, No. 128, Hearing on H.J.R. 44 Before Sen. Jud. Comm., 20th Leg., 2d Sess. (Apr. 29, 1998); Testimony of Brian Porter, Representative, Resolution Sponsor, Tape 98-49, Side B at 1:14:58-15:17, 1:19:31-20:24, Hearing on H.J.R. 44 Before the H. Fin. Comm., 20th Leg., 2d Sess. (Mar. 3, 1998).

[44] Comment of Jeannette James, Representative, Tape 98-12, Side A, No. 1669, Hearing on H.J.R. 44 Before the H. Jud. Comm., 20th Leg., 2d Sess. (Feb. 6, 1998).

[45] Statement of Ethan Berkowitz, Representative, Tape 98-15, Side A, No. 2326, Hearing on H.J.R. 44 Before the H. Jud. Comm., 20th Leg., 2d Sess. (Feb. 11, 1998).

[46] Statement of Con Bunde, Representative, Vice Chairman, Tape 98-15, Side B, No. 241 at 53:25-54:05, Hearing on H.J.R. 44 Before the H. Jud. Comm., 20th Leg., 2d Sess. (Feb. 11, 1998).

[47] Senator Drue Pearce suggested support for an earlier draft amendment under which the Board would have been appointed entirely by supreme court justices, keeping elected officials completely out of the process. Comment of Drue Pearce, Senator, Tape 98-161, Side A, Hearing on H.J.R. 44 Before the Sen. Fin. Comm., 20th Leg., 2d Sess. (May 8, 1998). Responding to critiques from a Department of Law representative that Board appointments by the governor "provide[d] an important safety valve" that would "protect the interest of the people," Senator Sean Parnell insisted that (continued...)

and a formal legislative analysis referred to avoiding partisan political influence on redistricting as the amendments' reason and intent.[48] To the extent we can determine the voters' intent when approving the 1999 amendments,[49] both proponents and opponents of the amendments believed their positions limited gerrymandering.[50]

C. Related Constitutional Provisions And Concerns

1. Equal protection

The United States and Alaska Constitutions guarantee equal protection

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[47] (...continued)
the pre-amendment system was the most partisan option and that the courts were the true safety valve. Comment of Sean Parnell, Senator, Tape 161, Side A, Hearing on H.J.R. 44 Before the Sen. Fin. Comm., 20th Leg., 2d Sess. (May 8, 1998).

[48] *See* H. Jud. Comm., Sectional Analysis of Proposed H.J.R. 44, 20th Leg., 2d Sess. at 1 (Feb. 4, 1998) (explaining changes to board selection process as "intended to remove reapportionment and redistricting as far as possible from the partisan political arena").

[49] *See Wielechowski v. State*, 403 P.3d 1141, 1150 (Alaska 2017) (looking to "any published arguments . . . to determine what meaning voters may have attached to the [proposed constitutional amendment]," including ballot initiative language, news articles, and sponsor statements (alterations in original) (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007))).

[50] The statement supporting the amendments, advocated by Representatives Brian S. Porter and Eldon Mulder, criticized the former redistricting procedure and plans for "being partisan and gerrymandered rather than creating redistricting plans based on bipartisan fairness and objectivity." *State of Alaska Official Election Pamphlet* 100 (Region III ed., Nov. 3, 1998). Amendment opponents represented by Deborah Bonito, then-Chair of the Alaska Democratic Party, were concerned that the amendment would "allow[] legislators to be directly involved in who determines the legislative lines they are subject to" and reduce the role of the governor, "Alaska's only elected official without a direct interest in the shape of individual election districts." *Id.* at 100-01.

under the law.[51] "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."[52] Fair representation, although "not a fundamental right, . . . represent[s] a significant constitutional interest."[53] We have explained that, unlike the "quantitative" one person, one vote inquiry, the fair representation question is "qualitative" and "more nebulous."[54] But Alaska's fair representation standard is stricter than the federal standard because Alaska's equal protection clause requires a more demanding review than its federal analog.[55]

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[51] U.S. Const. amend. XIV, § 1; Alaska Const. art. I, § 1.

[52] *Hickel v. Se. Conf.*, 846 P.2d 38, 47 (Alaska 1992) (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366 (Alaska 1987)).

[53] *Kenai Peninsula*, 743 P.2d at 1372.

[54] *Hickel*, 846 P.2d at 47, 48-49.

[55] *Braun v. Denali Borough*, 193 P.3d 719, 731 (Alaska 2008) ("In the context of reapportionment cases, the Alaska Constitution's equal protection standard is stricter than its federal counterpart."); *Hickel*, 846 P.2d at 49 ("The equal protection clause of the Alaska Constitution imposes a more strict standard than its federal counterpart."); *see also Ross v. State, Dep't of Revenue*, 292 P.3d 906, 910-11 (Alaska 2012) (explaining that Alaska's equal protection clause is "more demanding" than its federal counterpart); *Kenai Peninsula*, 743 P.2d at 1371 (explaining that when "no fundamental right [is] at stake, the equal protection clause of the Alaska Constitution imposes a stricter standard than its federal counterpart").

A redistricting plan satisfying Alaska's more stringent requirements thus likely survives federal scrutiny; a plan failing to meet Alaska's requirements is invalid regardless of federal law. *Cf. Ross*, 292 P.3d at 910-11 (explaining that, because of "more demanding" standards, "if [a] rule does not violate Alaska's Equal Protection (continued...)

In *Kenai Peninsula Borough v. State* we set out the controlling three-step equal protection analysis in redistricting, requiring an inquiry into and a balancing of competing voter and state interests.[56] First, what is the nature of the individual's constitutional interest at stake and what weight should it be given?[57] Second, what is the purpose of the state action and, to counterbalance the weight given to the individual's interest, what level of importance must it have?[58] Third, assuming the state action has a proper purpose, how close must the relationship be between the state's purpose and its chosen means?[59] Nonetheless, if the purpose is intended discrimination against a class of voters, the purpose will be considered illegitimate without needing to ask about the relationship between purpose and efficacy; an equal protection violation will be established absent a demonstration that a greater proportionality of representation will result from its action.[60]

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[55] (...continued)
Clause, it does not violate the federal Equal Protection Clause").

[56] 743 P.2d at 1371; *see also Braun*, 193 P.3d at 731.

[57] *Kenai Peninsula*, 743 P.2d at 1371 (stating that nature of interest is most important variable and that primacy of interest fixes review level and burden state has to justify action).

[58] *Id.* (stating that, depending on review level, state purpose ranges from legitimate objective (low end) to compelling state interest (high end)).

[59] *Id.* (stating that, depending on review level, fit between state's means and ends ranges from substantial relationship (low end) to close fit (high end) and that purpose must be implemented with least restrictive alternative).

[60] *Id.* at 1372; *Braun*, 193 P.3d at 731 (summarizing *Kenai Peninsula* holding). To the extent that *Braun*, *id.*, and *2001 Redistricting 1*, 44 P.2d 141, 144 (Alaska 2002), might suggest that intentional discrimination is a required element of an equal protection claim in the redistricting context, we disavow that language.

When determining whether a Board has discriminatory intent, courts should look to the "totality of the circumstances," including the Board's process and the substance of its decision.[61] As we explained in *Kenai Peninsula*:

> Wholesale exclusion of any geographic area from the reapportionment process and the use of any secretive procedures suggest an illegitimate purpose. District boundaries which meander and selectively ignore political subdivisions and communities of interest, and evidence of regional partisanship are also suggestive. The presentation of evidence that indicates, when considered with the totality of the circumstances, that the Board acted intentionally to discriminate against the voters of a geographic area will serve to compel the Board to demonstrate that its acts aimed to effectuate proportional representation.[62]

Districts drawn with an illegitimate purpose are unconstitutional even if the negative effect on proportional representation is slight,[63] but the harm's extent becomes more relevant when fashioning a remedy.[64] For example, in *Kenai Peninsula* we granted declaratory relief, as opposed to requiring the Board to redraw the challenged district, because the disproportionate representation was de minimis.[65]

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[61] *Kenai Peninsula*, 743 P.2d at 1372.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1373 ("[T]he degree of disproportionality will be considered in determining the appropriate relief to be granted.").

[65] *Id.*

2. Due process

The Alaska Constitution mandates that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[66] Due process has both a procedural and a substantive component.[67] Procedural due process "requires that adequate and fair procedures be employed when state action threatens protected life, liberty, or property interests."[68] "At a minimum, due process requires that the parties receive notice and an opportunity to be heard."[69] "Substantive due process is a doctrine that is meant to guard against unfair, irrational, or arbitrary state conduct that 'shock[s] the universal sense of justice.' "[70] As the superior court pointed out, courts in other jurisdictions have found due process violations if state action "seriously undermine[s] the fundamental fairness of the electoral process."[71]

We have not previously explored how the due process clause may apply to redistricting challenges,[72] but due process issues are raised tangentially in the matters before us. We note these issues when relevant, but, as we will explain, we see no need to delve into them at this time.

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[66] Alaska Const. art. I, § 7.

[67] *Doe v. State, Dep't of Pub. Safety*, 444 P.3d 116, 124-25 (Alaska 2019).

[68] *Id.* at 124.

[69] *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008).

[70] *Doe*, 444 P.3d at 125 (alteration in original) (quoting *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999)).

[71] *See, e.g.*, *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981).

[72] *Cf. 2001 Redistricting I*, 44 P.3d 141, 147 (Alaska 2002) (holding only that challengers' due process claims "ha[d] no merit").

3. The "*Hickel* Process" and the Voting Rights Act

The federal Voting Rights Act (VRA) — intended to protect the voting power of racial minorities — applies to state redistricting.[73] "Under section 5 of the [VRA], a reapportionment plan is invalid if it 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' "[74] We have noted that a "state may constitutionally reapportion districts to enhance the voting strength of minorities in order to facilitate compliance with the [VRA]."[75]

In *Hickel* we issued a remand order directing the Board to follow an order of priorities relating to redistricting affected by the VRA:

> Priority must be given first to the Federal Constitution, second to the federal [VRA], and third to the requirements of article VI, section 6 of the Alaska Constitution. The requirements of article VI, section 6 shall receive priority *inter se* in the following order: (1) contiguousness and compactness, (2) relative socioeconomic integration, (3) consideration of local government boundaries, [and] (4) use of drainage and other geographic features in describing boundaries.[76]

But we cautioned that "[t]he [VRA] need not be elevated in stature so that

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[73] *Hickel v. Se. Conf.*, 846 P.2d 38, 49 (Alaska 1992); 52 U.S.C. §§ 10301-508.

[74] *Hickel*, 846 P.2d at 49 (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987)).

[75] *Id.* at 49-50 (quoting *Kenai Peninsula*, 743 P.2d at 1361).

[76] *Id.* at 62.

the requirements of the Alaska Constitution are unnecessarily compromised."[77] We later clarified:

> 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 integration; it may consider local government boundaries and should use drainage and other geographic features in describing boundaries wherever possible. Once such a plan is drawn, the Board must determine whether it complies with the [VRA] and, to the extent it is noncompliant, make revisions that deviate from the Alaska Constitution when deviation is "the only means available to satisfy [VRA] requirements."[78]

We also noted United States Supreme Court decisions subsequent to *Hickel* "establish[ing] that under the [VRA], a jurisdiction cannot unnecessarily depart from traditional redistricting principles to draw districts using race as 'the predominant, overriding factor.' "[79] We observed that "[f]ollowing the *Hickel* process will facilitate compliance with federal constitutional law by ensuring that traditional redistricting principles are not 'subordinated to race.' "[80]

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[77] *Id.* at 51 n.22.

[78] *In re 2011 Redistricting Cases* (*2011 Redistricting I*), 274 P.3d 466, 467-68 (Alaska 2012) (quoting *Hickel*, 846 P.2d at 51 n.22).

[79] *Id.* at 468 (footnote omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)).

[80] *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996)).

The Board's compliance with the *Hickel* process is challenged in the matters before us.

D. Article VI, Section 10: Redistricting Process

Article VI, section 10(b) requires a majority vote of the Board to approve a redistricting plan.[81] Section 10(a) outlines an expedited procedure the Board must follow when crafting a redistricting plan:

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

We have yet to construe several portions of section 10. We have not previously decided whether a "proposed redistricting plan" includes both House and Senate districts. We also have not previously decided whether the public hearings requirement applies to all plans put forward by the Board or only those promulgated within the initial 30 days.[82] And we have not previously determined whether a plan

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[81] Alaska Const. art. VI, § 10(b).

[82] We have characterized section 10's public hearings requirement as:

> Under article VI, section 10 of the Alaska Constitution, the Alaska Redistricting Board . . . must adopt one or more

(continued...)

drafted by a third party and offered for public comment counts for the 30-day deadline's purposes. These questions are before us now.

E. Article VI, Section 11: Plan Challenges

Article VI, section 11 gives "[a]ny qualified voter" the right to challenge the Board's final redistricting plan or compel the Board to perform its duties.[83] Original jurisdiction for such challenges lies with the superior court.[84] Appellate jurisdiction rests with this court, and we must review the case "on the law and the facts."[85] We review redistricting plans "de novo upon the record developed in the superior court,"[86] but, as in other matters, we afford some deference to the superior court's findings when it was "in the best position to decide the issue," such as for witness credibility.[87]

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[82] (...continued)
proposed redistricting plans within 30 days after receiving official census data from the federal government. The Board must then hold public hearings on the proposed plans and adopt a final plan within 90 days of the census reporting.

In re 2011 Redistricting Cases (*2011 Redistricting III*), 294 P.3d 1032, 1033 (Alaska 2012). Although not based on any holding, this characterization implies that the public hearings requirement applies only to plans proposed within the 30-day window.

[83] Alaska Const. art. VI, § 11.

[84] *Id.*

[85] *Id*.

[86] *Groh v. Egan*, 526 P.2d 863, 867 (Alaska 1974).

[87] *See In re Hospitalization of Lucy G.*, 448 P.3d 868, 877-78 (Alaska 2019) (explaining that involuntary commitment and medication proceedings warrant clear error review of factual findings but independent review of superior court's decisions based on those factual findings); *Miller v. Fenton*, 474 U.S. 104, 114-15 (1985) (discussing situations, such as evaluating witness credibility, in which appellate court should defer (continued...)

Courts review Board redistricting plans as if they were "a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations[:] . . . first to ensure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary."[88] Determining whether a regulation is reasonable primarily concerns whether "the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making."[89] "[W]e always have authority to review the constitutionality of the action taken, but we . . . may not substitute [our] judgment as to the sagacity of a regulation for that of the administrative agency."[90] Similarly we do not substitute our judgment as to the sagacity of a redistricting map

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[87] (...continued)
to trial court's application of law to fact); HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 24 (3d ed. 2018) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982)).

[88] *Groh*, 526 P.2d at 866; *see also 2011 Redistricting III*, 294 P.3d at 1037. In *Groh* we justified this deferential standard of review to the Board based on the contemporary constitutional mandate that the executive branch was in charge of reapportionment. *See* 526 P.2d at 866. We have not yet considered the deference due a Board's decisions in light of the 1999 constitutional amendments, instead citing earlier cases for justification that the Board is treated the same as an administrative agency. *See, e.g.*, *2011 Redistricting III*, 294 P.3d at 1037 & nn.16-19. Although the justification for deferring to the Board's decision no longer is the same, we still treat the Board as an administrative agency and afford it a more deferential standard of review given that its decision-making power is constitutionally vested, although it is unclear whether the Board has any particular "expertise" beyond its initial training sessions for appointed members.

[89] *2001 Redistricting I*, 44 P.3d 141, 143 n.5 (Alaska 2002) (quoting *Interior Alaska Airboat Ass'n v. State, Bd. of Game*, 18 P.3d 686, 690 (Alaska 2001)).

[90] *Groh*, 526 P.2d at 866-67.

adopted by the Board.

III. 2021 REDISTRICTING PROCESS ROUND 1: BOARD'S FINAL PLAN; SUPERIOR COURT'S DECISION; PETITIONS FOR REVIEW

A. Board Proceedings

The Board's five members were appointed in July and August 2020. Governor Mike Dunleavy appointed Budd Simpson (from Juneau, First Judicial District) and Bethany Marcum (from Anchorage, Third Judicial District); Senate President Cathy Giessel appointed John Binkley (from Fairbanks, Fourth Judicial District); House Speaker Bryce Edgmon appointed Nicole Borromeo (from Anchorage, Third Judicial District); and Chief Justice Joel Bolger appointed Melanie Bahnke (from Nome, Second Judicial District). The members elected Binkley as Board Chair.

The Board first met in September 2020, and it met numerous times through July 2021 for "organizational work, procurement, training and planning." Among other things, the Board selected an executive director, adopted policies, interviewed and selected legal counsel, hired a VRA consultant, received training on the redistricting software, and attended the National Conference of State Legislatures "Ready to Redistrict" conference.

On August 12 the United States Census Bureau reported the 2020 census results to Alaska. The Board then had until September 11 to "adopt one or more proposed redistricting plans" for public hearings and until November 10 to adopt a final plan.[91] The Board held meetings and took public testimony August 23-24 and September 7-9. On September 9 — within the required 30-day period — the Board adopted two proposed redistricting plans with 40 House districts, but no Senate district

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[91] Alaska Const. art. VI, § 10(a) (requiring Board to adopt one or more proposed redistricting plans within 30 days of receiving official census information; to hold public hearings; and to adopt final plan within 90 days).

pairings. On September 20 — after the initial 30-day period — the Board adopted updated versions of the first two plans, as well as four third-party plans. The Board then took the six adopted plans on a "road show" from September 27 to November 1, holding public hearings throughout Alaska. These hearings included some testimony about possible Senate district pairings.

The Board reconvened in Anchorage November 2-5. On November 5 the Board voted 4-1 (with Member Marcum disagreeing) to approve the final House redistricting map. On November 8 the Board began working on Senate district pairings, and took two hours of public testimony. On November 9 the Board exited an executive session and without meaningful discussion immediately adopted, by a 3-2 vote with Board Members Bahnke and Borromeo disagreeing, a number of Senate pairings, including pairing House Districts 21 and 22 to create Senate District K. On November 10 the Board adopted its final state-wide redistricting plan; Board Members Binkley, Marcum, and Simpson signed in support and Board Members Bahnke and Borromeo signed in opposition.

B. Superior Court Proceedings

Five separate challenges to the Board's plan were filed in superior court and consolidated into one case. The challengers included: (1) Matanuska-Susitna Borough (Mat-Su Borough) and voter Michael Brown (collectively Mat-Su); (2) City of Valdez and voter Mark Detter (collectively Valdez); (3) Municipality of Skagway Borough and voter Brad Ryan (collectively Skagway); (4) East Anchorage voters Felisa Wilson, George Martinez, and Yarrow Silvers (collectively East Anchorage); and (5) Calista Corporation, William Naneng, and Harley Sundown (collectively Calista). The superior court also heard from several intervenors: Doyon, Limited; Tanana Chiefs Conference; Fairbanks Native Association; Ahtna, Inc.; Sealaska Corporation; Donald Charlie, Sr.; Rhonda Pitka; Cherise Beatus; and Gordon Carlson. Participating jointly as amici curiae

were Alaska Black Caucus; National Association for the Advancement of Colored People Anchorage, Alaska Branch #1000; Enclaces; Korean American Community of Anchorage, Inc.; Native Movement; and First Alaskans Institute. We refer to this group as "amici curiae Alaska Black Caucus."

The superior court conducted a 12-day bench trial starting January 21, 2022. Pretrial proceedings took place on a highly condensed schedule: The parties took depositions of Board members and other witnesses and filed direct testimony by depositions and affidavits in advance of trial. Cross-examination and redirect testimony were permitted at the trial.

The superior court issued its decision on February 15, making the following legal conclusions and remanding to the Board to remedy deficiencies in the final plan:

> 1. The Board violated the rights of the East Anchorage Plaintiffs under the Equal Protection Clause of the Alaska Constitution . . . by pairing House District 21-South Muldoon with the geographically and demographically distinct House District 22-Eagle River Valley to create Senate District K.
>
> 2. The Board violated the rights of the East Anchorage and Skagway Plaintiffs under the Due [Process] Clause of the Alaska Constitution . . . by failing to take a "hard look" at House District 3 and Senate District K in light of the clear weight of public testimony.
>
> 3. The Board violated Article VI, Section 10 by failing to hold meaningful public hearings on proposed Senate Districts prior to adoption.
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> 4. The Board violated Article VI, Section 10 by failing to include Senate District pairings in any proposed plan adopted before the 30-day constitutional deadline.
>
> 5. The Board violated Article VI, Section 10 by failing to make a good-faith effort to accommodate public testimony in regard to House District 3 and Senate

District K.

6. The Board violated the Open Meetings Act . . . in its improper use of executive session, but the violation does not, on balance, require the Court to void all actions taken by the Board in executive sessions.

7. In all other respects, the Board did not violate the Plaintiffs' rights under Article I, Sections 1 and 7, or Article VI, Sections 6 and 10.

This matter should be remanded to the Board to address the deficiencies in the Board plan consistent with this order.

C. Petitions For Review

The Board, Skagway, Mat-Su, and Valdez petitioned for our review of portions of the superior court's decision.[92] We granted review, later issuing a summary order resolving the petitions and noting that a full explanation would follow.[93]

1. The Board's petition

The Board's petition focuses on East Anchorage's successful challenge to Senate District K and on Skagway's successful challenge to House Districts 3 and 4. The Board contends that its mapping of House Districts 3 and 4 and Senate District K did not violate article VI, section 10 and that the superior court's textual interpretation of section 10 and reasoning by analogy to federal administrative procedures law were erroneous. The Board adds that Senate District K did not discriminate against distinct communities of interest in East Anchorage and thus did not violate the right to fair representation under Alaska's equal protection law. The Board further argues that it did

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[92] *See* Alaska R. App. P. 216.5(h) (providing for immediate petition for review to supreme court of superior court decision remanding to Board).

[93] We attach as Appendix A copies of relevant election district maps the Board published with its November 2021 redistricting proclamation. Our earlier summary order resolving the petitions for review is attached as Appendix B.

not violate the Open Meetings Act; that, even if it did, a waiver of attorney-client privilege is not an appropriate remedy for violations of the Act; and that the superior court erred in its handling of the Board's discovery requests and proposed witness testimony.

2. Skagway's petition

Skagway contends that, although the superior court correctly invalidated House Districts 3 and 4 on due process grounds, the court also should have invalidated the districts for violating article VI, section 6's socioeconomic integration requirement. Skagway also contends the superior court erred by concluding that the Board followed the *Hickel* process and by not addressing Skagway's equal protection argument.

3. Mat-Su's and Valdez's petitions

Mat-Su and Valdez primarily challenge the superior court's determinations that House Districts 29 and 36 satisfy Alaska's constitutional requirements. They contend that the superior court erred when it concluded the Board had followed the *Hickel* process, the Board's Open Meeting Act violations did not justify voiding any action taken, and the Board gave salient issues a "hard look" when creating the House district combining portions of the Mat-Su Borough and the Valdez area.

IV. RESOLUTION OF ROUND 1 PETITIONS FOR REVIEW

A. Common Issues

1. The superior court did not err when it concluded that the Board sufficiently followed the *Hickel* Process.

Not long after receiving the 2020 census data in mid-August 2021 the Board held a mapping work session, and the members learned that the mapping software could display race data. Although Board members clearly were interested in how race data changed based on district boundary lines, they made comments reflecting an understanding that race data and VRA requirements should not be considered until later

in the process. At this work session Member Bahnke drew what would become House Districts 37, 38, 39, and 40, covering much of Alaska; as she drew the districts, she nonetheless asked about certain race data.

On September 8 the Board orally affirmed that it would proceed without the race data being visible on the districting software. On September 9 the Board adopted two proposed redistricting plans, "Board Composite v.1" and "Board Composite v.2." Member Bahnke requested that the Board engage with its VRA expert "as soon as practicable" after adopting the proposed plans, "at least to look at what [has been] developed." House Districts 37, 38, 39, and 40 — referred to as early as November 2 as the "VRA Districts" by the Board — did not significantly change between September 9 and the final redistricting plan adopted in November.

From September 17 to 20 the Board took public testimony, replaced Composites v.1 and v.2 with Composites v.3 and v.4, and adopted four third-party plans for consideration. It then embarked on its public hearing road show from September 27 to November 1. After the road show the Board received a VRA compliance report. The report found that Districts 37, 38, 39, and 40 complied with the VRA. It also noted that because three of these four districts "experienced population growth which outpaced increases in the overall state population," the Board was able "to draw compact, contiguous districts which retain[ed] existing socio-economic integration while retaining core constituencies." The Board then adopted the final House districts map on November 5.

At trial challengers contended that the Board "locked in" Districts 37, 38, 39, and 40 as "VRA Districts" at an early stage of the process, violating the *Hickel* process. They argued that, having done so without entertaining modifications, the Valdez area was paired with portions of the Mat-Su Borough because the Board no longer had anywhere else to put the Valdez area.

The superior court found:

> The transcripts and videos of public Board meetings make it abundantly clear that Board Members were actively considering VRA-related issues since the beginning of the process. And the fact that all four of the Board's proposed plans contained identical versions of Districts 37, 38, 39, and 40 also creates a strong inference that the Board never truly considered available alternatives.

The superior court particularly noted that there were "very few changes to the so-called VRA districts throughout the entire process"; that "the Board [was] made aware of past VRA districts and requirements"; that "it was capable of viewing and had racial data displayed during several public work sessions in August and September"; that Member Bankhe made comments "throughout the redistricting process evidenc[ing] a strong preoccupation with both VRA requirements and the percentage of Alaska Natives in rural areas"; and that "by early September, the Board was requesting its VRA consultants to analyze the proposed plans 'as soon as practicable.' "

Despite these findings the superior court ultimately determined that the Board sufficiently followed the *Hickel* process, and the court declined to grant relief on the basis of any deviations. The court discussed how the Board clearly would have violated the *Hickel* process if it meant "that the Board can never consider VRA implications prior to adoption of the final house plan." But the court ultimately interpreted *Hickel* and our subsequent case law to mean that the Board may take "VRA requirements into account during the final stretch of the redistricting process" and that the Board sufficiently complied with the *Hickel* process.

Mat-Su, Skagway, and Valdez contend the superior court erred when it determined that the Board sufficiently followed the *Hickel* process. The Board responds that it completed "all of its proposed plans without analyzing or applying the VRA, or even considering racial data . . . until the proposed plans were set." Disputing the

assertion that "VRA Districts" were locked in, the Board points to the superior court's observation that House Districts 37, 38, and 39 were modified up until the last day.

Whether the Board violated the *Hickel* process is much less obvious in the matters now before us compared with *Hickel* or the 2011 redistricting cases. The Board clearly was aware of race data at the start, but we agree with the superior court that this seemed to be a part of learning "the basics of the redistricting process and how to use the districting software." Referring to these districts as "VRA districts" early in the process also seems reasonable given their historic consideration under the VRA,[94] and it would not necessarily mean that these districts were drawn with the VRA in mind during the redistricting process. We agree with the superior court that, given *Hickel*'s avoidance of the constitutional language of "proposed" and "final" plans, the Board is not required to save VRA considerations until the very end of the 90-day period for adopting a final redistricting plan.[95] Designing a proposed plan without specific attempts to meet VRA requirements and then submitting it to VRA experts, regardless of where the Board is in its timeline for adopting a final plan, satisfies the *Hickel* process.

We thus affirm the superior court's conclusion that the Board sufficiently complied with the *Hickel* process.

2. The superior court did not err by concluding that it was not in the public's best interest to vacate Board actions resulting from Open Meetings Act violations.

Many times throughout its work the Board met in executive session under

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[94] *See 2011 Redistricting III*, 294 P.3d 1032, 1035-36 (Alaska 2012) (identifying 2011 VRA regions that are similar to those identified in 2021).

[95] *See Hickel v. Se. Conf.*, 846 P.2d 38, 51 n.22 (Alaska 1992).

the Open Meetings Act (OMA),[96] and the Board's executive sessions were a significant issue at trial. The executive sessions were particularly problematic because they hindered the superior court's ability to review the Board's actions.

Toward the end of the Board's November 3 meeting, the members discussed the Valdez area's House district placement. The Board appears to have been deciding between pairing the Valdez area with portions of the Mat-Su Borough or with some Prince William Sound communities. Several members opined that an executive session might be necessary to discuss legal issues about pairing the Valdez area with portions of the Mat-Su Borough. The Board took a short break; immediately upon return Member Simpson moved to enter into executive session "under AS 44.62.310(c), subsections (3) and (4)," without further specification.[97] The executive session lasted

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[96] The OMA, instructing governmental bodies to make meetings open to the public, applies to "[a]ll meetings of a governmental body of a public entity of the state." AS 44.62.310(a). The OMA is meant to maintain open deliberations, prevent governmental agencies from deciding "what is good for the people to know and what is not good for them to know," and protect "the people's right to remain informed . . . so that they may retain control over the instruments they have created." AS 44.62.312. Consideration of matters required by law to be kept confidential or matters "not subject to public disclosure" need not be open to the public and can instead be "discussed at a meeting in executive session." AS 44.62.310(b), (c)(3), (c)(4). The OMA's remedy for executive sessions held contrary to the statutory terms is that, subject to a lawsuit, the hidden action is voidable but can be cured by "conducting a substantial and public reconsideration of the matters considered at the original meeting." AS 44.62.310(f).

[97] *Cf.* AS 44.62.310(b) ("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 the executive session unless auxiliary to the main question."). As the superior court noted, vague motions to enter into executive session hinder the ability to determine "whether a particular executive session was held in accordance with the law." We are unable to (continued...)

through the end of the day's meeting. That evening Member Borromeo sent text messages to two individuals asking for case law supporting a pairing of the Valdez area and portions of the Mat-Su Borough.

November 4 was a full-day mapping work session. The Board reviewed a map pairing the Valdez area with portions of the Mat-Su Borough. Board members discussed that the pairing was socioeconomically integrated and compact and that the Board's legal counsel had advised them there was historical precedent for the pairing. There was no further discussion of pairing the Valdez area with Prince William Sound communities. When Member Marcum suggested that the Board reconsider, Member Borromeo explained that three Board members were not willing to place the Valdez area in "the Interior" House district and that the Anchorage area apparently was not a viable pairing option due to other constitutional concerns. The Board eventually agreed that Member Marcum could propose pairing the Valdez area and the Anchorage area.

On November 5 the Board entered into executive session twice. After Member Simpson mentioned "a Voting Rights issue" he moved to enter into executive session "for the purpose of receiving legal advice . . . under AS 44.62.310, involving matters which by law or ordinance are required to be confidential, and matters involving consideration of government records that by law are not subject to public disclosure."[98] The Board returned from executive session and entered a mapping work session. Member Marcum mentioned that, despite public testimony demonstrating Valdez area

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[97] (...continued)
discern how these allowances for executive session applied to the Board's discussion about pairing the Valdez area with portions of the Mat-Su Borough.

[98] We are unable to discern how these allowances for executive session applied to the Board's discussion about pairing the Valdez area with portions of the Mat-Su Borough.

voters and Mat-Su Borough voters did not want to be paired together, after consulting with legal counsel the pairing appeared to be the only available option. Following more public testimony, Member Bahnke suggested that the Board enter into executive session for legal advice on the "whole new map that [was] on the table for consideration." Member Borromeo moved to enter into executive session under AS 44.62.310(c)(3) and (4), again without offering an explanation beyond the statutory language;[99] the motion passed. When the Board exited executive session it appeared to have narrowed its choices to two maps, both pairing the Valdez area with portions of the Mat-Su Borough. The Board ultimately voted and approved a final House district map with that pairing.

On November 8, when the Board began work on Senate district pairings, it took two hours of public testimony before entering into executive session. This was the only public testimony taken specifically for Senate district pairings, and residents from both Anchorage and Eagle River tended to support pairing the North and South Muldoon House districts together and the North and South Eagle River House districts together. The Board entered into executive session to "speak with [its] legal counsel and voting rights consultant" upon a motion by Member Borromeo citing "legal and other . . . purposes relating to receiving legal counsel."[100]

After the executive session ended, the Board conducted a work session for over three hours. During the work session Member Bahnke "strongly" recommended pairing the Eagle River House districts together, but Member Marcum stated there was a "socioeconomic connection between [Joint Base Elmendorf - Richardson (JBER)] and

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[99] We are unable to discern how these allowances for executive session applied to the Board's discussion about pairing the Valdez area with portions of the Mat-Su Borough.

[100] We are unable to discern how this topic fit within the statutory allowances for executive session.

[North] Eagle River" and said their two House districts should be paired together. The Board ended the day with an executive session, apparently seeking legal advice on the Senate district pairings.[101]

When the Board reconvened on November 9 it continued in executive session. The Board then resumed public session, and without any substantive discussion on the record, Member Marcum moved that the Board combine the South Eagle River House district with the South Muldoon House district to make up Senate District K. Members Binkley, Marcum, and Simpson voted in favor, with Members Bahnke and Borromeo opposed.

The propriety of the Board's various executive sessions first came before us in January 2022 after challengers asked the superior court to conduct a private review of certain Board communications, contending that "the Board [had] improperly utilized executive sessions to conduct what should have been public deliberations." The superior court found that the challengers had a reasonable basis to believe that in camera review[102] may show that some of the documents might not be subject to the attorney-client

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[101] We are unable to discern how this topic fit within the statutory allowances for executive session.

[102] When a party asserts that a requested document or communication is privileged, the superior court may privately review evidence "to determine the applicability of the" asserted privilege only upon " 'a showing of a factual basis adequate to support a good faith belief by a reasonable person,' . . . that in camera review of the materials may reveal evidence to establish" whether the asserted privilege applies. *Cent. Constr. Co. v. Home Indem. Co.*, 794 P.2d 595, 598-99 (Alaska 1990) (omission in original) (quoting *United States v. Zolin*, 491 U.S. 554, 572 (1989)).

privilege[103] due to the interplay of the OMA, the Public Records Act[104] and the appearance of the Board utilizing executive sessions to obtain general redistricting legal advice rather than specific litigation advice. Shortly before trial began, the superior court ordered a private review of some documents the Board had claimed were privileged.

The Board filed an emergency petition for review, asking us to decide that the order for in camera review would violate its privilege rights and that the OMA neither applies to the Board nor provides for in camera review of otherwise privileged documents as a remedy for violation. We denied the petition for review. Although the superior court ultimately determined that most of the documents were privileged, it ordered a few "be produced over the Board's objection." The superior court explained in its February 15 decision that it would have ordered production of additional documents regarding whether "discussions held during executive session" violated the OMA but that the violations did not appear to be in bad faith and the current state of the law made it unclear whether doing so was an available remedy.

In its February 15 decision the superior court additionally determined that the Board likely violated the OMA when "at least three Board members reached a 'consensus' outside of the public view" regarding Senate District K.[105] But because the

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[103] *See* Alaska R. Evid. 503 (establishing scope of lawyer-client privilege).

[104] *See* AS 40.25.120 (affording right to every person "to inspect a public record in the state" subject to specific exceptions).

[105] The court found the Board also violated procedural requirements under the OMA when the Board convened executive sessions "following a vague motion which did not specify the meeting's subject." Although stating that these violations "harm[] the public confidence in public entities generally and more importantly in the highly visible and consequential redistricting process," the superior court concluded that they did not, on balance, "outweigh the harm that would be caused were [it] to void the Senate (continued...)

Board publicly voted to adopt Senate District K, the court concluded that it was not a voidable action. The court noted that it had struggled to discern the extent to which the Board conducted executive session for inappropriate reasons. The court also suggested that an "appropriate remedy for violation of the OMA would include opening the door to discussions held during executive session, regardless of the presence of an attorney" in light of the "strong public policy in favor of open government."

a. The Board's OMA arguments

The Board challenges the superior court's determination that the Board engaged in "secret deliberations on senate pairings" and the superior court's suggestion that improperly entering into executive sessions might waive the attorney-client privilege. Unlike the Board's position in the superior court, the Board does not now assert that it is exempt from the OMA.[106] Because the superior court did not invalidate

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[105] (...continued)
pairings on that basis alone."

[106] The OMA's plain language seems to support the superior court's conclusion that the OMA applies to the Board. Subject to certain exceptions not relevant here, the OMA applies to "[a]ll meetings of a governmental body of a public entity of the state," and "governmental body" is defined broadly to mean: "[A]n assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity." AS 44.62.310(a), (h)(1). Prior to the 1999 constitutional amendments creating the independent redistricting board, we held that the governor's advisory board was subject to the OMA. *See Hickel v. Se. Conf.*, 846 P.2d 38, 57 (Alaska 1992). And in *2001 Redistricting I* we reviewed the Board's alleged OMA violations without reconsidering whether it still applied in light of the 1999 amendments changing Board appointment procedure. 44 P.3d 141, 147 (Alaska 2002). The OMA is unenforceable against the legislative and judicial branches of government. *See Abood v. League of Women Voters*, 743 P.2d 333, 337-40 (Alaska 1987) (holding that whether OMA applied to legislature was nonjusticiable issue because "[t]he Alaska Constitution expressly commits to the legislature authority to adopt its own rules of procedure" and that whether to conduct business "in open or closed sessions is (continued...)

Senate District K due to OMA violations and because we view the alleged abuse of executive session as more pertinent to the superior court's blended due process and "hard look" analysis we address later, we focus solely on the superior court's suggested remedy that OMA violations might act to waive the Board's attorney-client privilege in some situations. We address this issue because of the Board's continuing work.

The Board contends that the only remedy for an OMA violation is voiding the action wrongfully taken in executive session, not "abrogat[ing] the government's attorney-client privilege." We agree with the Board that the only remedy for an action taken during an OMA violation is voiding the action, "if the court finds that, considering all of the circumstances, the public interest in compliance with [the OMA] outweighs the harm that would be caused to the public interest and to the public entity by voiding the action."[107] But we also recognize that the OMA reflects a body of law distinct from the law of privilege[108] and that matters discussed during an executive session are not automatically privileged merely because an attorney for the governing body is present

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[106] (...continued)
a procedural question . . . traditionally . . . the subject of legislative rules"). But there is no express constitutional reservation of authority to the Board to promulgate its own procedural rules, and the Board thus is subject to Alaska Statutes that do not interfere with its constitutionally granted powers. *Compare* Alaska Const. art. II, § 12, *and* art. IV, §§ 8, 15, *with* art. VI, § 9 (expressly reserving rule-making powers to the legislature, judiciary, and judicial council, but not to the Board).

[107] AS 44.62.310(f).

[108] Generally, "[c]ourts consistently 'find no language in the [OMA] that would support the assertion that the Legislature intended to create an absolute privilege for all communications occurring while a public body is in a closed session.' " ANN TAYLOR SCHWING, OPEN MEETING LAWS § 7.11 F. (3d ed. 2011) (quoting *State ex rel. Upper Republican Nat. Res. Dist. v. Honorable Dist. Judges*, 728 N.W.2d 275, 279 (Neb. 2007)).

for the discussions. There are limits on using the OMA's executive session provisions for legal advice pertaining to the business of a government agency.[109] But we do not need to explore those limits at this time.

b. Mat-Su's OMA arguments

Mat-Su contends that the superior court failed to address a potential OMA violation raised by Mat-Su at trial and that the court erred when it failed to void Board actions after the Board violated the OMA. At trial Mat-Su raised the question whether the Board violated the OMA by improperly entering into executive session on November 3 and deciding to place the Valdez area with portions of the Mat-Su Borough in House District 29. Mat-Su asserted that the Board improperly discussed the placements "outside the view of the public eye" and that, in combination with some other "very egregious actions" by the Board, it warranted remanding the entire final plan for reconsideration.

Mat-Su is correct that the superior court's February 15 decision overlooked Mat-Su's challenge to the November 3 executive session, and we therefore give it our independent review.[110] Mat-Su argues that, procedurally, the Board's motions to enter

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[109] *See Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993) ("It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies."). We recognize that our case law addressing the intersection of statutory or constitutional public hearings requirements and privileged communication has room for development. *Cf. Detroit News, Inc. v. Indep. Citizens Redistricting Comm'n*, 976 N.W.2d 612, 628-29 (Mich. 2021) (holding privilege did not attach to recording and materials stemming from improperly held closed-session meeting discussing work within Redistricting Commission's core business in light of constitutional mandate for open meetings).

[110] *See* Alaska Const. art. VI, § 11 ("On appeal from the superior court, the (continued...)

into executive sessions were not sufficiently specific. Mat-Su argues that substantively the Board violated the OMA because: it started discussing placing the Valdez area with Prince William Sound communities on November 3; it entered into an executive session that lasted until the end of the day; Member Borromeo sent texts to two individuals asking for case law permitting the Valdez area to be paired with portions of the Mat-Su Borough;[111] and when the Board returned to open session on November 4, a majority of the members seemed to be in agreement that the Valdez area and portions of the Mat-Su Borough could be paired together, but the Board had "never engage[d] in a mapping session of the [Valdez area] with the Prince William Sound communities" despite Member Marcum continuing to state that other combinations might be more compact, contiguous, and socioeconomically integrated. Mat-Su contends that, taken together, these facts demonstrate the Board improperly deliberated outside the public eye about placing the Valdez area.

The Board responds by pointing to parts of the November 4 public proceedings when members were discussing the Valdez area. The Board also asserts that the public interest would not be served by voiding its final plan because of any procedural mistakes it made when calling executive sessions.

We agree with Mat-Su that on November 3, 4, and 5 the Board entered into executive sessions without clearly and specifically describing the subject of the proposed

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[110] (...continued)
cause shall be reviewed by the supreme court on the law and the facts.").

[111] Mat-Su argues, without citing authority, that these text messages during executive session violated the OMA, but the statutory language has no prohibition against such communications. We do not further address this issue.

session as required by law.[112] Instead of merely reciting the statutory language explaining broad subject categories that may be considered in executive session, the Board should have been more specific about the matters to be discussed, though not to the extent of defeating "the purpose of addressing the subject in private."[113] The Board's actions appear suspect, defeat the public's ability to witness deliberations, and cause courts to struggle in reviewing the constitutionality of the Board's actions. But despite likely inappropriate uses of executive session, the Board's public discussions about where to place the Valdez area are sufficient for appellate review and allow us to determine whether the Board gave the issue a hard look. Under the circumstances — particularly given the compressed timeline for the Board's work and redistricting's importance to all Alaskans — the superior court did not err by concluding that it would not be in the public interest to void the Board's entire final plan due to some OMA violations.[114]

3. Making the traditional hard look analysis more restrictive by blending it with other constitutional concerns was error.

A court's review of a redistricting plan is similar to its review of "a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations[:] . . . . first to

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[112] *See* AS 44.62.310(b) (requiring that motion for executive session "must clearly and with specificity describe the subject" to be discussed).

[113] *Id.*

[114] *See* AS 44.62.310(f) ("A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action."). However, if in future redistricting efforts the Board appears to abuse executive sessions, injunctive relief under Alaska Civil Rule 65(a) or (b) may be warranted.

insure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary."[115] The superior court conducted a "first impression" analysis to determine "the legal standards by which the concept of 'unreasonableness' should be measured" for the Board's redistricting plan. After reviewing Constitutional Convention minutes, legislative history from the 1999 amendments to article VI, and federal statutes and case law, the superior court concluded:

> [T]he spirit of [a]rticle VI, [s]ection 10 . . . compels the Board to present the public with a number of equally constitutional redistricting plans and then let the people have a say about which plan they prefer. While the Board need not respond to every single comment received, the Board must make a good-faith effort to consider and incorporate the clear weight of public comment, unless state or federal law requires otherwise. . . . [T]he Board must give some deference to the public's judgment. If the Board adopts a final plan contrary to the preponderance of public testimony, it must state on the record legitimate reasons for its decision. (Footnote omitted.)

This appears to be the standard the superior court used for its blended "hard look" and due process analysis.[116]

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[115] *Groh v. Egan*, 526 P.2d 863, 866 (Alaska 1974); *see also 2011 Redistricting III*, 294 P.3d 1032, 1037 (Alaska 2012).

[116] The superior court adopted this blended approach based on our traditional hard look requirement and constitutional procedural and substantive due process requirements, as well as the public hearings requirement under article VI, section 10. Although before us there were challenges to the court's overall "hard look" test, they did not detail the extent to which substantive due process concerns might apply. We accordingly do not parse the applicability of substantive due process to the "hard look" analysis. *See Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 263 (Alaska 2000) (describing heavy burden on party asserting substantive due process violation "for if any conceivable legitimate public policy for the [state action] is apparent on its face (continued...)

The superior court then concluded that the Board gave a hard look to House District 29's combination of the Valdez area with portions of the Mat-Su Borough, noting that the Board had "carefully considered the available options[,] . . . acted reasonably," and "certainly did not ignore public testimony." Regarding Senate District K, however, the court concluded that "the Board obviously violated the 'hard look' standard by ignoring public comment on the senate pairings," apparently "to accommodate the wishes of a single Member." The court similarly concluded that the Board "failed to take a hard look at [House] Districts 3 and 4" because it did not "make a good-faith attempt to incorporate the public testimony." The Board, Mat-Su, and Valdez challenge aspects of the superior court's hard look analysis.

a. Our view of the superior court's hard look analysis

Rather than requiring the Board to "make a good-faith effort to consider and incorporate the clear weight of public comment" or "give some deference to the public's judgment," the hard look analysis has more nuance. A redistricting plan is reasonable if "the [Board] has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making."[117] If public comments introduce a "salient problem," such as a defect under article VI, section 6, it would be unreasonable to ignore the problem when drawing district boundaries; absent some evidence explaining the Board's action and how it took the problem into account, a court could conclude that the Board failed to take a hard look. But if public comments merely reflect

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[116] (...continued)
or is offered by those defending the [action], the opponents of the [action] must disprove the factual basis for such a justification" (quoting *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974))). If relevant in future redistricting litigation, parties should more robustly address this concept.

[117] *2001 Redistricting I*, 44 P.3d 141, 143 n.5 (Alaska 2002) (quoting *Interior Alaska Airboat Ass'n v. State, Bd. of Game*, 18 P.3d 686, 690 (Alaska 2001)).

preferences for district boundaries without implicating substantive redistricting requirements, drawing district boundaries based on demonstrated substantive redistricting requirements and not the "weight of public comment" likely would not violate the hard look requirement. We nonetheless note that a Board's failure to follow a clear majority preference between two otherwise equally constitutional legislative districts under article VI, section 6 may be evidence supporting a gerrymandering claim.

b. The Board's arguments

The Board contends that the superior court's erroneous hard look analysis caused the court to err when it invalidated House Districts 3 and 4 and Senate District K. Because the court invalidated Senate District K on grounds beyond the hard look analysis — specifically for unconstitutional political gerrymandering, a ruling which we affirm below — we do not address the Board's argument on this point. But the court ruled that House Districts 3 and 4 were unconstitutional based solely on its "weight of public testimony" approach to the hard look analysis. Because the court otherwise agreed substantive redistricting requirements were satisfied and no salient problems were raised that the Board failed to consider, we reverse the court's invalidation of House Districts 3 and 4 and its accompanying remand to the Board.

c. Mat-Su's and Valdez's arguments

Mat-Su contends that in light of the superior court's approach to the hard look requirement, "the court erred when it found that the Board took a 'hard look' at testimony offered by Valdez and [Mat-Su]" regarding House District 29. Because Mat-Su's assertion relies entirely on the misguided standard for the hard look analysis without pointing to any discrete salient problems (beyond the weight of public preference) that the Board did not consider, we reject its argument and turn to Valdez's arguments about the Board's creation of House Districts 29 and 36.

Valdez first argues that the Board did not engage in reasoned decision-

making about forming District 29 because the Board "spent minimal time analyzing how to accommodate the strong public testimony against pairing [the Valdez area] and [portions of the Mat-Su Borough] together in a district." Again, this argument alone is insufficient to invalidate House District 29 without the public comments having raised some salient problem that the Board failed to address.

Valdez also argues that it is evident the Board did not give House District 29 a hard look because (1) "District 29 in the Final Plan is virtually unchanged from Member Borromeo's proposed plan, . . . which was developed prior to the Board's public hearing tour with minimal involvement of other Board members," and (2) what turned out to be the final plan "was adopted outside of the constitutionally mandated [30-day] deadline for adopting proposed plans set forth in article VI, section 10" and was "an entirely new 40[-]district plan with radically different districts than those" of the original version it replaced. But a proposed election district's evolution over the course of redistricting, without more, lends little insight into whether the Board gave it a hard look, and the superior court discussed this factor when rejecting the argument that the Board violated the *Hickel* process. And Valdez presents no legal support for its argument that adopting a final redistricting plan developed after the first 30 days of the redistricting process is unconstitutional; such a position would make the constitutional public hearing requirement virtually meaningless.

Valdez also appears to argue that the Board impermissibly "constrained the range of redistricting options it considered based upon the mistaken legal premise that the [Fairbanks North Star Borough (FNSB)] could not be included in more than one district that included population from outside of FNSB." Valdez asserts that "[t]he [superior] court erred in holding that the Board properly viewed any redistricting alternative that placed population from FNSB in more than one district [with population from outside FNSB] as not viable." The Board responds that *Hickel* instructs, when

possible, to "include all of a borough's excess population in one other district"[118] and that "*2001 Redistricting* [*I*] does not suggest otherwise."[119] We conclude, given that the Board was able to keep FNSB's excess population together in one House district while abiding by other constitutional requirements, the Board did not act arbitrarily or unreasonably by doing so without considering additional plans that would split FNSB's excess population between multiple House districts.

Valdez's remaining hard look arguments about District 29 focus on the Valdez area being more socioeconomically integrated with communities other than those in the Mat-Su Borough and the Board making only passing mention of the other article VI, section 6 requirements. But, as we note throughout this opinion, the Constitution does not require the most possible socioeconomic integration, particularly if other constitutional requirements may be compromised.[120] The superior court described Board-identified socioeconomic connections between the Valdez area and the Mat-Su Borough, and we agree with the superior court that the described socioeconomic integration level satisfied section 6's "relatively integrated socio-economic area"

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[118] *See* 846 P.2d 38, 52 (Alaska 1992) ("This result is compelled not only by the article VI, section 6 requirements, but also by the state equal protection clause which guarantees the right to proportional geographic representation.").

[119] *See* 44 P.3d at 144 (instructing that Board may combine excess populations from adjoining boroughs).

[120] *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1362-63 (Alaska 1987) (discussing socioeconomic integration under sufficiency standard); *see also Hickel*, 846 P.2d at 45 n.10 (explaining that socioeconomic integration requirement is more flexible than contiguity and compactness requirements such that degree of integration can be reduced if necessary "to maximize the other constitutional requirements of contiguity and compactness").

requirement.[121] The court's February 15 decision discussed the Board's impressive steps when drawing the Valdez area House district boundaries, and we affirm the court's conclusion that — for the hard look analysis — the Board acted reasonably in making ultimately unsuccessful efforts to keep the Valdez and Mat-Su Borough areas in separate House districts.

Valdez relatedly argues that the Board improperly neglected constitutional redistricting criteria while prioritizing individual Board member goals.[122] Valdez first asserts that certain Board members were too deferential to the "Doyon Coalition's goal of keeping Interior Doyon and Ahtna villages together in one District" at the expense of putting the Valdez area with portions of the Mat-Su Borough. Valdez next asserts that "the Board openly sought to maximize the percentage of Native voters in District 36," constituting gerrymandering and warranting remand of the final plan. Valdez also argues that Member Binkley prioritized "protecting the borough boundaries of FNSB," impermissibly foreclosing "consideration of numerous viable redistricting options including districting [the Valdez area] with Richardson Highway communities and the FNSB." Valdez finally argues that the Board improperly relied on "ANCSA boundaries[123] to support the creation of District 36 and justify keeping Bering Straits

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[121] Alaska Const. art. VI, § 6; *see Hickel*, 846 P.2d at 46-47 (describing comparable scenarios satisfying socioeconomic integration requirement).

[122] Valdez raises similar arguments when challenging Districts 29 and 36 as not complying with article VI, section 6 requirements. Valdez couches these arguments under the *Hickel* requirement that the Board "is not permitted to diminish the degree of socio-economic integration in order to achieve other policy goals," *see* 846 P.2d at 45 n.10, but because Valdez seems also to challenge the Board's hard look requirement, we discuss it here.

[123] "ANCSA boundaries" refers to the Alaska Native Claims Settlement Act (continued...)

communities separate from Doyon communities," warranting remand because it created "District 29, which is not socio-economically integrated, and District 36, which is neither socio-economically integrated nor compact."

The first three arguments quickly can be dispensed with for similar reasons. We agree with the superior court that the "practice of assigning each [Board] Member a region and ultimately deferring to those [m]embers' judgment on their assigned regions" is somewhat troubling. But it is not necessarily improper to consider a Board member's personal regional experiences if constitutional requirements are met, and the line between excessive deference to and independent agreement with a Board member is difficult to monitor. As discussed earlier, we also agree with the superior court that the Board did not violate the *Hickel* process, and thus any alleged premature VRA considerations likely did not interfere with the Board taking a hard look at the issues Valdez raised. Despite Valdez seemingly indicating otherwise, the hard look analysis does not require that the Board consider every possible permutation of statewide House districts.[124] The expedited nature of the redistricting process also means that when changes are made toward the end of the process — an appropriate result almost

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[123] (...continued)
of 1971. *See generally* 43 U.S.C. §§ 1601-1629h. "Under that 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 groupings of Native peoples having a common heritage and sharing common interests." *Groh v. Egan*, 526 P.2d 863, 877 (Alaska 1974) (footnote omitted).

[124] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) ("It is true that a rulemaking 'cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been . . . .' " (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978))).

inevitably happening after public hearings — the Board cannot be expected to reconsider every subsequently possible permutation in light of new boundaries. Finally, we note the zero-sum nature of redistricting: accepting Valdez's proposed House district in turn would have affected House districts throughout interior Alaska; municipalities and voters in the affected areas likely would have raised the same arguments Valdez raises, suggesting that the Board was biased in favor of the Valdez area and that adopting Valdez's proposed House district "locked in" unfavorable House districts in Alaska's interior region.

Valdez's fourth argument — that the Board improperly relied upon ANCSA boundaries for House District 36 — challenges the superior court's assertion that "ANCSA regions are indicative of socio-economic integration and may be used to guide redistricting decisions, and they may even justify some degree of population deviation." Valdez argues that because the "purpose of ANCSA was to form 'homogeneous grouping' of Alaska Natives in 1970," ANCSA does not reflect the present-day Alaskan populations nor "the article VI, section 6 constitutional standards for contiguity, compactness, or socio-economic integration." Valdez then points to various statistics tending to show that "ANCSA boundaries do not provide evidence of socio-economic integration among non-Native populations." Finally, Valdez argues that, to the extent ANCSA boundaries are relevant to drawing districts, the relevance is limited only to justifying a population deviation greater than ten percent.

Valdez is correct that we previously have discussed using ANCSA boundaries in redistricting only as a justification for "a population deviation greater than 10 percent."[125] But in the present case evidence about ANCSA boundaries was tied to socioeconomic integration. For example, there was testimony that Doyon region villages

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[125] *Hickel*, 846 P.2d at 48; *see also Kenai Peninsula*, 743 P.2d at 1359 n.10.

likely to have been moved from District 36 to accommodate the Valdez area were "predominantly Alaska Native" and that the ANCSA boundary would be helpful to assess socioeconomic integration among the villages. Another witness explained how ANCSA boundaries can be significant for non-Native residents because they tend to delineate service areas for non-profit healthcare providers. And an expert witness analogously testified, when questioned about the boundary between Districts 36 and 39 coinciding with school district boundaries, that interactions between communities related to school functions could be a further indicia of socioeconomic integration within District 36. Finally, as discussed in more detail below, we agree with the 2001 redistricting superior court's reasoning affording more flexibility for rural communities when discussing socioeconomic integration.[126]

For the foregoing reasons, we affirm the superior court's ruling that the Board gave a constitutionally sufficient hard look at where to place the Valdez area.

B. Mat-Su's And Valdez's Substantive Constitutional Challenges

1. Aside from the "Cantwell Appendage," Mat-Su's and Valdez's article IV, section 6 arguments fail.

Mat-Su and Valdez contend the superior court erred by concluding that House Districts 29 and 36 are constitutional under article VI, section 6.[127] They assert that the districts are not compact and are not socioeconomically integrated. Mat-Su

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[126] *See In re 2001 Redistricting Cases*, No. 3AN-01-8914 CI, 61 (Alaska Super., Feb. 1, 2002) (explaining that rural communities are not necessarily "interconnected by road systems" or "integrated as a result of repeated and systematic face to face interaction" but may be "linked by common culture, values, and needs").

[127] House District 29 contains portions of the Mat-Su Borough, including parts of Palmer and Wasilla, as well as the Valdez area. House District 36 is quite large; it includes Holy Cross and Huslia in the western portion, stretches east to the Canadian border, has Fairbanks's Goldstream Valley, and has an appendage cutting into the Denali Borough and the Mat-Su Borough to reach Cantwell. *See* Appendix A.

additionally asserts that the Board did not create districts "as near as practicable" to the population quotient because the Mat-Su districts as a whole are overpopulated compared to other districts.[128] We address each argument in turn.

a. Compactness

i. House District 29

Mat-Su takes issue with House District 29 extending to the Valdez area without containing Richardson Highway communities on the road between the Valdez area and the Mat-Su Borough. Mat-Su asserts that the "cutout of the road system makes the shape of the district less compact and orphans [the Valdez area] from its transportation link to the [Mat-Su Borough] and the communities in its immediate area that it associates with regularly."

We have instructed that " 'corridors' of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement."[129] House District 29 does not contain the Richardson Highway communities along the road to the Valdez area, but it contains the "less-populated land" around Valdez. Mat-Su cites no relevant authority for its proposition that inability to travel by road between communities in a House district without leaving the district renders it non-compact. Indeed, it would be unworkable in rural Alaska to impose a requirement of being able to travel by road between any two points in a district without crossing district borders.[130] The superior court did not err by determining that

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[128] Alaska Const. art. VI, § 6 (requiring house districts to "contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty").

[129] *Hickel*, 846 P.2d at 45-46.

[130] *See, e.g.*, *In re 2001 Redistricting Cases* (*2001 Redistricting II*), 47 P.3d (continued...)

"[House] District 29's shape is the natural result of Alaska's landscape and irregular features" and that it is compact.

ii. House District 36

House District 36 is a large, horseshoe-shaped district composed of portions of three different boroughs and encompassing 35% of Alaska's land. An "appendage" of House District 36 reaches between House Districts 29 and 30 to include Cantwell, but not the surrounding land or communities.[131] Cantwell otherwise likely would have been placed with the rest of the Denali Borough in House District 30. As a Denali Borough community, Cantwell would have been sufficiently socioeconomically integrated with the rest of the Denali Borough within House District 30 as a matter of law.[132]

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[130] (...continued)
1089, 1092 (Alaska 2002) ("[N]either size nor lack of direct road access makes a district unconstitutionally non-compact . . . ."). On the other hand, in areas dependent on road transportation direct road access is a feature of communities of interest and socioeconomic integration.

[131] Valdez argues that House District 36 also contains an inappropriate appendage "carv[ing] out Glennallen and neighboring population along the Glenn Highway." This argument fails; District 36 contains several communities along the Richardson and Glenn Highways near Glennallen but does not appear to carve out a bizarre appendage or corridor. *See Hickel*, 846 P.2d at 45-46 (" '[C]orridors' 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.").

[132] *2001 Redistricting I*, 44 P.3d 141, 146 (Alaska 2002) (referring to Anchorage, a consolidated city and borough, as "by definition socio-economically integrated"); *Hickel*, 846 P.2d at 51 ("By statute, a borough must have a population which 'is interrelated and integrated as to its social, cultural, and economic activities.' " (quoting AS 29.05.031)); *cf. id.* at 51 n.20 (stating that splitting "a borough which otherwise [could] support an election district will be an indication of gerrymandering for not preserving the government boundaries").

The superior court acknowledged that the Cantwell appendage makes House District 36 less compact; the court then examined whether House District 36 is socioeconomically integrated and adopted the Board's argument that including "Cantwell [was] justified because Cantwell is socio-economically integrated with the Ahtna region (the rest of which was placed with District 36)." This analysis runs afoul of our *Hickel* guidance: "The requirements of article VI, section 6 shall receive priority *inter se* in the following order: (1) contiguousness and compactness, (2) relative socioeconomic integration, (3) consideration of local government boundaries, (4) use of drainage and other geographic features in describing boundaries."[133] Both the Board and the superior court appear to have prioritized more socioeconomic integration over compactness.

The Board recognized that adding Cantwell to House District 36 created potential compactness problems. One Board member asked the Board's attorney:

> [W]e 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, or do you believe that in this instance, for socioeconomic reasons that we took Cantwell out of the [Denali] borough probably are sufficient to overcome the . . . loss of compactness with that removal?

The attorney agreed that adding Cantwell rendered House District 36 less compact, advising that whether it made sense was "a coin toss" and that the Board was "balancing constitutional concerns."

When a more compact district would be sufficiently socioeconomically integrated, the Board may not sacrifice compactness in favor of greater socioeconomic

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[133] *Hickel*, 846 P.2d at 62; *cf. id.* at 45 n.10 (providing socioeconomic integration may be diminished only to maximize contiguity and compactness).

integration.[134] We therefore hold that the Cantwell appendage to House District 36 was unconstitutionally drawn.

b. Socioeconomic integration

i. House District 29

Valdez and Mat-Su first argue that the superior court misapplied precedent by assuming that if the Valdez area and the Mat-Su Borough independently were socioeconomically integrated with Anchorage, then they also must be socioeconomically integrated with each other. The court was "greatly influenced" by its interpretation of *Kenai Peninsula*,[135] relying heavily on a "regional integration" concept to determine that the Valdez area and the Mat-Su Borough are socioeconomically integrated. The court said its conclusion that House District 29 is socioeconomically integrated may have been different had it not interpreted *Kenai Peninsula* to hold that "regional integration" is sufficient to achieve socioeconomic integration. Valdez further contends the court misconstrued precedent by assuming that the Mat-Su Borough and the Valdez area each are socioeconomically integrated with Anchorage. Because the court's interpretation of *Kenai Peninsula* was erroneous, we do not need to reach whether the two areas each are socioeconomically integrated with Anchorage.

In *Kenai Peninsula* we considered whether a House district containing North Kenai and South Anchorage was socioeconomically integrated.[136] We saw minimal interaction; we said: "[T]o the extent that they interact at all, they do so as a

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[134] *Id.* at 62 (prioritizing article VI, section 6 requirements as follows: "(1) contiguousness and compactness, (2) relative socioeconomic integration").

[135] 743 P.2d 1352 (Alaska 1987).

[136] *Id.* at 1361-62.

consequence of the nexus between Kenai and Anchorage."[137] We framed the issue as "whether interaction between the communities comprising [the challenged district] and communities outside the district but within a common region sufficiently demonstrates the requisite interconnectedness and interaction mandated by article VI, section 6."[138] We considered that North Kenai and South Anchorage are geographically close, that they are connected by highways and daily airline flights, and that both are "linked to the hub of Anchorage"; we also noted that the North Kenai and South Anchorage areas were linked economically and socially.[139] Determining that the challenge "[drew] too fine a distinction between the interaction of North Kenai with Anchorage and that of North Kenai with South Anchorage," we held that "any distinctions between Anchorage and South Anchorage [were] too insignificant to constitute a basis for invalidating the state's plan."[140]

Analogizing North Kenai and South Anchorage to the Valdez area and the Mat-Su Borough, the superior court concluded they were "relatively socio-economically

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[137] *Id.* at 1362.

[138] *Id.* at 1363.

[139] *Id.* at 1362-63.

[140] *Id.* at 1363 & n.17. We since have cited *Kenai Peninsula* for the following:

> In areas where a common region is divided into several districts, significant socio-economic integration between communities within a district outside the region and the region in general "demonstrates the requisite interconnectedness and interaction," even though there may be little actual interaction between the areas joined in a district.

Hickel v. Se. Conf., 846 P.2d 38, 46 (Alaska 1992).

integrated . . . because both communities are socio-economically integrated with Anchorage." But this conclusion takes *Kenai Peninsula* too far. Even if both the Valdez area and the Mat-Su Borough were socioeconomically integrated with Anchorage, it does not necessarily follow that they are socioeconomically integrated with each other. North Kenai was socioeconomically integrated with South Anchorage primarily because evidence supported a conclusion that North Kenai was socioeconomically integrated with Anchorage as a whole.[141] South Anchorage and Anchorage were not merely socioeconomically integrated, they were indistinguishable for the constitutional analysis.[142] The same cannot be said of the Mat-Su Borough or the Valdez area; each community is entirely separate from, rather than a neighborhood or region within, Anchorage.

Mat-Su and Valdez next contend that the superior court erred when it determined House District 29 was socioeconomically integrated partly because it was drawn similarly in the 2002 and 2013 redistricting proclamations. We previously have noted that the requirement for House districts to be "relatively" integrated "means that we compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient."[143] With this principle in mind, the superior court compared House District 29 in the 2021 Proclamation with House District 9 from the 2010 redistricting cycle and House District 12 from the 2000 redistricting cycle. The court noted substantial similarities between the earlier House districts, including that they both paired portions of the Mat-Su Borough with the Valdez area. The court reasoned that prior redistricting pairings were evidence

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[141] *See Kenai Peninsula*, 743 P.2d at 1362-63.

[142] *See id*. at 1363 & n.17.

[143] *Hickel*, 846 P.2d at 47.

that the Mat-Su Borough and the Valdez area are "relatively integrated."[144]

Mat-Su and Valdez disagree. Valdez contends that the crucial difference from the historic districts is House District 29 does not contain the Richardson Highway communities that rendered the prior districts socioeconomically integrated. But, as we discuss below, in addition to considering the historical districts, the superior court generally found evidence of sufficient interactions between the Valdez area and the Mat-Su Borough to render House District 29 socioeconomically integrated. The Valdez area's greater socioeconomic integration with certain Richardson Highway communities does not preclude a finding that the Valdez area is also socioeconomically integrated with the Mat-Su Borough.

The superior court's factual inquiry into interactions between the Valdez area and the Mat-Su Borough found "evidence of at least minimal socio-economic links":

> These include geographic proximity and connection via the road system, shared interests in the outdoor recreation industry, and common hunting and fishing areas in the region around Lake Louise, Klutina Lake, and Eureka. They also have at least some shared ties to the oil industry. The nearest hospital to Valdez, at least by road, is located in the Mat-Su Borough. Similarly, the nearest car dealerships[] and large box stores are located in the Mat-Su. Valdez and Mat-Su also share an interest in maintenance and development of the state highway system . . . .
>
> The communities in District 29 are served by school

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[144] Using prior redistricting maps to support or oppose current redistricting options has limitations. Redistricting occurs every decade, and in the intervening years community population and socioeconomic integration may wax and wane. As we discuss below in connection with the second round of the 2021 redistricting cycle litigation, the nature of legal challenges, if any, raised and resolved in prior redistricting cycles also are important. For example, a prior House or Senate district that never was challenged is not dispositive evidence of constitutional compliance.

> districts that are a part of home rule or first-class municipalities or boroughs, meaning their funding is obtained in part from a local tax base, and these home rule communities also have a shared interest in debt reimbursement from the legislature. Similarly, Valdez school sports teams compete against sports teams in the Mat-Su Borough. (Footnotes omitted.)

Mat-Su and Valdez do not challenge these findings, instead asserting that these interactions are insufficient to satisfy article VI, section 6's socioeconomic integration requirement because the Board failed to engage in reasoned decision-making and did not maximize socioeconomic integration. But, as the superior court correctly pointed out, we have not required that the Board maximize socioeconomic integration in every House district nor have we held that there is a right to be paired with other most closely integrated communities.[145] The interactions the court identified align with the types of interactions previously identified as evidencing socioeconomic integration. In particular, the shared recreation and fishing sites, transportation networks, economic links, interests in the state highway system's development, and competition between sports teams all are considerations similar to those previously recognized as supporting finding socioeconomic integration.[146] Although the court placed too much emphasis on both communities' connections with Anchorage, we affirm the court's determination that House District 29 is sufficiently socioeconomically integrated to satisfy article VI, section 6.

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[145] Mat-Su concedes this point in its petition: "[T]here is nothing in case law that provides for a right to be placed together with other socioeconomic areas, even areas in which a location may be *more* socioeconomically integrated, so long as the other area the location is placed with is also socioeconomically integrated." (Emphasis in original.)

[146] *See Kenai Peninsula*, 743 P.2d at 1362-63; *see also Hickel*, 846 P.2d at 46-47.

ii. House District 36

Valdez's sole contention is that there is insufficient evidence of interaction and interconnectedness between communities within this extremely large House district. This argument failed before the superior court and fails with us as well.

During the 2001 redistricting cycle a superior court facing a similar argument commented on the practicalities of socioeconomic integration in rural Alaska:

> Often the communities within such large districts are geographically isolated and small in population. They are not interconnected by road systems or by other convenient means of transportation. Such communities are not integrated as a result of repeated and systematic face to face interaction. Rather they are linked by common culture, values, and needs. The constitutional requirement of socio-economic integration does not depend on repeated and systematic interaction among each and every community within a district. Rather, the requirement in Article VI, Section 6 of the Alaska Constitution may, by its very terms, be satisfied if the "area" comprising the district is relatively socio-economically integrated without regard to whether each community within the "area" directly and repeatedly interacts with every other community in the area.[147]

This understanding of socioeconomic integration in rural House districts provides needed flexibility for pairing rural communities that cannot have the extensive interconnectedness and interaction of urban communities. For example, isolated rural communities off the road system may be interconnected through their use of and dependence on the same rivers for travel and fishing and the same migratory animals for

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[147] *In re 2001 Redistricting Cases*, No. 3AN-01-8914 CI, 61 (Alaska Super., Feb. 1, 2002).

subsistence. Although we have noted that mere homogeneity generally is insufficient,[148] socioeconomic integration in this rural Alaska context can be supported by evidence of interdependence and related "common culture, values, and needs" rather than requiring interactions between all communities.[149]

The superior court noted that House "District 36 generally (though not perfectly) encompasses the Doyon and Ahtna ANCSA regions." The court cited trial evidence that the region's people share socioeconomic similarities, as "they engage in subsistence, access similar types of healthcare, face similar challenges with regard to access to utilities, and have similar concerns with regard to the quality of rural schools." There also was trial testimony that Doyon and Ahtna have primarily Athabascan shareholders sharing "common language and culture."

We affirm the superior court's determination that House District 36 is sufficiently socioeconomically integrated to satisfy article VI, section 6.

c. "As near as practicable" to the population quotient

Mat-Su contends that the Board violated article VI, section 6's requirement that each House district "contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty."[150] Mat-Su argues that House Districts 25-30, containing the Mat-Su Borough, are unconstitutionally overpopulated. It is true that House Districts 25-30 each are overpopulated and that House Districts 25-29 each are overpopulated by about 2.5%.

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[148] *Hickel*, 846 P.2d at 46.

[149] *In re 2001 Redistricting Cases*, No. 3AN-01-8914 CI, at 61 (Alaska Super., Feb. 1, 2002); *see also Kenai Peninsula*, 743 P.2d at 1363 (discussing socioeconomic integration requirements in context of what is "reasonable and not arbitrary").

[150] Alaska Const. art. VI, § 6.

Before the 1999 constitutional amendments, maximum deviations below ten percent were insufficient, without more, to make out a prima facie case that a plan or part thereof was unconstitutional.[151] The section as amended now requires "equality of population 'as near as practicable' ";[152] we have noted that modern technology "will often make it practicable to achieve deviations substantially below the ten percent federal threshold, particularly in urban areas."[153] But Mat-Su seems to misunderstand our *2001 Redistricting I* analysis.

We concluded in that case that the Board had failed to draw Anchorage House districts containing as near as practicable the population quotient when the districts had maximum population deviations of 9.5%.[154] The Board had made a mistaken assumption that deviations within 10% automatically satisfied the constitutional requirement and accordingly had failed to attempt to further minimize the population deviations.[155] We explained that, because the Board had made no effort to further reduce population deviations, "the burden shifted to the [B]oard to demonstrate that further minimizing the deviations would have been impracticable in light of competing

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[151] *2001 Redistricting I*, 44 P.3d 141, 145 (Alaska 2002); *see White v. Regester*, 412 U.S. 755, 764 (1973) (instructing that districts differing from one another by more than 9.9% likely "would not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy' " (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964))).

[152] *2001 Redistricting I*, 44 P.3d at 145-46.

[153] *Id.* at 146.

[154] *Id.* at 145-46.

[155] *Id.* at 146.

requirements imposed under either federal or state law."[156]

Mat-Su interprets that decision as requiring the Board to "justify any failure to reduce population deviance across districts" and asserts that the Board failed to meet this burden. But that is not what *2001 Redistricting I* requires, and Mat-Su points to nothing in the record indicating the Board failed to make efforts to reduce population deviations in the Mat-Su Borough. We agree with the superior court that the Board was not required to further justify the noted de minimis deviations.

2. Mat-Su's equal protection challenge fails.

a. One person, one vote

Mat-Su argues that the House districts' over-populations also violate the constitutional "one person, one vote" requirement. Equal protection requires the State to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[157] "[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state."[158] We have noted that "minor deviations from mathematical equality . . . are insufficient to make out a prima facie case of invidious discrimination."[159] As Mat-Su correctly recognizes, article VI, section 6's population equality and one person, one vote requirements are "by and large synonymous." For the same reason we affirmed the

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[156] *Id.*

[157] *Hickel v. Se. Conf.*, 846 P.2d 38, 47 (Alaska 1992) (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

[158] *Id.* (quoting *Reynolds*, 377 U.S. at 579).

[159] *Id.* at 47-48 (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366 (Alaska 1987)).

superior court's decision on Mat-Su's challenge to article VI, section 6's population quotient requirement, we affirm the court's decision that House Districts 25-30 satisfy the "one person, one vote" requirement under an equal protection analysis.

b. Fair and effective representation

Mat-Su also argues that the Mat-Su Borough and its citizens are denied fair and effective representation in violation of equal protection. Mat-Su argues that the Board prioritized the Fairbanks and Anchorage areas over the Mat-Su Borough, evidencing discriminatory intent against the Mat-Su Borough.[160]

The superior court found that the small over-populations in the Mat-Su Borough House districts resulted from bringing 4,000 Valdez area residents into House District 29. But, as we already have discussed, the evidence indicates the Board considered the available options and ultimately determined constitutional considerations were best served by placing the Valdez area with the Mat-Su Borough. We see no evidence that the Board's decision was predicated on an illegitimate intent to favor the Fairbanks or Anchorage areas or that there are partisan overtones to the decision. As the Board persuasively points out, the Mat-Su Borough's population equaled 5.84 House districts, the Board proposed a plan with 6 House districts in the area, and the Board's final plan created 6 House districts over which Mat-Su Borough voters have control.

We are not persuaded that the Board acted with discriminatory intent such that the Mat-Su Borough and its voters were denied fair and effective representation in violation of equal protection.

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[160] *See supra* pp. 14-17 (discussing equal protection analysis for fair representation claims). Mat-Su Borough does not engage in the traditional three-step analysis, focusing only on alleged discriminatory intent.

C. Skagway's Substantive Constitutional Challenges

Skagway contends that the superior court should have determined House Districts 3 and 4 violate article VI, section 6's socioeconomic integration requirement and that it should have considered Skagway's equal protection claim. House Districts 3 and 4 include the Juneau, Skagway, and Haines Boroughs, as well as other southeast Alaska communities.[161] Skagway contended, and the superior court agreed, that a clear majority of people testifying about Skagway's placement preferred districting Skagway with downtown Juneau. The Board conceded in its petition to us that a "Board member noted that the weight of public testimony tipped in favor of keeping Skagway and downtown Juneau districted together," although that member ultimately did not vote for that option.

At trial Skagway argued that its separation from downtown Juneau, with which it has strong socioeconomic ties, violated article VI, section 6's socioeconomic integration requirement; that the Board violated Skagway's equal protection rights; and that the Board violated article VI, section 10's public hearings requirement and thus Skagway's due process rights. The superior court rejected Skagway's section 6 socioeconomic integration challenge, and, believing that it encompassed the fair representation argument as well, rejected it without a separate analysis. The court instead invalidated House Districts 3 and 4 under its blended "hard look" and due process analysis because the Board failed "to make a good-faith attempt to incorporate the public testimony of Alaska citizens," who favored keeping Skagway with downtown

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[161] The 2010 redistricting cycle had placed Skagway in a House district with downtown Juneau. In this cycle, the Board unanimously voted to place Skagway, fellow port towns Haines and Gustavus, and part of Juneau's Mendenhall neighborhood in House District 3; Mendenhall was split between House Districts 3 and 4. *See* Appendix A.

Juneau. Because we reverse the superior court's "hard look" invalidation of House Districts 3 and 4, we address Skagway's arguments.

1. Socioeconomic integration

Skagway argues that it is more socioeconomically integrated with downtown Juneau than any other part of the Juneau Borough, including the Mendenhall neighborhood. Skagway mistakenly asserts that socioeconomic integration must be maximized, but, as we have discussed earlier, article VI, section 6 calls for House districts "containing as nearly as practicable a relatively integrated socio-economic area"; this flexible language means that some degree of integration can be sacrificed to achieve greater contiguity and compactness.[162] The Board correctly notes that House Districts 3 and 4 are more compact than the 2010 redistricting cycle's districts, and Skagway does not meaningfully contest this point. And in line with our *Groh v. Egan* holding, trial evidence supports a conclusion that House District 3 is sufficiently socioeconomically integrated because the Skagway, Haines, and Juneau Boroughs share "close transportation ties," "Juneau serv[es] as an economic hub for Haines and Skagway," and the three communities historically "have always been closely linked."[163] Skagway notes that *Groh* was decided before Juneau's Mendenhall neighborhood was fully developed. But as we stated in *Hickel*: "In areas where a common region is divided into several districts, significant socio-economic integration between communities within a district

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[162] *Hickel*, 846 P.2d at 45 n.10. Skagway refers to *Hickel*'s Appendix E, the superior court's explanation of its changes to the special masters' interim redistricting plan. *Id.* at 63-96. In *Hickel* the superior court said it made changes "to establish contiguity, to maximize socio-economic integration, to avoid pitting incumbent minorities one against another, and to equalize population." *Id.* at 73. As the Board points out, that superior court merely was explaining changes, not announcing a new rule of law.

[163] 526 P.2d 863, 879 (Alaska 1974).

outside the region and the region in general 'demonstrates the requisite interconnectedness and interaction,' even though there may be little actual interaction between the areas joined in a district."[164] Juneau fits within this description.

Skagway also asserts that the Board's map failed to keep the Mendenhall neighborhood intact, contending that the Board erred by ignoring neighborhood boundaries absent overriding constitutional considerations.[165] But Skagway tethers this contention only to the Constitution's socioeconomic integration requirement. We fail to see how merely dividing the Mendenhall neighborhood into two different House district renders either district vulnerable to a challenge that it is not socioeconomically integrated.

We affirm the superior court's holding that Districts 3 and 4 did not violate article VI, section 6's socioeconomic integration requirement.

2. Fair representation and geographic discrimination

Skagway contends that placing its voters with the Mendenhall neighborhood dilutes Skagway's votes, implicating equal protection. It faults the superior court for failing to address this issue even though Skagway briefed it at trial. But Skagway's trial brief minimally addressed the fair and effective representation issue. After setting out a short rule statement, Skagway asserted, without pointing to any evidence or making any substantive argument, that the Board "ignore[d] political subdivision boundaries and communities of interest" when it "combin[ed] Skagway with

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[164] 846 P.2d at 46 (quoting *Kenai Peninsula*, 743 P.2d at 1363). We note that this statement should not be expanded to mean that outside communities integrated with one part of a *borough* are always integrated with all parts of that borough.

[165] *See 2001 Redistricting II*, 47 P.3d 1089, 1091 (Alaska 2002) (quoting approvingly superior court's statement that maintaining neighborhood boundaries is an "admirable goal" but "not constitutionally required" and concluding districts that split Eagle River were not unconstitutional merely because they split neighborhoods).

dissimilar communities." And contrary to Skagway's argument to us, the superior court *did* address Skagway's equal protection claim, saying that it was the same as Skagway's socioeconomic integration claim and thus did "not merit being addressed twice."

Skagway's petition for review does little to bolster its contention. Skagway asserts that its 4,000 voters will be drowned out by Mendenhall's 14,000 voters. Skagway also emphasizes advisory votes taken in 2000 and 2004 when Skagway and downtown Juneau voters supported increasing access to Juneau by expanding the ferry system, but Mendenhall voters seemed more supportive of a proposed road. But, like Mat-Su, Skagway fails to engage in the traditional three-step equal protection analysis for fair representation claims. Aside from noting that Member Simpson apparently favored the road, Skagway points to no evidence of discriminatory intent, such as secretive procedures, ignoring political subdivisions and communities of interest, or regional partisanship affecting House Districts 3 and 4.

Alaska's equal protection clause would be far too restrictive if a community's fair representation claim could be based on nothing more than a disagreement with other communities in its House district about a single public policy issue. Nor does Skagway's relatively small population compared to Mendenhall's create an equal protection claim. The ideal population for a House district is roughly 18,000 voters; Skagway's 4,000 voters will be overwhelmed by non-Skagway voters in any district, such as, for example, inclusion with downtown Juneau. We see no equal protection violation regarding Skagway and House Districts 3 and 4.[166]

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[166] During the Constitutional Convention the redistricting goal was expressed as achieving "adequate and true representation by the people in their elected legislature, true, just, and fair representation." *See* 3 PACC 1835 (Jan. 11, 1956) (statement of Del. John S. Hellenthal). In the second round of 2021 redistricting litigation, discussed later in this decision, evidence included an email from Member Simpson clearly expressing (continued...)

D. The Board's East Anchorage Ruling Challenges

The superior court considered East Anchorage's challenges to the South Muldoon (House District 21) and Eagle River (House District 22) Senate District K pairing based on article VI, sections 6 and 10 and Alaska's equal protection and due process clauses. The court held that the Senate district did not violate section 6 but that it violated section 10, due process rights, and the equal protection clause. The Board challenges nearly every aspect of the court's findings and conclusions on this matter, ranging from pure questions of law to fact-intensive inquiries. The Board also raises two general evidentiary issues which we discuss here because they effectively are relevant only to our East Anchorage discussion.

1. The Board's evidentiary issues

a. The superior court did not abuse its discretion when it denied the Board's requests to compel discovery.[167]

Many individual plaintiffs objected to the Board's discovery requests. The relevant requests sought production of all communications: (1) "[y]ou have sent to or

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[166] (...continued)
an approach to redistricting that involved ensuring more safe Republican seats and keeping Democrats at bay. A portion of the email — expressing Member Simpson's approval that our March order reversing the superior court's remand of House Districts 3 and 4 will leave "Skagway . . . stuck with that arrangement for the next 10 years, at least" — may suggest some kind of geographic or political bias played a role. But we see nothing in Skagway's petition for review suggesting that political advantage played a role in House Districts 3 and 4, and this email was not part of that record. Without more information — perhaps unavailable due to the Board's improper use of executive sessions — we do not further pursue the issue.

[167] "We generally review a trial court's discovery rulings for abuse of discretion." *Marron v. Stromstad*, 123 P.3d 992, 998 (Alaska 2005). Whether the superior court "weighed the appropriate factors in issuing a discovery order" is a matter we review de novo. *Id.*

received from anyone . . . that relate in any way to the 2021 redistricting process"; (2) "[y]ou have sent or received that relate in any way to [y]our participation in this lawsuit"; and (3) "between or among the [p]laintiffs that relate in any way to the 2021 redistricting process or the subject-matter of their lawsuit." Without first attempting to confer with the plaintiffs the Board sought to compel discovery; the superior court characterized the Board's argument as "the communications [were] relevant to show bias and motive for impeachment purposes."

The superior court denied the Board's request to compel discovery, ruling that the Board's production requests would elicit information only tangentially relevant to the proceedings and that the benefit of the information did not outweigh the burdens of production. The court recognized that "Alaska provides for liberal civil discovery"[168] and that " 'evidence of bias is relevant and probative'[169] in most instances." But the court relied on limiting factors from Alaska Civil Rule 26(b)(2)(A)[170] and an additional instruction under Alaska Civil Rule 90.8(d) that "[t]he record in the superior court proceeding consists of the record from the [Board] . . . as supplemented by such

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[168] *State v. Doe*, 378 P.3d 704, 706 (Alaska 2016).

[169] *Ray v. Draeger*, 353 P.3d 806, 811 (Alaska 2015).

[170] The relevant Rule 26(b)(2)(A) factors counseling denial of the Board's request were:

> The discovery sought . . . [was] obtainable from some other source that [was] more convenient, less burdensome, or less expensive; . . . [and] the burden or expense of the proposed discovery outweigh[ed] its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

additional evidence as the court, in its discretion, may permit." The court reasoned that the requests were overly broad and burdensome; that the information was obtainable (or already available) through other avenues, such as deposition or cross-examination; and that the requests had limited relevance due to the scope of the proceedings. The court also noted that the Board had not filed a certification of good faith attempts to confer as required by Rule 37(a)(2)(B) and that the Board justified this omission based only on the expedited nature of the proceedings without citing authority.

The Board suggests that the superior court unfairly discussed the Board's political leanings without allowing "the Board to discover and present evidence of the political affiliation and biases of the plaintiffs to the redistricting matters." These arguments notwithstanding, the Board fails to request any specific relief from us related to the court's alleged discovery error; the Board certainly does not suggest that the court's decision on the merits of the Board's redistricting efforts should be reversed due to the alleged error. Although evidence of party or witness bias typically is relevant and probative, the Board fails to persuade us that the superior court acted unreasonably by not compelling the disputed production. We find it particularly notable that the Board has not explained how further knowledge of any plan challenger's political motivations would have meaningfully benefitted the Board's trial position that its final redistricting plan satisfied the Alaska Constitution's requirements and did not involve partisan gerrymandering. The court did not abuse its discretion by denying the Board's request to compel production.

b. The superior court did not abuse its discretion when it adopted streamlined proceedings regarding witness testimony at trial.[171]

Because this was an expedited case with a short time for trial, the superior court relied on Board members' depositions submitted by the plaintiffs and allowed the parties to pre-file direct testimony rather than giving live direct testimony. Although the court had allowed for live re-direct examination of witnesses who were cross-examined by other parties, East Anchorage did not cross-examine Board members. The court denied the Board's subsequent request to engage in re-direct examination of its members. The court indicated that the Board could instead submit supplemental Board member affidavits. The Board did not do so. But the Board now complains about the court not allowing live re-direct examination of the Board members, contending that the court's "heavy reliance" on depositions in its analysis of the Board's "secretive process" involving the Senate district pairings prejudiced the Board by denying it "the opportunity to explain its decisions."[172]

The Board cites case law supporting the general proposition that a civil

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[171] "We exercise our independent judgment when interpreting Alaska's civil rules, but [we] review a superior court's procedural decisions for abuse of discretion." *Werba v. Ass'n of Vill. Council Presidents*, 480 P.3d 1200, 1204 (Alaska 2021) (alteration in original) (quoting *Rockstad v. Erikson*, 113 P.3d 1215, 1219-20 (Alaska 2005)).

[172] We find it difficult to give serious consideration to the Board's contention that it has been denied the opportunity to explain its Senate District K pairing decision. Had the Board conducted redistricting business in open sessions, the public could have had a real-time understanding of the Board members' positions and reasoning. And Board members surely could have explained their decisions when they gave sworn depositions, pre-filed affidavit testimony, or were given the chance to file later supplemental affidavit testimony.

litigant has the right to confront adverse witnesses.[173] But we struggle to comprehend how the right to confront witnesses *against* the Board gives rise to a right to confront the Board members' own pre-filed depositions and affidavits. The depositions and affidavits gave the Board members a full and unfettered opportunity to justify and explain their decision and actions regarding Senate District K. And the Board chose not to submit supplemental affidavits despite being given the opportunity to do so. We see no error on this point.

The Board also contends that Alaska Civil Rule 46(b) dictates the order of evidence presented at trial and argues that the superior court should have allowed the Board "to put on its case." But that Rule instructs that the order of evidence is left to the court's "sound discretion."[174] The court did not abuse its discretion in the way it permitted witness testimony, especially in light of the abridged timeline for the proceedings, and any possible error would have been rendered harmless had the Board accepted the court's invitation to file supplemental affidavits. Indeed, we commend the superior court's tremendous efforts expediting the trial and its final decision in this challenging litigation.

2. The Board's article VI, section 10 arguments

We now review the superior court's application of article VI, section 10's public hearings requirement.[175]

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[173] *See Thorne v. Dep't of Pub. Safety*, 774 P.2d 1326, 1332 & n.14 (Alaska 1989) (holding "right to confront and cross-examine witnesses is one right, founded upon due process and fundamental fairness, which civil defendants do enjoy").

[174] Alaska R. Civ. P. 46(b).

[175] We do not reach the superior court's blended "hard look" and due process analysis regarding Senate District K because we affirm its remand to the Board on (continued...)

a. Superior court's article VI, section 10 ruling

The superior court concluded that the Board's Senate district pairings violated article VI, section 10 in two ways. The first violation related to article VI, section 10's requirement that the Board adopt one or more "proposed redistricting plans" within the first 30 days of its tenure; the court interpreted this as meaning that the Board must adopt a draft of both the House districts and Senate district pairings within the first 30 days. The court concluded that the Board violated section 10 by not adopting a Senate plan within the first 30 days. The court also expressed skepticism that "third-party plans" with Senate district pairings were adequate because they were not "proposed" by the Board.

The second violation was based on section 10's public hearings requirement; the superior court considered this issue intertwined with procedural due process. The court found: "[T]here was no opportunity for the public to comment on the Senate pairings that were actually proposed by the members of the Board." The court noted that the Board had taken third-party maps with Senate district pairings on its statewide public hearings road show but that the Board did not "hold public hearings on Senate pairings it actually proposed on the final [H]ouse map." The court also found that the Board did not "make good-faith attempts to incorporate public testimony into the Board's final plan," observing that "the vast majority of both East Anchorage and Eagle River residents were strongly against splitting either region and combining one with the other." The court concluded that by failing "to take an appropriate 'hard look' at the Senate pairings," the Board had violated East Anchorage Plaintiffs's constitutional rights under article VI, section 10.

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[175] (...continued)
unconstitutional political gerrymander grounds.

b. Article VI, section 10's 30-day deadline and the meaning of "proposed redistricting plan"

The Board does not meaningfully contest the superior court's interpretation of "proposed redistricting plan" to include a House district map with Senate district pairings, pointing only to evidence suggesting that past Boards waited until late in the process to make Senate pairings. The Board asserts that adopting third-party Senate plans for its public road show nine days late, even if unconstitutional, was "harmless" and did not prevent the public from offering meaningful feedback on the Senate district plans. East Anchorage acknowledges that third-party maps included Senate district pairings, arguing generally that the Board "failed to hold any hearings regarding any specified [S]enate pairings proposal, and actively shut down discussion and testimony at its public meetings before November 8." East Anchorage cites citizens' testimony from October 4 and 30 requesting that the Board release Senate pairings for comment.

We agree with the superior court's thorough analysis of the question, and we hold that article VI, section 10 calls for one or more "proposed redistricting plans" — including both House and Senate districts — within the first 30 days. It is difficult to see how section 10's drafters could have envisioned a timeline allowing the Board to promulgate only a House district map within the first 30 days and then wait until the very end of the 90-day redistricting period to propose Senate districts: Senate district pairings then conceivably could escape scrutiny at public hearings. But we disagree with the superior court that the Senate district maps drawn by third parties, adopted by the Board and taken on the road show, are categorically inadequate for section 10 purposes. Third-party participation and input should be welcome, and section 10 states that the Board need only "adopt" a proposed redistricting plan, not that it need propose the adopted plan. The Board "adopted" third-party plans with Senate district pairings to take on its

road show, albeit over a week late.[176]

We therefore agree with the Board that its failure to adopt a Senate district plan within 30 days was harmless error. Despite the roughly one-week delay in initially adopting a proposed plan that included Senate districts, the public had an opportunity to comment on potential Senate district pairings throughout the Board's public road show and toward the end of the 90-day period when the Board was focused on making the Senate pairings. Had the Board actually refused to adopt and present any Senate district plans until later in the process, we might draw a different conclusion.

c. Article VI, section 10's public hearings requirement and procedural due process

i. Hearings

The superior court concluded that article VI, section 10 requires "public hearings . . . on all plans proposed by the Board." (Alteration in original.) That provision states:

> 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*.[177]

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[176] Adopting proposed plans for public comment is designed to focus public attention and testimony on the Board's proposals. That purpose is not well-served by indiscriminately adopting third-party plans with no suggestion of tentative Board approval, and even less so by Senate districts proposed in the third-party plans based on House districts substantially different from those the Board tentatively endorsed. In this case the Board may not have complied with the spirit of article VI, § 10, but the Board's actions were minimally compliant with its literal requirements.

[177] Alaska Constitution, art. VI, § 10 (emphasis added).

The superior court's interpretation appears to be taken out of context. The most natural reading is that public hearings are required on one or more plans adopted within the 30-day window. We have interpreted, but not previously held, that section 10 requires hearings only on plans proposed or adopted within the first 30 days:

> Under article VI, section 10 of the Alaska Constitution, the Alaska Redistricting Board (the Board) must adopt one or more proposed redistricting plans within 30 days after receiving official census data from the federal government. *The Board must then hold public hearings on the proposed plans and adopt a final plan within 90 days of the census reporting*.[178]

The emphasized text can be read to mean that, if the Board cannot agree on one plan within 30 days, *all* plans, regardless of when they are proposed, are subject to the public hearings requirement. This highly semantic reading seems unnatural; we instead hold that section 10 requires hearings on plans adopted within the first 30 days.

ii. Procedural due process

Procedural due process under article I, section 7 — prohibiting the deprivation of life, liberty, or property without due process of law — requires, at a minimum, appropriate "notice and an opportunity to be heard" given the context.[179] The superior court did not tether its limited procedural due process analysis to a specific right to which procedural due process might apply, and the parties did not grapple with this threshold issue in their petitions for review. And we found no arguments in the parties' petitions for review about how procedural due process requirements actually play a role in this context. Much like the superior court's substantive due process analogy in its

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[178] *2011 Redistricting III*, 294 P.3d 1032, 1033 (Alaska 2012) (emphasis added).

[179] *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008).

"hard look" analysis, there is less here than meets the eye.[180]

To the extent the superior court considered that East Anchorage's due process rights were violated, we note the following. At least one proposed third-party redistricting map presented on the road show districted part of the Eagle River area with part of the Muldoon area. Given the volume of comments throughout the 90-day process about the Muldoon and Eagle River areas and their possible pairing, it would be difficult to conclude that there was no notice or meaningful opportunity to comment. Amici curiae Alaska Black Caucus's own compilation of public comments amply demonstrates this. And the Board's proposed plan was not a surprise; the Board did exactly what East Anchorage feared and testified against. East Anchorage thus had a chance to adequately comment on the Board's plans.

3. The Board's equal protection arguments[181]

The superior court considered whether the Board created the two Eagle River area Senate Districts, K and L, with an illegitimate purpose. The court analyzed "whether there were secret procedures in the contemplation and adoption of these senate districts, whether there is evidence of partisanship, and whether the adopted senate boundaries selectively ignore political subdivisions and communities of interest."[182]

The superior court found "evidence of secretive procedures . . . in the Board's consideration and deliberation" of the Senate districts' pairings. The court pointed to "overwhelming public testimony against splitting and combining Eagle River"

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[180] *See supra* note 116 and related text.

[181] *See supra* pp. 14-17 (discussing analytical framework for equal protection claim).

[182] *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987) (establishing neutral factors test).

with the East Anchorage South Muldoon community that seemed to have been ignored by the three Board members who voted in favor of the Senate district pairings. Noting that immediately following an executive session one Board member moved to accept the Senate district pairings, the court reasoned that this "evidences not only secretive procedures, but suggests that certain Board members came to some kind of consensus either during executive session, or altogether outside of the meeting processes." The court discussed statements by the two Board members who did not support the Senate pairings, including statements that the Board had engaged in "naked gerrymandering" and that the Board members favoring the Senate district pairings "recognized that it was not possible to 'get to North Muldoon,' so instead South Muldoon was paired."

The superior court also found evidence of regional partisanship. The court noted the expert witness testimony about the Eagle River and South Muldoon House districts' political leanings, that the adopted Senate pairings would minimize South Muldoon's voting strength, and that there would be no competition in its Senate seat election. The court also pointed to the statement of one Board member, who favored these pairings, that splitting Eagle River gave it "more representation" and that Eagle River would control two Senate seats rather than one.

Finally, the superior court found that the Eagle River and Muldoon areas are separate "communities of interest." It based this determination on "ample public comment" and trial testimony, including that of an expert witness. The court found that "evidence in the record makes clear that any interaction [between Eagle River and Muldoon] includes only Eagle River residents driving into or through Muldoon, with Muldoon residents having no regular travel to or interaction with Eagle River." The court thus concluded "that the Board intentionally discriminated against residents of East Anchorage in favor of Eagle River[] and [that] this intentional discrimination had an illegitimate purpose."

The superior court then considered whether the pairings nonetheless led to more proportional representation. It found that "[p]airing Eagle River Valley with South Muldoon creates an average deviation of -1.68%, whereas pairing both Eagle River districts creates an average deviation of -1.18%." The court concluded that the challenged Senate pairings did not lead to more proportional representation.[183]

Finding an equal protection violation, the superior court then turned to the remedy. It found that the effect of disproportionality in Senate District K was de minimis. But distinguishing this case from *Kenai Peninsula*, the court noted that although "ultimately illegitimate, [the *Kenai Peninsula* Board] lacked the secretive processes and discrimination against the communities of interest and political areas apparent in this case." The court found that a mere declaration of unconstitutionality under a declaratory judgment was not appropriate and remanded the Senate district pairings to the Board, citing *Kenai Peninsula*'s dissent.[184]

a. "Politically salient class" versus "communities of interest"

An equal protection claim requires an assertion that two groups are being treated differently; the Board contests the notion that the Muldoon and Eagle River areas are, for equal protection purposes, different communities. This is a somewhat confusing issue because we have used two different terms to describe groups of people who may be able to bring fair representation claims: "politically salient class" and "communities

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[183] As the Board points out, the superior court's characterization of "under" and "over" representation was incorrect. We also note that the court's approach to the "proportionality of representation" defense reflects a misunderstanding of the defense. We address these issues below.

[184] *See Kenai Peninsula*, 743 P.2d at 1374-75 (Compton, J., dissenting) (explaining that merely offering declaratory relief in face of unconstitutional district does not suffice nor does it deter future boards).

of interest."[185]

The Board advocates using "politically salient class," stating that we "clarified" it as the proper term after the 1999 constitutional amendments.[186] We first used that term in the redistricting context in *2001 Redistricting I* when characterizing *Kenai Peninsula* as discussing politically salient classes.[187] In *Braun v. Denali Borough* we repeated the characterization,[188] and in *2011 Redistricting I* we cited the term's use in *2001 Redistricting I*.[189] But the *Kenai Peninsula* reference in *2001 Redistricting I* does not contain the phrase "politically salient class" — the phrase does not appear in the opinion.[190] We appear to have borrowed the term from a concurring opinion in the United States Supreme Court's *Karcher v. Daggett* decision.[191] Contrary to the Board's

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[185] *Compare Kenai Peninsula*, 743 P.2d at 1365 n.21, 1372 ("[S]enate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska equal protection clause."), *with Braun v. Denali Borough*, 193 P.3d 719, 730 (Alaska 2008) (describing *Kenai Peninsula* holding "that the [B]oard 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" (quoting *2001 Redistricting I*, 44 P.3d 141, 144 (Alaska 2002))).

[186] The Board presumably focuses on "politically salient class" because in *2001 Redistricting I* we used the term in a footnote discussing "racial or political groups." 44 P.3d at 144 n.8.

[187] *Id.* at 144 (citing *Kenai Peninsula*, 743 P.2d at 1370-73).

[188] 193 P.3d at 730 (quoting discussion from *2001 Redistricting I*, 44 P.3d at 144).

[189] *2011 Redistricting I*, 274 P.3d 466, 469 (Alaska 2012).

[190] *See generally Kenai Peninsula*, 743 P.2d at 1352.

[191] *See* 462 U.S. 725, 754 (1983) (Stevens, J., concurring); *2001 Redistricting I*, 44 P.3d at 144 n.8.

assertion, we see nothing about our use of the term "politically salient class" suggesting we intended to "clarify," or even discuss, that the term was a change from the term "communities of interest."

The Board calls *Kenai Peninsula*'s mention of "communities of interest" "vague dicta." We disagree that the phrase qualifies as dicta; we used it when explaining the various factors we would consider to evaluate the equal protection claim before us.[192] And the Board engages with the same factors throughout its briefing. More aptly qualifying as "vague dicta" was our cursory use of the phrase "politically salient class" — which seems not to be a widely used redistricting term of art — when briefly describing *Kenai Peninsula*'s equal protection test in an inapposite context.

At trial the Board argued that East Anchorage "do[es] not state what race or ethnic group is being disenfranchised by the pairings" and that East Anchorage had not shown its voters to be "politically cohesive" or likely to vote in the same way. But the contexts in which we have used the term "politically salient class" do not support the Board's implication that the term relates only to race or political affiliation. We used the term in *2001 Redistricting I* to correct the Board's misunderstanding that *Kenai Peninsula* "entitle[s] political subdivisions to control a particular number of seats based upon their populations."[193] That was not our holding in *Kenai Peninsula*; we "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."[194] Nor did the *Kenai Peninsula* holding referred to by *2001*

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[192] *Kenai Peninsula*, 743 P.2d at 1372.

[193] *2001 Redistricting I*, 44 P.3d at 144.

[194] *Id.* We drew the phrase from Justice Stevens's *Karcher* concurrence, (continued...)

Redistricting I turn on racial discrimination or political party discrimination; the House district in dispute was deemed unconstitutional because of geographic discrimination.[195] *2001 Redistricting I* used the term in the context of a voter dilution claim.[196] *Braun v. Denali Borough*, a case about a borough reapportionment plan, referenced *2001 Redistricting I* for a similar proposition: equal protection did not guarantee Healy voters majority control of the Denali Borough Assembly merely because Healy had a majority of the population.[197] No redistricting decision has discussed "politically salient class" in the context of a challenge based on race or political affiliation. As East Anchorage points out, "community of interest" and "politically salient class" are simply phrases courts use "to name and refer to identifiable groups which are alleged to have been treated differently from other groups for purposes of conducting an equal protection analysis."

To allow for meaningful judicial review in redistricting cases, we formally adopt Professor Nicholas O. Stephanopoulos's "community of interest" definition, which in large part is consistent with our case law: A community of interest "is (1) a geographically defined group of people who (2) share similar social, cultural, and economic interests and (3) believe they are part of the same coherent entity. The first

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[194] (...continued)
defining a "politically salient class" as "one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries." 462 U.S. at 754 (Stevens, J., concurring). Justice Stevens's definition contains no mention of race or political party. *Id.*

[195] *Kenai Peninsula*, 743 P.2d at 1370-73. Indeed, we *dismissed* an equal protection claim in *Kenai Peninsula* based on political party discrimination. *Id.* at 1369-70.

[196] 44 P.3d at 144.

[197] 193 P.3d 719, 729-30 (Alaska 2008).

element, geographic demarcation, is necessary because of the American commitment to geographic districting."[198]

b. Whether socioeconomic integration and "communities of interest" are synonymous

The Board argues that taking "communities of interest" into account already is required by article VI, section 6's mandate that House districts be socioeconomically integrated. The Board cites two examples of "[l]egal commenta[ry]" supporting this view. The first is a chart from the Brennan Center for Justice, simply compiling definitions of "community of interest" from numerous states using the term, and listing article VI, section 6 as the source of Alaska's "community of interest" inquiry.[199] This informative resource is hardly "legal commentary"; it is a two-page chart expressing no

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[198] Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1430 (2012). Professor Stephanopolous used the term "territorial community" rather than "community of interest" because the latter "does not have to be spatially bounded" and "can be deemed to arise on the basis of any common concern, making the term notably imprecise and malleable." *Id.* at 1431-32. We address this concern by simply defining community of interest using his territorial community definition. Professor Stephanopolous suggests that election district boundaries should correspond with territorial communities to the extent possible and that courts should intervene when such communities unnecessarily are fused or split and the redistricting authority offers no reasonable explanation for the community disruption. *Id.* at 1385. Our case law similarly imposes a justification duty when a plausible equal protection violation claim is made. *See Kenai Peninsula*, 743 P.2d at 1371 ("Depending upon the primacy of the interest involved, the State will have a greater or lesser burden in justifying its" questioned action). *See generally Pub. Emps. Ret. Sys. v. Gallant*, 153 P.3d 346, 349 (Alaska 2007) ("We most often review [an act treating two groups differently] 'by asking whether a legitimate reason for disparate treatment exists, and, given a legitimate reason, whether the enactment . . . bears a fair and substantial relationship to that reason.' ").

[199] *Communities of Interest*, BRENNAN CENTER FOR JUSTICE (Nov. 2010), https://bit.ly/BrennanCOI (last visited Feb. 18, 2023).

view and engaging in no analysis.[200] The Board's second source is a 1997 Virginia Law Review article citing article VI, section 6 as support, within a broader discussion of communities of interest, that "[t]he [C]onstitution[] of Alaska . . . require[s] consideration of communities of interest in apportionment."[201] The Board contends that article VI, section 6's socioeconomic integration requirement is the only place in Alaska redistricting law accounting for communities of interest. But neither the Board's sources nor our decisions support its conclusion.

A court asking whether a House district is socioeconomically integrated may look to its communities of interest because the analyses might overlap to a significant degree. But that does not mean Senate district pairings of two socioeconomically integrated House districts can never implicate concerns about fair representation for communities of interest. In *Kenai Peninsula* we stated that district boundaries "which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska equal protection clause."[202] A community of interest, for example, could stretch across two boroughs or be contained entirely within a borough. This reasoning finds support in a special master's report we commissioned in *Egan v. Hammond*:[203] The special master suggested that "Anchorage subdivisions [could] coincide with rough communities of interest" despite Anchorage's

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[200] *See id*.

[201] Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 466 (1997).

[202] 743 P.2d at 1365 n.21; *see also Hickel v. Se. Conf.*, 846 P.2d 38, 48 (Alaska 1992) (stating that "a state's desire to maintain political boundaries is sufficient justification for population deviation if consistently applied" (citing *Kenai Peninsula*, 743 P.2d at 1360)).

[203] 502 P.2d 856 (Alaska 1972).

lack of "clearly delineated ethnic ghettoes."[204]

The Board misframes the issue, setting out the seemingly absurd conclusion that, under the superior court's findings of fact and conclusions of law, "in 2002, it was constitutional to place portions of Eagle River and Muldoon in a single [*H*]*ouse* district because they are socioeconomically integrated, but in 2021, those areas of Anchorage cannot be in the same [*S*]*enate* district because they are different 'communities of interest.' " (Emphasis in original.) But in this case the challenge is about *splitting up* a community of interest to increase those residents' voting power over two Senate districts rather than one, not about putting separate communities of interest from one borough — which by law are socioeconomically integrated — together in the same legislative districts. It would not be contradictory to find that the Muldoon and Eagle River areas are, as a matter of law, socioeconomically integrated but nonetheless separate communities of interest.

The Board advances no argument whether the Muldoon and Eagle River areas are separate communities of interest beyond pointing out that they are socioeconomically integrated because they are in the same borough. The superior court's finding that the Muldoon and Eagle River areas constitute separate communities of interest was well-supported by the affidavit of East Anchorage's expert witness, Dr. Chase Hensel, a local anthropologist. Dr. Hensel noted the "one-way flow" of Eagle

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[204] *Id.* at 894. We recognize that "ghetto" has more recently developed a colloquially pejorative connotation. *See, e.g.*, Camila Domonoske, *Segregated From Its History, How 'Ghetto' Lost Its Meaning*, NPR (Apr. 27, 2014), https://www.npr.org/sections/codeswitch/2014/04/27/306829915/segregated-from-its-history-how-ghetto-lost-its-meaning; Hugo Quintana, *"The Ghetto"*, THE MICH. DAILY (Oct. 14, 2021), https://www.michigandaily.com/michigan-in-color/the-ghetto/ (discussing historic and slang usage of "ghetto"). For historical accuracy and in light of the term's ongoing legal significance, *see, e.g.*, Tommie Shelby, *Justice, Work and the Ghetto Poor*, 6 L. & ETHICS HUM. RTS. 70 (2012), we quote the term as used in 1972.

River commuter traffic to East Anchorage; amici curiae Alaska Black Caucus noted that Member Marcum's assertion about the two communities sharing close ties was limited to her observation that some Eagle River residents commute to Anchorage via Muldoon Road. Dr. Hensel pointed out that the two communities' events and professional groups do not include one another. He noted different transportation service providers, local newspapers, histories and socioeconomic statuses, voting patterns, and racial and ethnic makeups. He also noted that Eagle River people described their community as "separate," "independent," "unique," and "stand alone."

Dr. Hensel's data also persuasively demonstrated racial and socioeconomic disparity between the two areas. In the Bartlett High School catchment area, primarily covering North and South Muldoon, students are 18% White and 70% economically disadvantaged. By contrast, in the Eagle River High School catchment area students are 68% White and 24% economically disadvantaged. Muldoon has 9% and northeast Anchorage has 14% of residents living below the poverty line, compared to just 3% in Eagle River and 2% in Chugiak. And 75% of North Muldoon students qualified for free and reduced lunch, compared to just 16% of Eagle River Valley's students.

North and South Muldoon are roughly 38% and 52% White respectively, while Eagle River Valley and North Eagle River are 76% and 75% White, respectively. Amici curiae Alaska Black Caucus provides similar statistics, pointing out that combining the two Muldoon House districts would create a majority-minority district, as would combining the Mountain View/Joint Base Elmendorf-Richardson (JBER) districts.

Given the definition of "community of interest" we have adopted, these observations support the superior court's findings that the Muldoon and Eagle River areas constitute separate communities of interest and that the Board's Senate district pairings split up the Eagle River community of interest to give it more political influence,

evidencing discriminatory intent.[205] And even if we disagreed with the strong evidence that the Muldoon and Eagle River areas constitute separate communities of interest, it would be unwise to hold, *categorically*, that separate communities of interest cannot exist within a single borough. As Alaska's largest city, Anchorage likely will continue growing more populous and diverse. The historical, economic, or traditional significance of neighborhoods may change with time, and courts should remain open to hearing evidence that certain Anchorage neighborhoods are sufficiently different from one another that they constitute separate communities of interest. Categorically holding that no subregion of Anchorage can be a community of interest would expose Alaskans to gerrymandering.

c. Discriminatory intent

i. Secretive procedures

The Board challenges the superior court's "speculative" finding that the Board engaged in "secretive procedures," a *Kenai Peninsula* fair representation test factor for discriminatory intent.[206] But the superior court did not err by finding that the Board engaged in secretive procedures.

The Board began its Anchorage Senate district pairings on November 8. Member Bahnke first discussed her recommended Anchorage pairings, strongly expressing her feeling that the Eagle River and Muldoon areas each should be kept intact based on her review of public comments supporting the idea. Member Borromeo agreed, stating: "I don't know why you would ever consider splitting Eagle River unless you were trying to expand Eagle River's reach in the Senate."

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[205] *See Kenai Peninsula*, 743 P.2d at 1372 ("District boundaries which meander and selectively ignore political subdivisions and communities of interest, and evidence of regional partisanship are also suggestive [of discriminatory intent].").

[206] *Id.* (setting out multifactor totality of circumstances test).

Member Marcum then presented four versions of Anchorage-area pairings, noting that her four maps paired JBER with one of the Eagle River districts based on her personal experience that Eagle River is a "bedroom community" for JBER. Extensive discussions took place about why Member Marcum believed JBER and a portion of Eagle River should be paired and about pairing South Muldoon with part of Eagle River. When asked why putting the two Eagle River House districts together was not the most logical choice, Member Marcum stated: "Eagle River has its own two separate House districts. This actually gives Eagle River the opportunity to have more representation . . . ." Member Marcum obviously meant that if the Eagle River area were placed in two distinct Senate districts, Eagle River voters could control the election of two senators rather than one.

The Board did not appear to come to an agreement on the record about any map before voting. The superior court noted:

> In the midst of discussion, where several [S]enate pairings that split Eagle River and split the Muldoon area were offered by Member Marcum, Chairman Binkley states[:] "So I get a sense that there's a majority of, not consensus for the plan that [Member Marcum] has brought forward. If that's the case, I think we should move on to the last one that we got, which is Fairbanks."

Member Borromeo responded: "Mr. Chairman, before we do that, . . . is it your understanding that [Member Marcum is] only presenting one? Because there's so many . . . . I don't know what all of the different combinations were." The superior court noted that — and after review, we agree — it is unclear, and it was unclear to fellow Board members, which map a majority of the Board had agreed upon. The court thus inferred:

> [There was] some sort of coalition or at least a tacit understanding between Members Marcum, Simpson, and

> Binkley. All three appeared to agree on all four of Member Marcum's maps with little public discussion. Most surprising was that at that time, it is unclear in the transcript, and was apparently also unclear to Member Borromeo, which of Member Marcum's maps the Board had apparently reached a majority on when the deliberative discussion was ended. It seems that what the three Board Members had reached a majority [on] was the only element of the map that was consistent between them: that Eagle River was split and North Eagle River was paired with JBER. That confusion is highlighted in the Chairman's choice to move on from Anchorage Senate pairings in the midst of deliberations to talk about Fairbanks to the surprise of Members Borromeo and Bahnke. There was no further public deliberation regarding Anchorage Senate pairings after this point, yet three Board members, the only three Board Members who signed the final proclamation in support, seemed to at some point understand which set map of [S]enate pairings to offer for adoption among the four.[207]

After discussing Fairbanks-area Senate district pairings, the Board entered into executive session to receive "legal advice with regard to the . . . proposed Senate pairings in Anchorage."[208] Upon exiting executive session, Member Marcum immediately moved to accept the Anchorage Senate pairings without further public discussion. The superior court observed:

> This evidences not only secretive procedures, but suggests that certain Board members came to some kind of consensus either during executive session, or altogether outside of the meeting processes. While the Court stops short of a finding that this happened, the Court does see ample evidence of secretive process[es] at play.

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[207] The superior court's internal citations to the record have been omitted.

[208] We are unable to discern the specific OMA allowance relied upon for the executive session.

The Board emphasizes that on November 8 it extensively discussed possible Senate district pairings on record, including the multiple potential Anchorage Senate district pairings presented by Members Bahnke and Marcum mentioned above. The Board also points to trial testimony from Members Binkley and Simpson that Board members did not agree on the maps during executive session or between public meetings and that the Board entered into executive session on November 8 to receive legal advice about some potential Senate pairings. The Board asserts that this testimony was uncontested at trial.

Yet, as amici curiae Alaska Black Caucus notes: "The Board never discussed the relative merits of Bahnke's plan as compared to Marcum's. No other Board member spoke on record in favor of Marcum's proposal, . . . yet Binkley somehow knew that a majority favored Marcum's plan over Bahnke's." East Anchorage points to other evidence of secretive procedures. It notes Member Borromeo's statements on the record that in executive session the Board likely had been advised *against* the Senate District K pairing and that Member Binkley, despite voting for splitting Muldoon, made no statement on the record supporting the pairings or explaining why he thought they "were more lawful or correct than those proposed by Member Bahnke." East Anchorage also notes that Members Marcum and Simpson, the two members most vocally supporting the Eagle River-Muldoon pairing, "had access to incumbent information" provided by a Republican strategist, Randy Ruedrich.

Bearing in mind that the results of secretive procedures are, by their nature, difficult to prove, and, paradoxically, that habitually using executive session to conduct the Board's business is indicative of secretive procedures, we agree with the superior court that this factor tends to weigh in favor of finding discriminatory intent.

ii. Partisanship

The superior court found evidence of regional partisanship, another *Kenai*

Peninsula equal protection discriminatory intent factor.[209] The court framed the issue as favoring Eagle River and disfavoring Muldoon as geographic regions rather than as discriminating against a particular political party. The court stated that although South Muldoon historically was a Republican-leaning swing district, the Senate pairings would "usurp[] [its] voting strength in the event it chooses to elect a Democratic senator." As amici curiae Alaska Black Caucus put it:

> An East Anchorage [S]enate district formed from the two Muldoon [H]ouse districts would be a swing district, with no guarantee that the next senator would be a Democrat rather than a Republican. But this pairing would guarantee that the votes of East Anchorage would matter: voters could elect a senator who resides in the community, who understands its concerns, and who does not need to compromise those concerns . . . to protect the interest of voters in the other half of a district with very different needs.

The Senate District K pairing's political undertones are impossible to ignore. We first must address the Board's contention that we have "never recognized the viability of a partisan gerrymandering claim" and its reliance on *Rucho v. Common Cause* — holding that political gerrymandering claims are non-justiciable in federal courts — to urge us to follow the Supreme Court's lead.[210] Contrary to the Board's contention, we have recognized partisan gerrymandering claims. *Kenai Peninsula* adjudicated a partisan gerrymandering claim that ultimately was dismissed, but not on justiciability grounds.[211] Considering the Constitutional Convention minutes, the 1999 amendments' legislative history, and our case law, we expressly recognize that partisan

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[209] 743 P.2d at 1372 (setting out multifactor totality of circumstances test).

[210] 139 S. Ct. 2484, 2506-07 (2019).

[211] *See* 743 P.2d at 1369-70.

gerrymandering is unconstitutional under the Alaska Constitution.

There is ample evidence of regional and political partisanship in this case. East Anchorage points out that the Board's 3-2 majority in favor of splitting the Muldoon and Eagle River areas was comprised only of the Republican-appointed Board members. Member Simpson said at trial that, despite article VI, section 8's instruction that Board members be chosen "without regard to political affiliation," he was chosen because he was "a Republican from Southeast."[212] As the superior court acknowledged, Muldoon leans Republican but is a "highly competitive" district, whereas Eagle River is "firmly Republican." East Anchorage notes that Randy Ruedrich, a Republican strategist and

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[212] As noted earlier, Member Simpson's post-remand email, not available in the record for this part of our review, shows that he viewed the redistricting process through a partisan lens. *See supra* note 166. The email stated:

> The Supremes also upheld the Superior Court's ruling that we had politically gerrymandered one Senate district in Anchorage . . . . To me this implies that what the court perceived as a political gerrymander must be replaced with a different political gerrymander more to their liking. The district in question paired two [H]ouse districts that were both majority non-minority, one of which was reliably [R]epublican and the other was [R]epublican 2/3 of the time. Not clear to me why this is bad but the D[emocrat]s will push to dilute both of them to make it easier to elect their candidates.

These comments reveal more about the member's views of the propriety of political gerrymandering than about our role in resolving constitutional challenges to a redistricting plan. We decide the redistricting cases brought to us, including the challenges to the current Board's redistricting plans; we do not seek out the redistricting cases we hear. Our past redistricting decisions reflect that the political affiliations of those creating a redistricting plan had no bearing on our decisions. *See, e.g.*, *supra* note 17 (discussing redistricting challenges and our decisions when governors controlled redistricting).

former chair of the Alaska Republican Party, emailed Members Marcum and Simpson "political incumbent information for each of the Board's adopted [H]ouse districts." Ruedrich also appears to be the only person to have testified in favor of pairing Eagle River and Muldoon during the November 8 public comments meeting. There also is Member Marcum's statement that Eagle River would get "more representation" if it were split into two Senate districts, meaning increased Senate representation for Eagle River by controlling two firmly Republican Senate districts rather than one.

Finally, notwithstanding our deferential hard look standard, the Board's justification for pairing a Muldoon House district and an Eagle River House district in the face of overwhelming public opposition from *both* communities is difficult to understand unless some form of regional or political partisanship were involved. And amici curiae Alaska Black Caucus persuasively illustrates how past pairings involving East Anchorage and Eagle River areas resulted in Alaska's first Black female senator — a Democrat — losing her seat, despite having been re-elected multiple times before the pairing. Considering the rushed manner in which the Board adopted the Senate District K pairing, the nearly unanimous public opposition, and the contrasting political effects of the pairing on Muldoon's and Eagle River's voting power, we agree with the superior court that the record supports the inference that partisanship was at play.

d. Proportionality of representation

Kenai Peninsula instructs that a Senate district drawn with a discriminatory purpose might be justifiable if the Board can show that it led to greater "proportionality of representation."[213] Equating the concept of proportionality with the degree of deviation from the ideal district population, the superior court invalidated the South Muldoon and Eagle River Senate pairings because it concluded that the Board's plan led

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[213] 743 P.2d at 1372.

to more population deviation than the challengers' plan.

The Board correctly points out that, when a House district is underpopulated relative to the "ideal" House district population, residents of that district are *over*represented because their voting power is higher relative to residents of districts with higher populations. The Board points out that the superior court got this backward; the court repeatedly referred to House districts with lower populations as *under*represented when it should have called them *over*represented. But this misses the point.

We agree with the superior court that the closer to zero a district's deviation from the ideal population is, the greater the "proportionality of representation" is *in that context*. But in the fair representation context proportional representation is the extent to which members of a particular group are represented in public office.[214] For example, in a hypothetical pairing created specifically to discriminate against Black citizens, the fact that the House districts exactly equaled the ideal district population, rather than deviating from the ideal by a percent or two, would neither be a defense nor serve the interests of justice. *Kenai Peninsula*'s discussion of "proportionality of representation" makes more sense in this context; that proportional representation inquiry concerned over- or under-representation in the State legislature based on Anchorage's share of Alaska's population, not its degree of deviation from the ideal district population.[215] We already have unequivocally stated in *Braun* and *2011 Redistricting I* that Alaskans do not

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[214] *See Thornburg v. Gingles*, 478 U.S. 30, 74-77 (1986) (discussing proportional representation of Black population in state legislature); *Proportional representation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An electoral system that allocates legislative seats to each political group in proportion to its actual voting strength in the electorate.").

[215] 743 P.2d at 1372-73.

have an absolute right to proportional representation based on population.[216] And such an inquiry would not make sense in this case. Muldoon and Eagle River area citizens are not scattered across the state, comparable to the Black population in *Thornburg v. Gingles*,[217] but are by definition located in fixed places.

e. Conclusion

Under the totality of the circumstances, the superior court correctly concluded that Senate District K is unconstitutional due to geographic and partisan gerrymandering. And the appropriate remedy was to remand to the Board to correct the constitutional deficiency.

V. CONCLUSION OF CHALLENGES TO 2021 PROCLAMATION

We AFFIRM the superior court's determination that House Districts 3 and 4 comply with article VI, section 6 of the Alaska Constitution and should not otherwise be vacated due to procedural aspects of the Board's work. We REVERSE the superior court's remand to the Board for further proceedings on those districts under the superior court's hard look analysis relating to public comments on these House districts.

We AFFIRM the superior court's determination that House Districts 29, 30, and 36 do not violate article VI, section 6 of the Alaska Constitution and should not otherwise be vacated due to procedural aspects of the Board's work, with one exception: We conclude that the so-called "Cantwell Appendage" violates article VI, section 6 because it renders House District 36 non-compact without adequate justification. We therefore REVERSE the superior court's determination to this limited extent.

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[216] *Braun v. Denali Borough*, 193 P.3d 719, 730 (Alaska 2008); *2001 Redistricting I*, 44 P.3d 141, 144 (Alaska 2002); *accord* Voting Rights Act 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

[217] *See generally* 478 U.S. at 74-77.

We AFFIRM the superior court's determination that the Board's Senate District K pairing of House Districts 21 and 22 constituted an unconstitutional political gerrymander violating equal protection under the Alaska Constitution.

VI. 2021 REDISTRICTING PROCESS AFTER REMAND, ROUND 2: BOARD PROCEDURES AND AMENDED PLAN; CHALLENGE AND SUPERIOR COURT'S DECISION; BOARD'S PETITION FOR REVIEW

The superior court remanded the redistricting plan back to the Board with instructions consistent with our summary order. The superior court ordered, among other things, that the Board correct the constitutional error that both we and the superior court identified with respect to Senate District K.

A. Board Proceedings On Remand

The Board met and heard public testimony almost every day April 2-9. The Board did not enter into any executive sessions, though the superior court later noted that there were indications Board Members Binkley, Marcum, and Simpson — the three members in favor of the initial Senate District K — may have been privately communicating and formed a coalition with the goal of preserving a JBER/North Eagle River Senate district.

By April 6 the Board was deciding between Options 2 and 3B for Senate district pairings. Option 2 and Option 3B both resulted in four Senate districts different from the original November 2021 plan. Both options paired North and South Muldoon into Senate District K. But where Option 2 would have combined North and South Eagle River into an Eklutna/Eagle River/Chugiak Senate district, Option 3B kept North Eagle River with JBER (Senate District L) and placed South Eagle River with South Anchorage/Girdwood/Whittier (Senate District E). The final amended plan was adopted on April 13 with Members Binkley, Marcum, and Simpson voting in favor of Option 3B and Members Bahnke and Borromeo opposed.

B. Superior Court Proceedings

Louis Theiss, Ken Waugh, and Jennifer Wingard (collectively Girdwood) appeared in the superior court later in April to challenge Senate District E as violating their equal protection rights and article VI, section 6 because it was non-compact, was "falsely contiguous," and ignored geographic features. Girdwood also contended that again creating two separate Eagle River Senate districts, Districts K and L, constituted unlawful political gerrymandering.[218]

Due to the proceeding's expedited nature — potential legislative candidates had an impending June 1 filing deadline[219] — there was no formal discovery and the superior court held only one day of oral argument, largely working from the parties' briefing. The court "accepted all materials submitted by the parties, regardless of timing" and reviewed them under a more relaxed standard of evidence, considering "their relevance to the issues presented" and affording them weight "under the totality of the circumstances." The superior court issued its decision on May 16. We again commend the superior court on its expedited work resolving the challenges to the Board's plan.

1. Girdwood's article VI, section 6 challenge

Girdwood argued that pairing South Eagle River with South Anchorage/Girdwood/Whittier in Senate District E violated article VI, section 6's "contiguity requirement and disregard[ed] local government boundaries without explanation." Girdwood acknowledged that Senate District E was technically contiguous

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[218] Attached as Appendix C are copies of relevant election district maps the Board published with its April 2022 amended proclamation. These maps show the contested Senate districts.

[219] AS 15.25.040(a).

— the districts physically touched at the border[220] — but that this was "false contiguity" because "several hundred miles of uninhabited state park, including the Chugach Mountains, divide the actual population centers" of the Senate district. An expert witness for Girdwood, Dr. Chase Hensel, testified about this contiguity requirement, but the superior court discounted the testimony as amounting to an improper legal conclusion. The superior court held that "Senate District E does not violate [a]rticle VI, [section] 6" because the two House districts composing the Senate district share a border, fulfilling the contiguity requirement.

2. Girdwood's equal protection challenge

Girdwood next argued that the "Board acted with illegitimate purpose when it adopted Option 3B," violating equal protection. Girdwood pointed to the superior court's prior findings that the Board had engaged in "secret procedures" and contended that the Board's splitting Eagle River voters into two Senate districts was evidence of partisanship gerrymandering; Girdwood argued that the Board continued to have an illegitimate purpose when it again split Eagle River voters into two Senate districts for the amended plan. Girdwood argued that the Board's majority coalition chose to split up communities of interest in contravention of what the majority of public commenters requested and without justification for more proportional representation.

The bulk of the superior court's decision considered whether the new Senate district pairings violated equal protection by intentionally discriminating in favor of or against a community of interest. The court again relied on the *Kenai Peninsula* "neutral factors test" to find that, under the totality of the circumstances, the Board was

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[220] *See* Alaska Const. art. VI, § 6 ("Each [S]enate district shall be composed as near as practicable of two contiguous [H]ouse districts."); *Hickel v. Se. Conf.*, 846 P.2d 38, 45 (Alaska 1992) (explaining territories are contiguous when they are "bordering or touching" each other).

intentionally discriminating when it engaged in unconstitutional partisan gerrymandering to ensure "two solidly Republican senate seats" in Senate Districts L and E. The court found that the Board ignored the Eagle River and South Anchorage communities of interest when constructing Senate District E because a majority of the Board "insisted continuously" that Senate District L — combining North Eagle River and JBER — "remain intact."

The superior court initially was unsure "how much weight" to afford its March 2021 finding, that the Board had engaged in intentional discrimination when it split Eagle River voters into separate Senate districts, when considering the constitutionality of the Board's amended plan. After reviewing federal case law addressing how to apply prior discriminatory intent in equal protection cases the court concluded that it would look at "the Board's prior discriminatory intent as part of the 'totality of the circumstances' in addressing the Girdwood challenge" but that it would not be dispositive; the burden would remain on Girdwood to prove discriminatory intent.[221]

The superior court then discussed circumstances it found relevant for the Girdwood challenge. Given that the South Anchorage/Girdwood House district is

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[221] The superior court commented that in light of the Board's prior partisan gerrymandering, the court would be in favor of shifting "the burden to the Board to demonstrate that its Amended Proclamation . . . w[as] made in good faith and without partisan considerations." But the court recognized that there is a presumption of constitutionality and that the Board's actions generally are reviewed under a deferential arbitrary and capricious standard. *See Treacy v. Mun. of Anchorage*, 91 P.3d 252, 260 (Alaska 2004) ("A duly enacted law or rule . . . is presumed to be constitutional."); *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 899-900 (Alaska 2003) (reasoning that rules or laws created by bodies with rulemaking or lawmaking powers conferred directly by Constitution are entitled to presumption of constitutionality); *Kenai Peninsula*, 743 P.2d at 1357-58. The court utilized the deferential arbitrary and capricious standard of review for the Board's amended plan.

Republican-leaning already, the court first noted that South Anchorage's pairing with a strong Republican district would not "necessarily result in any significant discriminatory effect." Second, the court found that the Board's prior act of pairing South Eagle River with South Muldoon to "give[] Eagle River more [Senate] representation" "weigh[ed] heavily in Girdwood's favor." Third, the court concluded that the Board's main rationale for ignoring "public testimony, geography, and even the boundaries of Eagle River to justify adopting Option 3B" — " 'to preserve the military community's voting strength' as a 'community of interest' " — was not supported by the record (when the court had never found that JBER was a community of interest) and constituted "substantive departures . . . weighing heavily in Girdwood's favor." Fourth, the court found that "contemporaneous statements of the decision-makers" were inconclusive regarding discriminatory intent. "Ultimately, the factor that tip[ped] the balance in Girdwood's favor [was the superior court's] prior finding on intent."

The superior court discussed the Board's primary justification for selecting Option 3B: "[P]airing JBER with downtown Anchorage would result in JBER's preference for candidates being usurped by downtown Anchorage's preference for opposing candidates." But because the court was not given evidence supporting that JBER was a community of interest and the Board failed to engage with comments pointing out that the large, demographically diverse "portion of Downtown" paired with JBER in House District 23 would not be served by the Senate District L pairing, the court found that the Board had "not put forth any legitimate, nondiscriminatory purpose for its actions" and thus "violated equal protection rights of the residents of Girdwood and House District 9." The court also found that "the majority of the Board acted in concert with at least a tacit understanding that Eagle River would again be [split and] paired in such a way as to provide it with two solidly Republican senate seats — an unconstitutional partisan gerrymander." Thus, under the totality of the circumstances,

the court concluded "that the Board intentionally discriminated against residents of District 10, including Girdwood[,] in order to favor Eagle River, and this intentional discrimination had an illegitimate purpose" violating equal protection.

The superior court remanded the proceedings to the Board to draft a constitutional plan and also ordered "the Board to adopt Option 2 on an *interim* basis for the 2022 general election."

C. The Board's Petition For Review

The Board petitioned for our review of the superior court's May 2022 order, challenging both the basis for remand and the court's imposed interim plan. We granted review, later issuing a summary order resolving the petitions and noting that a full explanation would follow.[222]

VII. RESOLUTION OF ROUND 2 PETITION FOR REVIEW

A. The Superior Court Did Not Improperly Consider The Weight Of The Public's Testimony.

The Board argues that the superior court "recycled [its] weight-of-public-testimony standard" which had been effectively struck down by our March 25, 2022 order. The Board is correct that we struck down the court's earlier hard look analysis and that the court continued to express concern about the weight of the public testimony regarding the amended plan. But the Board fails to recognize that the court expressly acknowledged our earlier order and noted the weight of the public testimony only in light of our pending full opinion. The court appears to have landed on the appropriate hard look analysis we discussed above: Public comment should be considered when it raises a salient issue that the Board should address if it is engaging in reasoned decision-

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[222] Our summary order resolving the petition for review is attached as Appendix D.

making.[223]

The Board does not argue that the superior court's discussion of public testimony impacted any particular step in its decision to remand the amended plan — the Board appears to understand the immense value of public testimony in the decision-making process, extensively quoting public comments in its petition for review — and asks us only to "remind lower courts that public testimony cannot change the . . . requirements of the Alaska Constitution." We do not further address this issue.

B. The Superior Court Correctly Concluded That The Senate District Pairings Continued To Violate Equal Protection.

1. The superior court did not adopt a new burden of proof from federal case law.

The Board contends that the superior court adopted a new burden of proof. The Board seems to suggest that the court adopted a federal standard placing the burden on the Board to prove it did not violate equal protection, despite federal case law instructing courts to impose a "presumption of legislative good faith" in these circumstances.[224] But the court affirmatively asserted that it did "not chang[e] the standard or the burden of proof." Rather, the court highlighted that perhaps a new

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[223] *See 2001 Redistricting I*, 44 P.3d 141, 144 n.5 (Alaska 2002) (determining whether regulation is reasonable primarily concerns whether "the [Board] has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making" (quoting *Interior Alaska Airboat Ass'n v. State, Bd. of Game*, 18 P.3d 686, 690 (Alaska 2001))).

[224] *See Abbott v. Perez*, 138 S. Ct. 2305, 2311 (2018) ("The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination, which is but 'one evidentiary source' relevant to the question of intent." (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977))). We note that the Board quotes a different portion of *Abbott* in which it is less obvious that past discrimination is one factor relevant to the analysis of present discriminatory intent.

approach was warranted given our previous rejection of gerrymandering in this redistricting cycle, and the court left the matter for us to decide whether the burden of proof should be adjusted in comparable future scenarios. The Board's argument, as we said in our earlier order, is specious.[225]

The Board also challenges the superior court's subsequent review of federal case law when determining that it should include its earlier finding that the Board engaged in unconstitutional political gerrymandering in conducting its *Kenai Peninsula* neutral factors test.[226] We see no error in the court's analysis and agree that prior acts of discrimination by the same Board in the same redistricting cycle are relevant under the *Kenai Peninsula* neutral factors test.[227]

2. The superior court did not improperly distinguish our holding in *2001 Redistricting I*.

The Board argues that, because two decades ago we upheld a House district combining the Eagle River Valley with South Anchorage, the superior court erred when it allegedly "ignored this dispositive holding and never distinguished it."[228] The Board does not suggest that it made this argument to the superior court, does not point to

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[225] *See infra* Appendix 2.

[226] *See* 743 P.2d at 1372.

[227] *See id.*; Alaska R. Civ. P. 90.8(d) (explaining that record before superior court in redistricting challenges "consists of the record from the Redistricting Board"); *cf. Abbott*, 138 S. Ct. at 2313, 2317, 2324-25 (holding 2013 election map that looked similar to unconstitutional 2011 map necessitated new finding of discriminatory intent because different legislature created new map).

[228] *See 2001 Redistricting II*, 47 P.3d 1089, 1091 (Alaska 2002) (holding House district that did not follow "natural and local government boundaries" was not automatically unconstitutional on grounds of socioeconomic integration or other article VI, section 6 concerns).

anywhere in the order following remand where the court wrestled with this concern, and does not point to any case law suggesting that approvals of prior redistricting plans have a preclusive effect on subsequent plans.

The Board appears to be making a stare decisis argument, which intuitively would be irrelevant in the redistricting context because each new redistricting cycle naturally entails new circumstances in light of new census data.[229] Otherwise, every ten years the Board presumptively would be able to adopt the proclamation from the last redistricting cycle and the burden would be on voters to argue why any deviations would be justified.[230] It also is important to consider whether a particular constitutional requirement was at issue and litigated in the previous redistricting cycle; the Board does not assert that partisan gerrymandering was a disputed issue we resolved. We reject the Board's argument.

3. The superior court did not err in its discussion of communities of interest.

The superior court critically reviewed the Board's assertion that military residents of JBER necessarily constitute a community of interest. The Board argues that the court's critique was erroneous because the court never defined community of interest;

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[229] *Cf. Thomas v. Anchorage Equal Rts. Comm'n*, 102 P.3d 937, 943 (Alaska 2004) ("The stare decisis doctrine rests on a solid bedrock of practicality: ' "no judicial system could do society's work if it eyed each issue afresh in every case that raised it." ' " (quoting *Pratt & Whitney Canada, Inc. v. United Techs.*, 852 P.2d 1173, 1175 (Alaska 1993))).

[230] *See id.* ("In recognizing the importance of this doctrine, we have consistently held that a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling: 'We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.' " (quoting *State, Com. Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003))).

"obvious[ly] . . . military personnel share the same employer, the same noble mission, the same workplace, and the same shopping and medical facilities"; and " 'communities of interest' is a synonym for areas that are socio-economically integrated," such that "Eagle River and South Anchorage are not separate communities of interest that cannot be combined with other areas of Anchorage and cannot be split." The Board's argument somewhat misrepresents the court's discussion. The court did not find that JBER was *not* a community of interest; rather the court pointed out that JBER previously had not been identified as a community of interest and found that the Board failed to present any evidence supporting its assertion. And the crux of the issue before us is not whether separate communities of interest can be combined, but whether a community of interest can be split to its own advantage (and to the disadvantage of separate communities of interest) by allowing it to control multiple Senate districts.

We note again, as we did when resolving the Board's earlier petition for review, that the Board's assertion that communities of interest are equivalent to socioeconomically integrated communities is incorrect. A community of interest almost always will be socioeconomically integrated within itself and externally with other nearby communities of interest, but a larger socioeconomically integrated community is not automatically an all-encompassing community of interest.[231] The Board cited no evidence, aside from its own speculation, that JBER is a community of interest; in any case, there was no showing that the House district encompassing the populated portion of the military base as a whole would tend to share political preferences more closely with an Eagle River House district than with the downtown Anchorage House district. We thus reject the Board's argument that concerns about JBER justify splitting Eagle River.

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[231] *See* Stephanopoulos, *supra* note 198, at 1430.

4. The superior court's discussion of local government boundaries was not erroneous.

The superior court acknowledged that the disputed House districts were within the Municipality of Anchorage and therefore were socioeconomically integrated as a matter of law, but criticized the Board for not considering "local [government] boundaries, including school zones, community councils and even the Downtown Improvement District" when drawing the new senate map. The Board asserts that "high school attendance boundaries within the Anchorage School District are not 'local government boundaries' because all students within the Anchorage School District are governed by the same political entity: the Anchorage School District School Board."[232] The Board also asserts that "community council boundaries within the Municipality of Anchorage are of *no constitutional import*." (Emphasis in original.) In *2001 Redistricting II* we recognized that "respect for neighborhood boundaries is an admirable goal"; we then held that "it is not constitutionally required and must give way to other legal requirements."[233] Although districting along "neighborhood boundaries" is not "constitutionally required,"[234] it is an unconvincing stretch for the Board to argue that

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[232] The Board makes a frivolous argument that "[n]othing in the state [C]onstitution or case law suggests that the Board must consider where non-voting minor children go to school when the Board adopts legislative districts for adult voters." The court was, of course, not considering school zones because children going to the same school might have similar voting interests, but rather because those students tend to have concerned parents and guardians who could be unified by issues surrounding the fact that their children attend the same schools. It does not seem unreasonable that "local government boundaries" might include school zones. Alaska Const. art. VI, § 6.

[233] 47 P.3d at 1091.

[234] *Id.*

they are of "no constitutional import."[235] (Emphasis omitted.) And the Board identifies no "legal requirements" that convinced it to forgo considering community boundaries.

Girdwood responds that public comments demonstrate the Board's justification for pairing JBER with North Eagle River — recognizing JBER as a military community of interest better paired with Eagle River's military community — was pretextual. Girdwood also points to numerous local governing entities' comments tending to oppose the Eagle River area split. For example, the Anchorage Downtown Community Council (DCC) adopted a resolution requesting that House District 23 (containing JBER) be paired with now-House District 19 (part of downtown Anchorage). DCC suggested that splitting up the "downtown core" by pairing JBER's district with Eagle River continued to promulgate the "unconstitutional problem" from the plan previously struck down. Girdwood argues that the Board disregarded, and perhaps did not even read, these comments given members' statements indicating they did not grasp that JBER was placed in a House district with portions of downtown Anchorage. These public comments and local government resolutions rise to the level of "salient issues" that the Board should have addressed if it were taking a hard look at Senate redistricting.[236]

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[235] *See* Alaska Const. art. VI, § 6 ("Each [S]enate district shall be composed as near as practicable of two contiguous [H]ouse districts. Consideration may be given to local government boundaries.").

[236] *See supra* note 223 and accompanying text.

5. The superior court did not err when it applied the *Kenai Peninsula* neutral factors test and concluded that Senate Districts E and L constituted an unconstitutional political gerrymander.

The superior court relied on *Kenai Peninsula*'s neutral factors test to conclude that, under the totality of the circumstances, the Board intentionally discriminated when it unconstitutionally engaged in partisan gerrymandering to ensure "two solidly Republican [S]enate seats" in Senate Districts E and L. The Board contends that the court "disregarded the neutral factors test because [the test] did not allow [the court] to reach the desired result."

Rather than engaging with the entire *Kenai Peninsula* neutral factors test, the Board primarily emphasizes its more open procedures on remand and its stated rationale for pairing JBER with Eagle River. The Board points out that the court credited the Board for holding transparent meetings with ample public testimony. And, although continuing to oppose the court's emphasis on the weight of the public testimony, the Board nevertheless emphasizes public testimony favoring pairing JBER with Eagle River. The Board says it was concerned, at least in part, about minimizing the voices of the JBER area military members and veterans by pairing it with downtown Anchorage. The Board also notes that Members Bahnke and Borromeo acknowledged some similarities between Eagle River and JBER, despite voting against the pairing.

Girdwood responds that the superior court properly considered "the Board's disregard for the public testimony in context, and concluded that it was *further* evidence of illegitimate intent." (Emphasis in original.) Girdwood points to examples of Board members seeming not to have taken public comments seriously and even being confused after several days of public testimony about where "Chugiak and the Chugach mountains . . . were geographically located relative to Eagle River." Girdwood asserts that this evidence supports the court's findings that "the majority board members approached the

process with a predetermined outcome in mind," that the "totality of the circumstances indicate[d] a goal-oriented approach[,] [and that] they paid attention to the details only as much as they needed to say the right words on the public record when explaining their choice." We agree.

After the superior court found that the Board intentionally discriminated against certain voters, the burden switched to "the Board to demonstrate that its acts aimed to effectuate proportional representation."[237] The Board appears to suggest that its actions were justified because Girdwood's voting power increased by 0.17% when paired with District 10 as opposed to being paired with District 13 (if Option 2 had been adopted). Aside from this being a de minimis increase in voting power for Girdwood and not being directly relevant to the proportionality of representation issue as we discussed earlier, the Board omits any discussion of discriminating in Eagle River's favor with the aim of "effectuat[ing] proportional representation" in some other way.[238] Absent such justification, we agree with the superior court that continuing to divide the Eagle River area solely "to provide it with two solidly Republican [S]enate seats" constituted "an unconstitutional partisan gerrymander" violating our equal protection doctrine.

C. The Superior Court Did Not Err When It Ordered As An Interim Plan The Only Other Alternative Considered By The Board.

The Board had adopted two potential redistricting plans for public presentation and comment and for adoption as the final amended plan, Options 2 and 3B. The Board adopted Option 3B as its final amended plan. After deciding Option 3B was unconstitutional, the superior court ordered that the Board implement Option 2 as the upcoming 2022 elections interim plan, enabling legislative candidates to file for office

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

[238] *See id.*

by the June 1 deadline. Because we agree with the superior court that the Board's final amended plan — Option 3B — is unconstitutional, the issue of an interim plan remains.

The Board seemingly argues that the superior court had no authority to order the Board to adopt Option 2 as the interim proclamation plan. But the Board must have believed Option 2 fulfilled constitutional requirements, or it would not have adopted the plan for public presentation and consideration. At no point during its public discussion of the two options did a Board member assert that Option 2 was unconstitutional. We issued our May order about a week before June 1, and the Board had made no known effort to prepare or present to us another interim plan.[239] We therefore affirm the superior court's order that the Board adopt the Option 2 proclamation plan as the interim plan for the 2022 elections.

VIII. CONCLUSION OF ROUND 2 CHALLENGES TO AMENDED PROCLAMATION

We AFFIRM the superior court's determination that the Board again engaged in unconstitutional partisan gerrymandering to increase one group's Senate district voting power at the expense of others. Under the specific circumstances of these proceedings, we AFFIRM the superior court's order that the Board adopt the Option 2 proclamation plan as an interim plan for the 2022 elections.

IX. FINAL REMEDY

After the second remand, the Board adopted the Option 2 proclamation plan as the 2022 elections interim plan.[240] The question of a final redistricting plan for the

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[239] *Cf. 2011 Redistricting I*, 274 P.3d 466, 468-69 (Alaska 2012) (inviting Board to submit proposed interim plan for our approval in light of upcoming election deadlines when remanding final plan to Board for further proceedings).

[240] Attached as Appendix E are copies of relevant election district maps the Board published with its May 2022 interim redistricting plan proclamation.

decade remains. Having concluded that the Board engaged in unconstitutional gerrymandering in its initial final redistricting plan and that the Board then did so again in its amended final redistricting plan, our remanding for yet another redistricting plan may be questioned. Indeed, by clear implication article VI, section 11 authorizes courts to mandate a redistricting plan when, after a remand, the Board develops a new plan that is declared invalid.[241] But we will remand out of respect for the Board's constitutional role in redistricting.

Given that the Board adopted the current interim redistricting plan for its final plan deliberations — confirming the Board's belief that the interim plan is constitutional — and given that Alaska's voters have not had a chance to raise challenges to that plan in the superior court:

We REMAND for the superior court to order that the Board shall have 90 days to show cause why the interim redistricting plan should not be the Board's final redistricting plan for the 2020 redistricting cycle:

> A. Upon a showing by the Board of good cause for a remand, the superior court shall REMAND to the Board for another round of redistricting efforts; or
>
> B. Absent a showing by the Board of good cause for a remand, the superior court shall direct the Board to approve the interim redistricting plan as its final redistricting plan, allowing any legal challenges to that plan to be filed in superior court in the normal course.

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[241] *See* Alaska Const. art. VI, § 11 ("Upon a final judicial decision that a plan is invalid, the matter shall be returned to the [B]oard for correction and development of a new plan. If that new plan is declared invalid, the matter *may* be referred again to the [B]oard." (Emphasis added.)).

EASTAUGH, Senior Justice, concurring.

I agree in full with the court's resolution of these disputes. But I write separately because I have doubts about whether *Hickel v. Southeast Conference*[1] correctly described the priorities and order for applying the contiguity, compactness, and socio-economic integration criteria.[2] If I were reading the constitution in a vacuum, I would not necessarily conclude that the delegates agreed or that the Alaska Constitution's text requires that the first two criteria should have priority over the third. But there was no challenge to *Hickel*'s description of those priorities in this case, nor any contention its description should not be given stare decisis effect. Moreover, my doubts do not affect the outcome of any of the issues before us, even as to the "Cantwell Appendage," because the asserted increase in socio-economic integration in House District 36 does not outweigh the diminution in that district's compactness.

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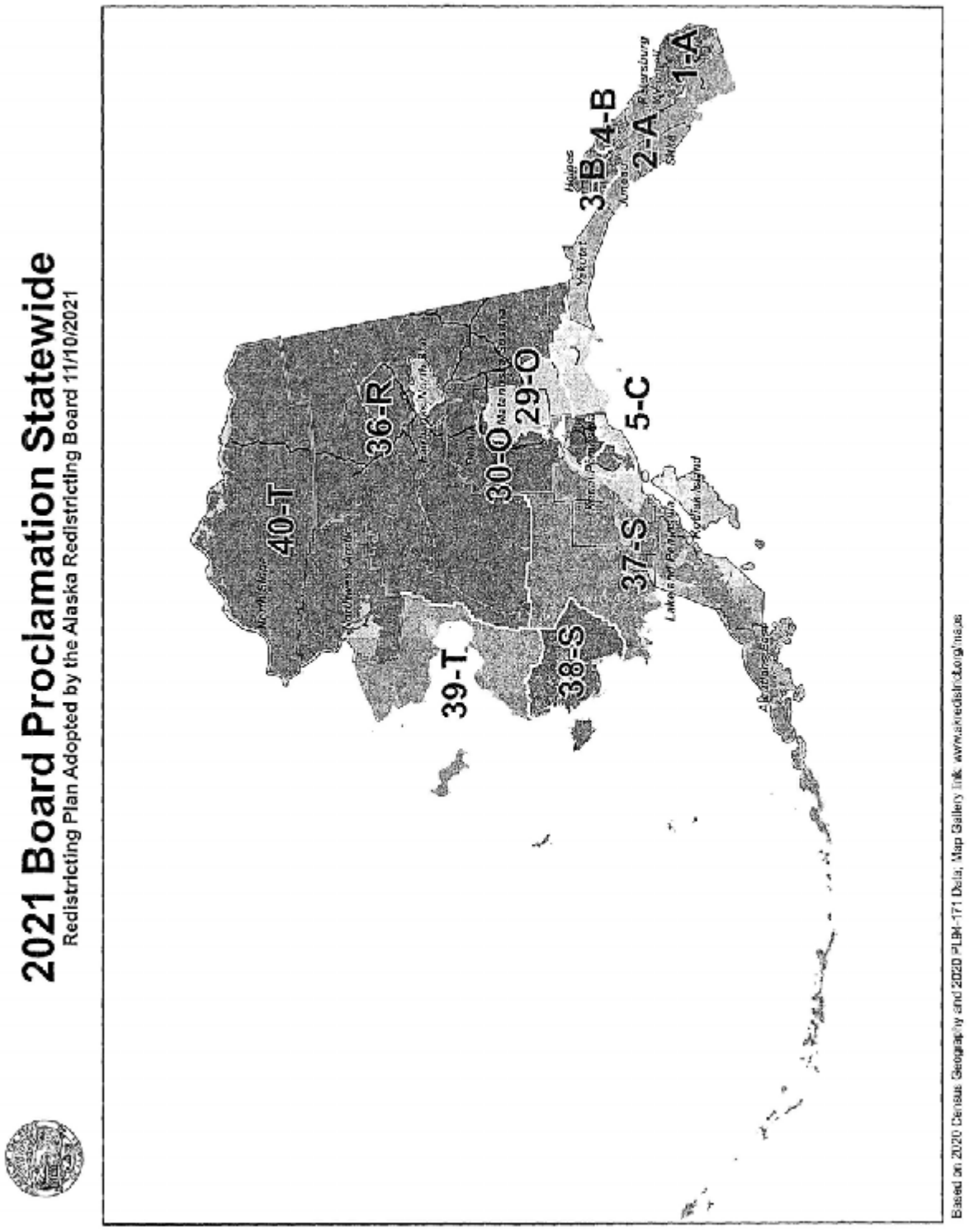
[1] 846 P.2d 38, 62 (Alaska 1992).

[2] *See id.* at 44-47, 62 (describing priorities and order for applying contiguity, compactness, and socio-economic integration criteria). The court's opinion today at page 53 quotes the *Hickel* passage that I find problematic.



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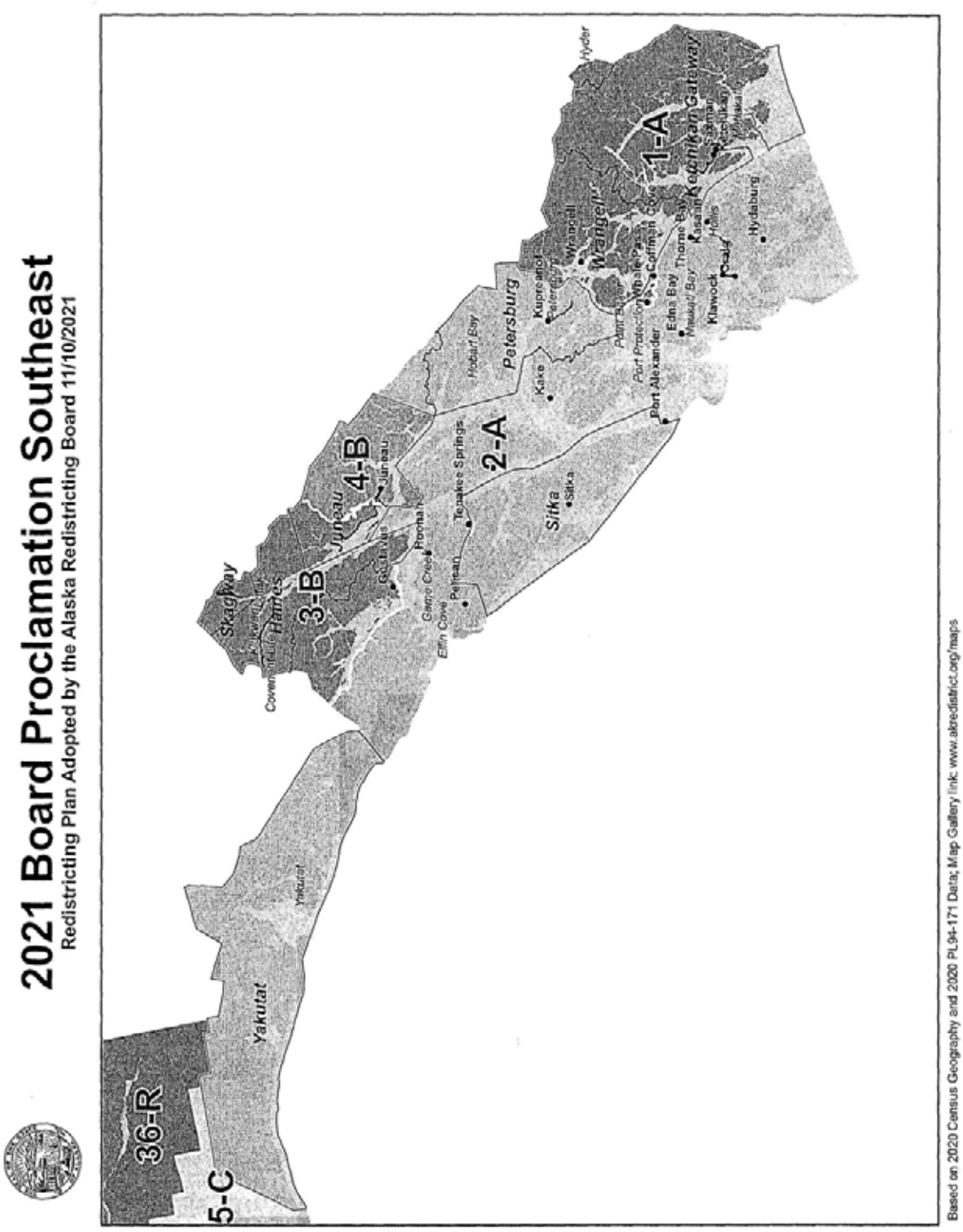

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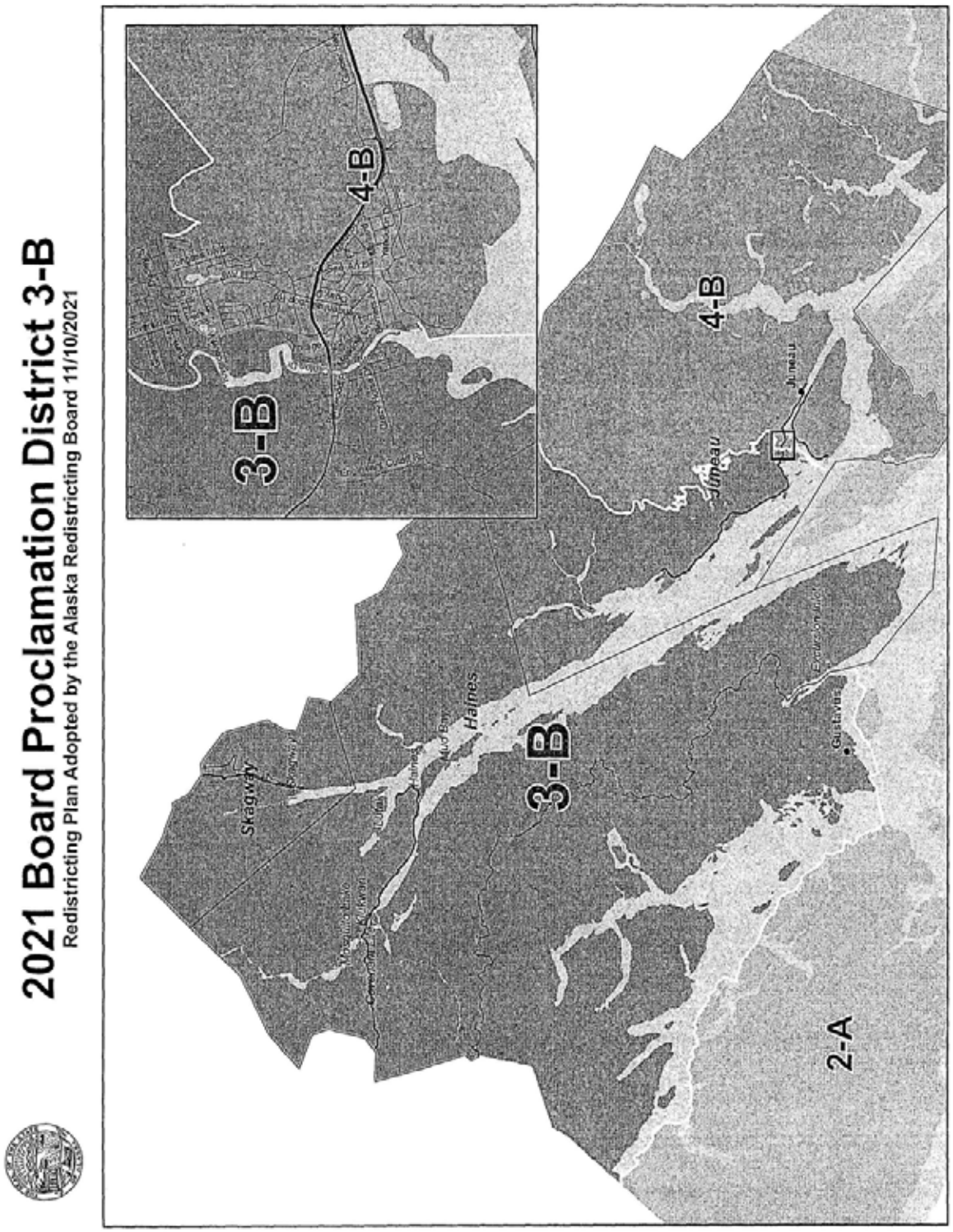

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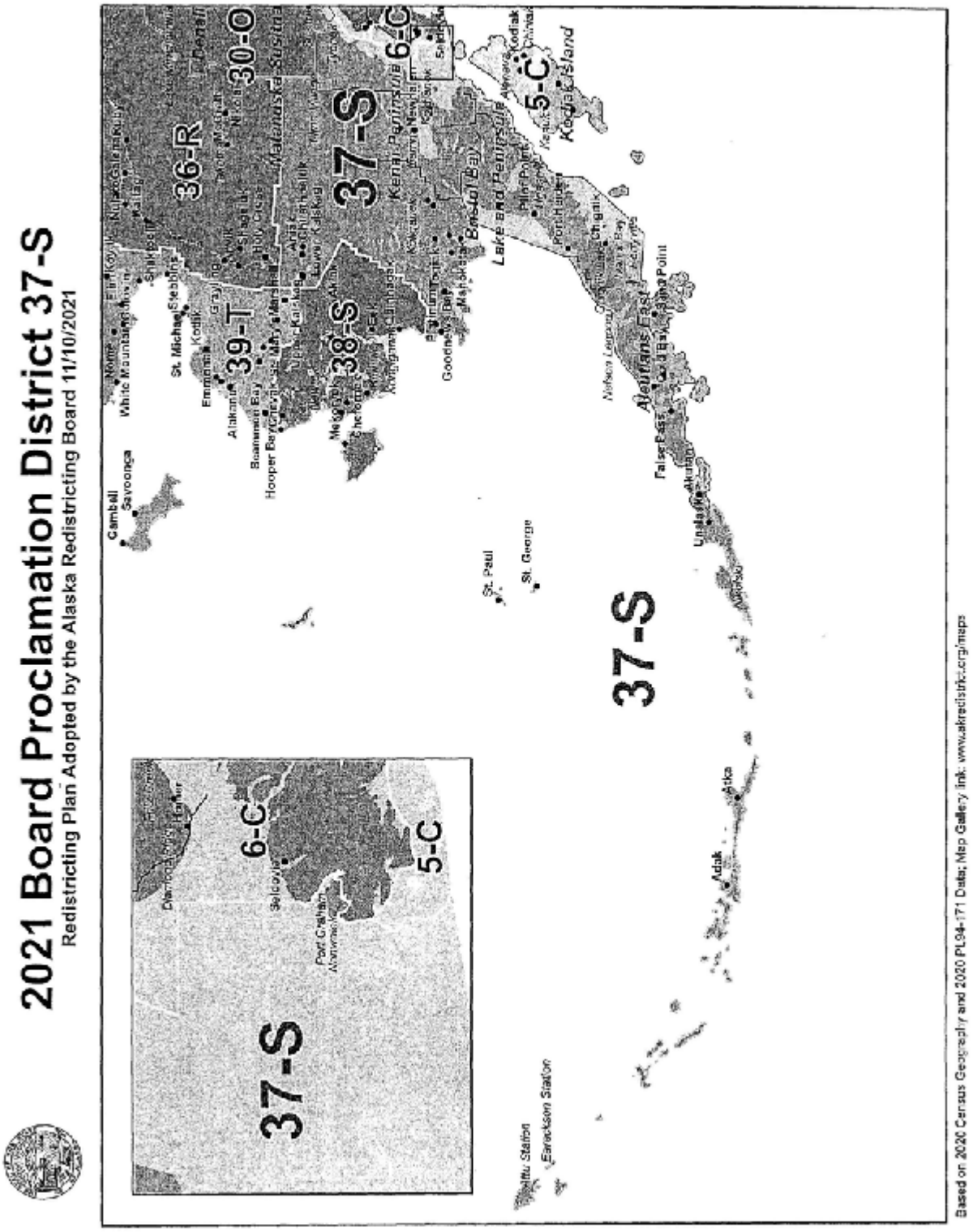

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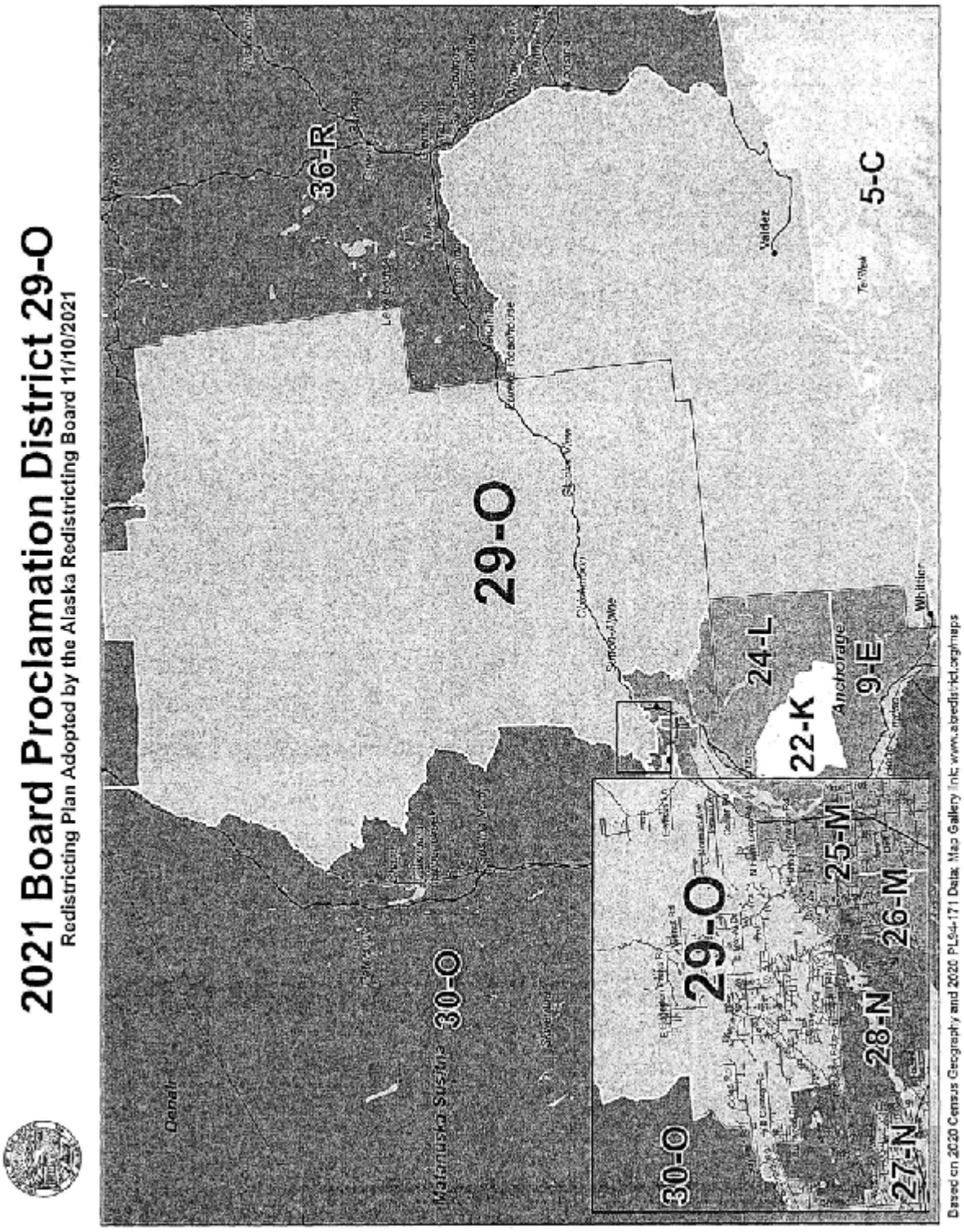

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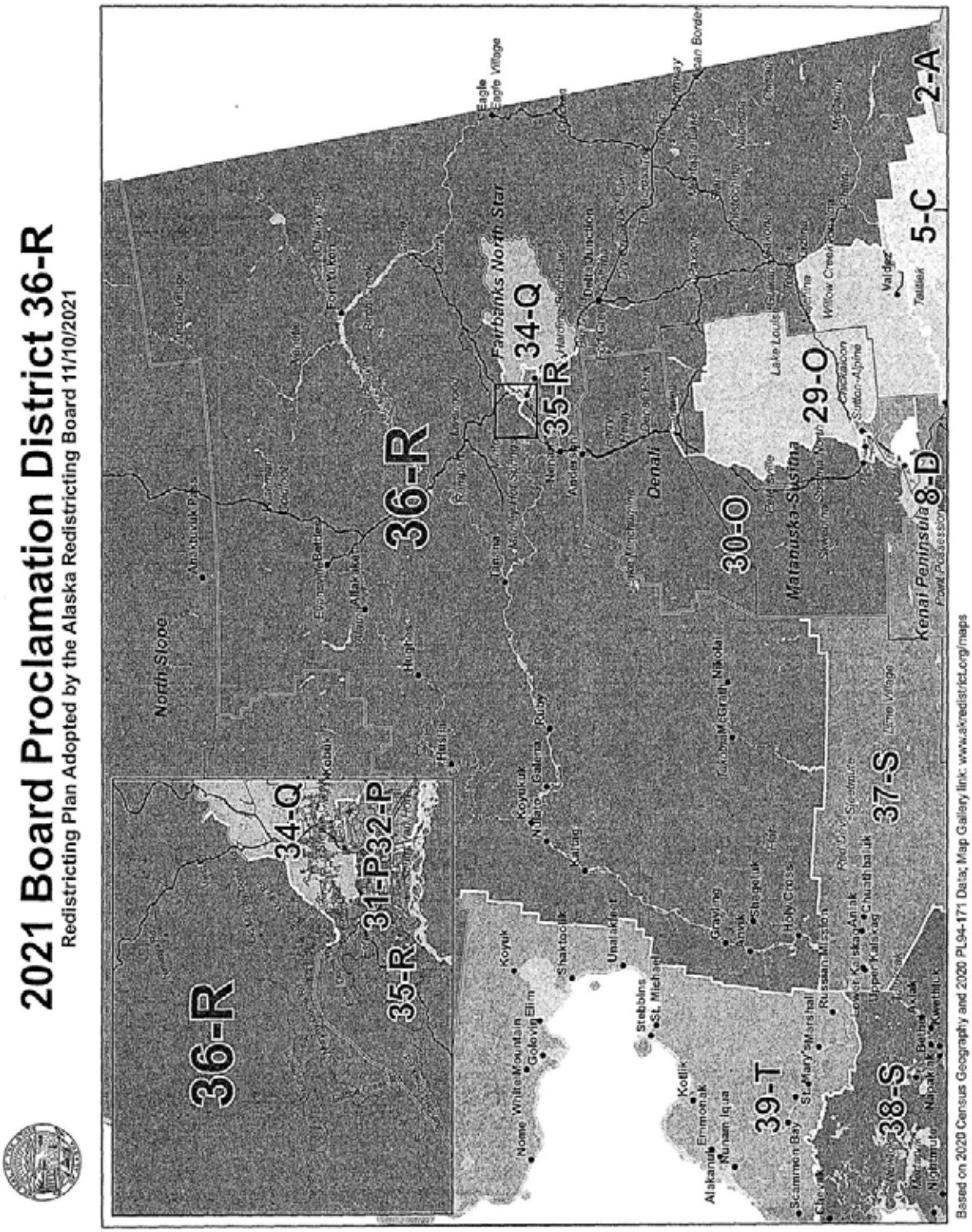

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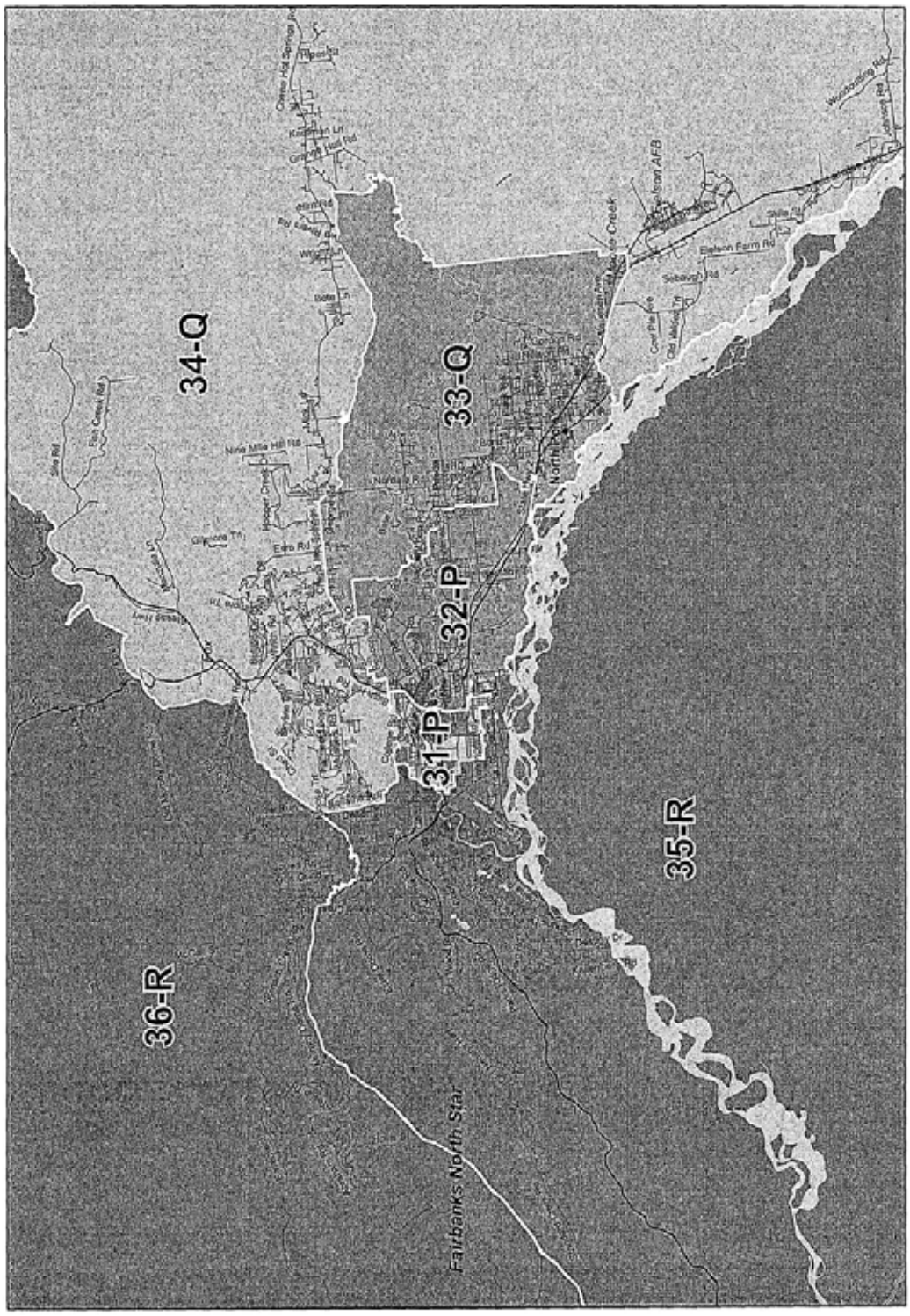
2021 Board Proclamation Fairbanks

Redistricting Plan Adopted by the Alaska Redistricting Board 11/10/2021



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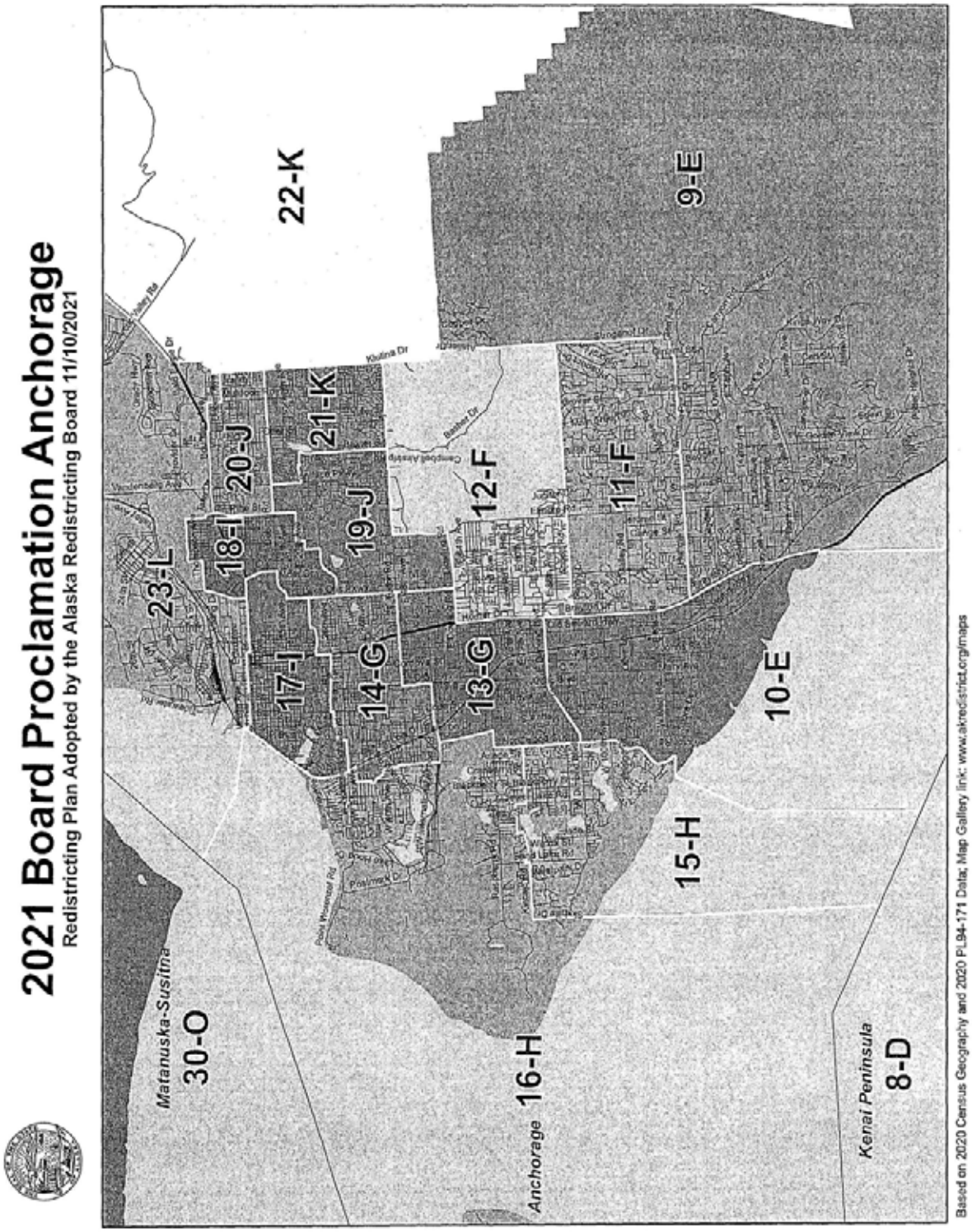

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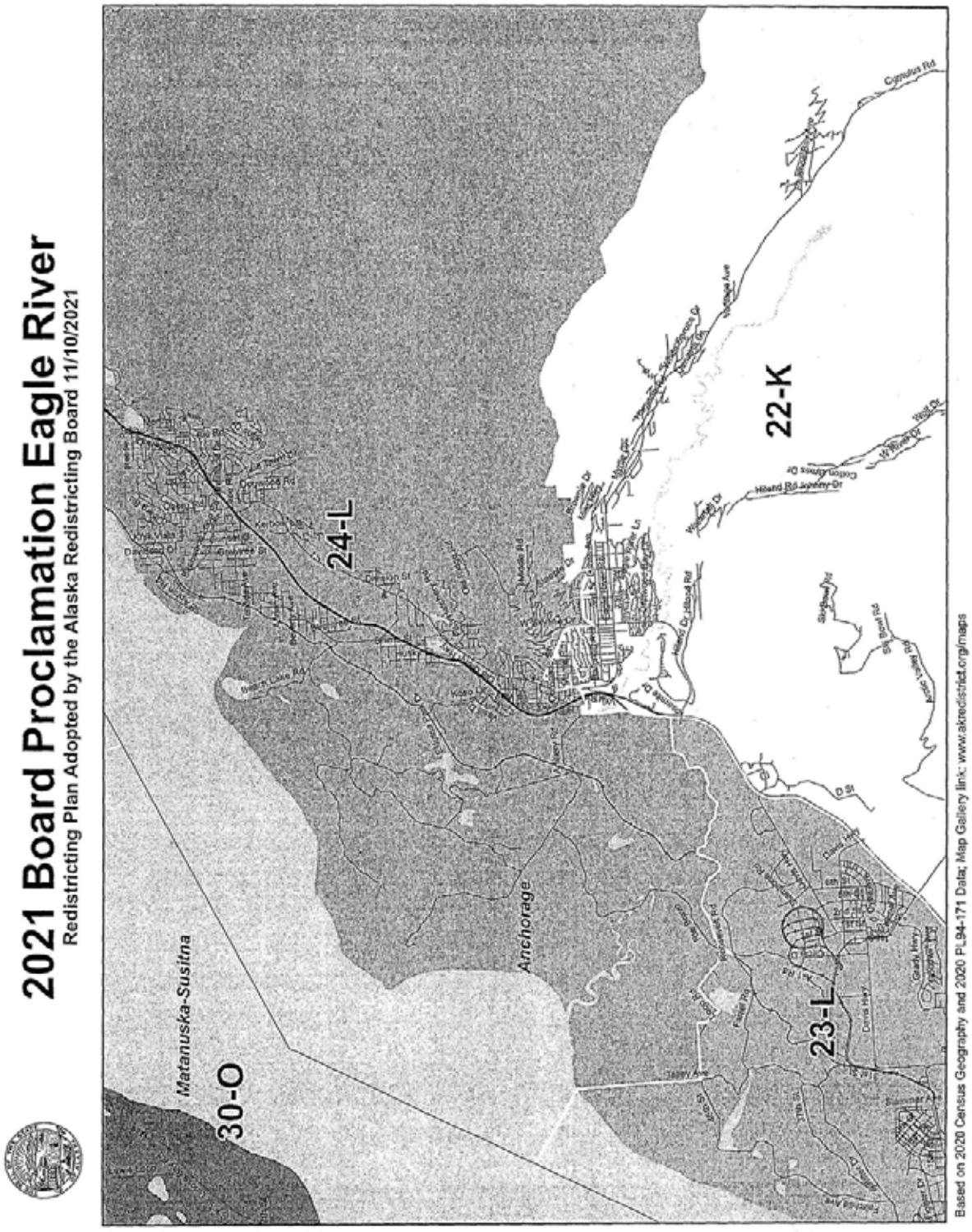

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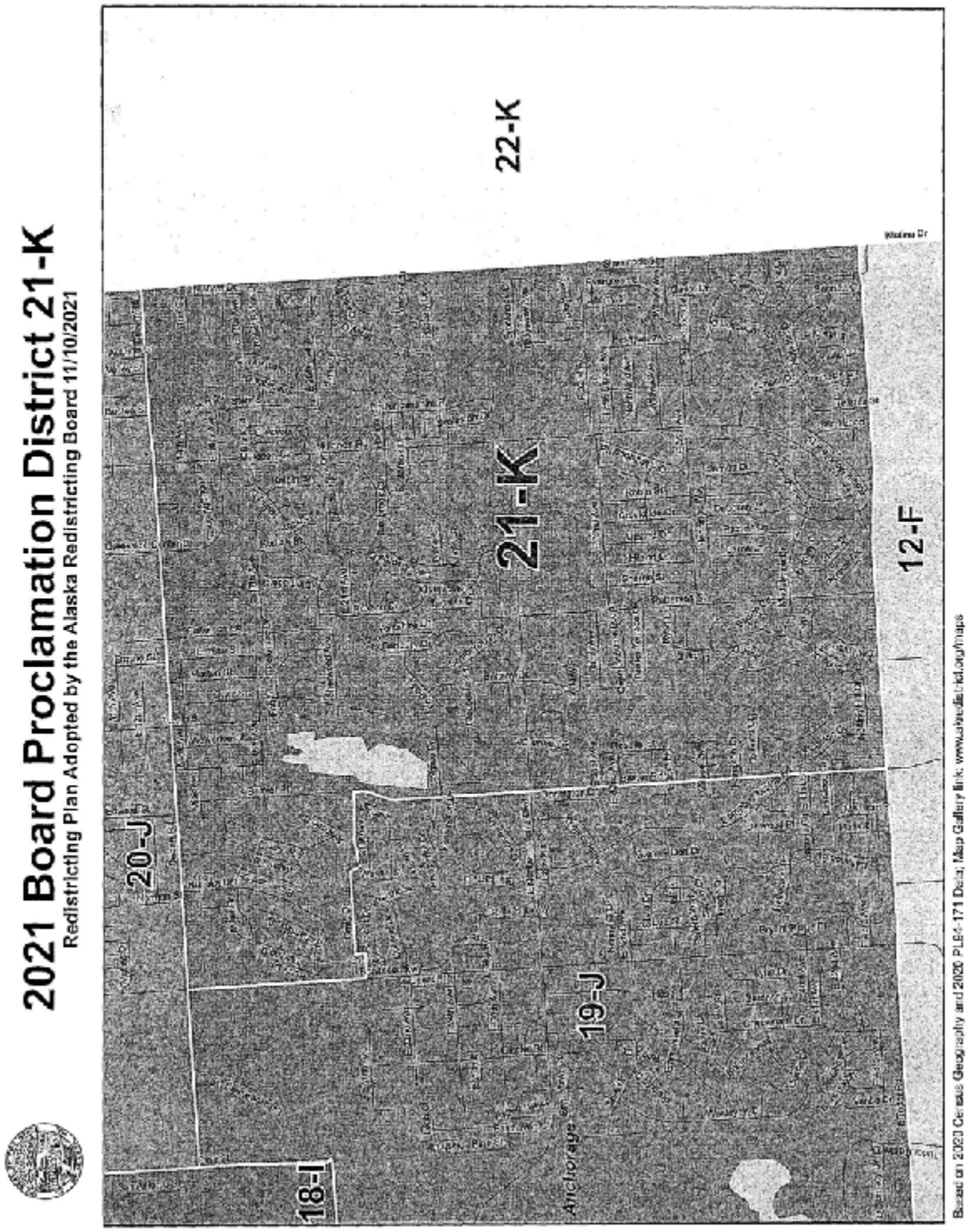

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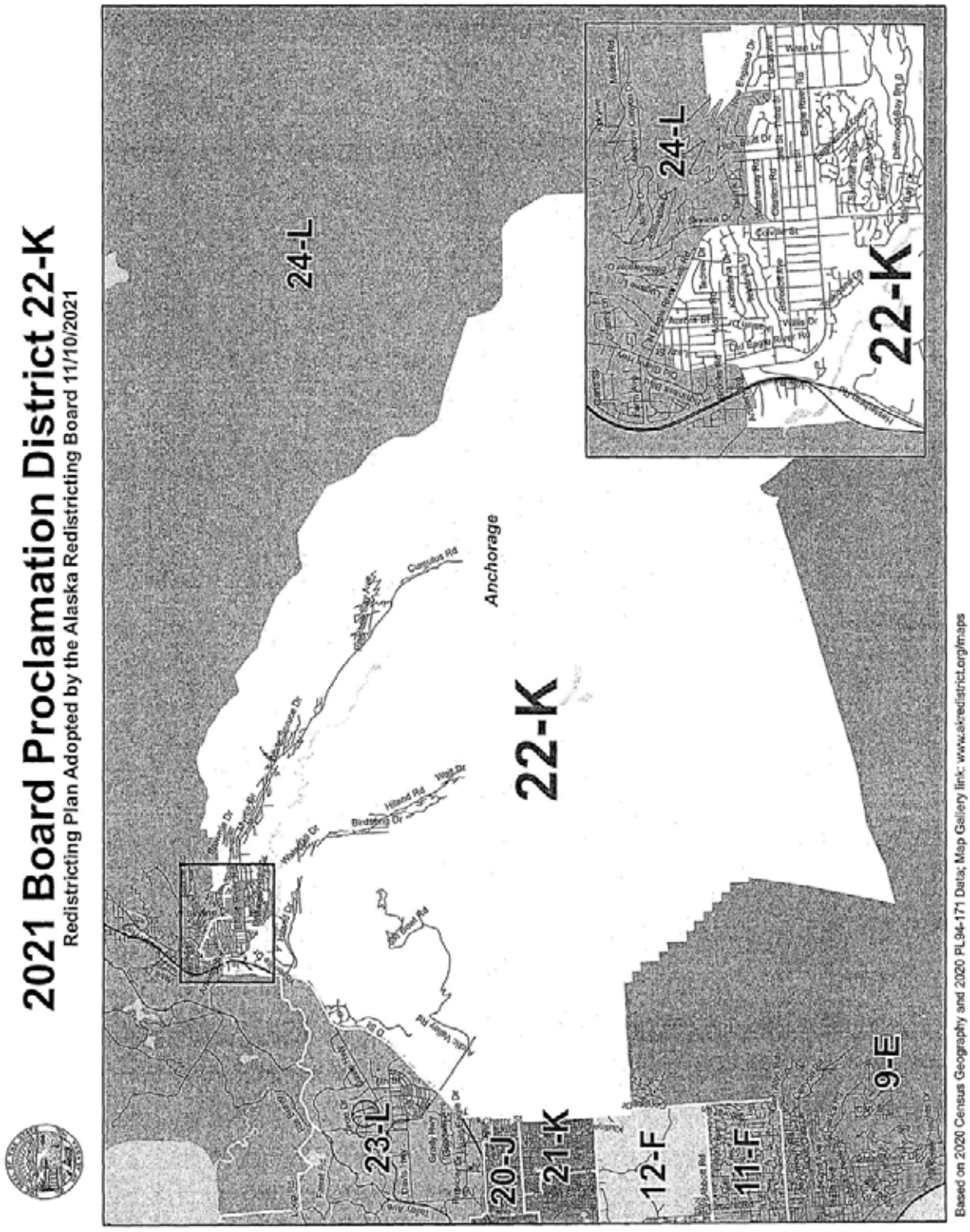

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In the Supreme Court of the State of Alaska

In the Matter of the 2021 Redistricting Cases,
(Matanuska-Susitna Borough, S-18328)
(City of Valdez, S-18329)
(Municipality of Skagway, S-18330)
(Alaska Redistricting Board, S-18332)

Trial Court Case No. 3AN-21-08869CI

Supreme Court No. **S-18332**

Order
Petitions for Review

Date of Order: **3/25/2022**

Before: Winfree, Chief Justice, Borghesan and Henderson, Justices, and Matthews and Eastaugh, Senior Justices.*
Eastaugh, Senior Justice, concurring.

On February 15, 2022 the superior court remanded the underlying redistricting case to the Alaska Redistricting Board for further proceedings on House Districts 3 and 4 and Senate District K of the 2021 Proclamation of Redistricting.[1] We now have before us four petitions for review arising from that decision: by the Board, the Municipality of Skagway Borough, the Matanuska-Susitna Borough, and the City of Valdez (with qualified voters joining the municipality petitions).[2] Because a redistricting matter has priority over all other matters pending before this court,[3] and because a decision in this redistricting

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* Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

[1] *See generally* Alaska Const. art. VI (providing for creation of Redistricting Board, redistricting process leading to redistricting proclamation, and challenges to proclamation in superior court and then this court).

[2] *See* Alaska R. App. P. 216.5(h) (providing for petitions for review of superior court decision remanding redistricting case to the Redistricting Board).

[3] *See* Alaska Const. art. VI, § 11 (providing that redistricting matter "shall have priority over all other matters pending before the . . . court"); Alaska R. App. P. 216.5(i) (same).

matter is required by April 1,[4] the parties followed an expedited briefing schedule for fully briefed petitions due by March 2 and fully briefed responses due by March 10. We then held oral arguments on the petitions on March 18. Having considered the parties' briefing and oral arguments, we GRANT review under all four petitions.[5] To now further expedite the redistricting process, we set out in summary fashion our decisions on the merits of the four petitions, with a formal opinion explaining our reasoning to follow:

House Districts 3 and 4

House Districts 3 and 4 are the subject of two petitions, one by the Board and one by the Municipality of Skagway Borough. We AFFIRM the superior court's determination that the house districts comply with article VI, section 6 of the Alaska Constitution[6] and should not otherwise be vacated due to procedural aspects of the Board's

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[4] *See* Alaska R. App. P. 216.5(i) (providing that appellate decisions in redistricting challenges be decided no later than 60 days before statutory filing deadline for next statewide election).

[5] Alaska Appellate Rule 403(a)-(g) governs petitions for review and generally contemplates a process of a party petitioning for review of a trial court ruling, describing why the ruling is incorrect and why immediate review is necessary, and opposing parties then filing responses; the appellate court has an opportunity to consider whether immediate review is warranted and may order full briefing and oral argument on legal issues presented if appropriate. Given the expedited and weighty nature of redistricting matters, we allowed full briefing on the merits of the parties' challenges and the opportunity for oral argument before we considered whether to grant review. We thank the parties, their attorneys, and amici curiae for their excellent presentation of the arguments in such an expedited fashion. We recognize this was no easy feat.

[6] Article VI, section 6 instructs:

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

work. We REVERSE the superior court's remand to the Board for further proceedings under the superior court's "hard look" analysis relating to public comments on the house districts. There is no constitutional infirmity with House Districts 3 and 4 and no need for further work by the Board.

House Districts 29, 30, and 36

The Matanuska-Susitna Borough and the City of Valdez separately challenge the superior court's determination that House Districts 29, 30, and 36 do not violate article VI, section 6 of the Constitution and should not otherwise be vacated due to procedural aspects of the Board's work. We AFFIRM the superior court's determination, with one exception: We conclude that the so-called "Cantwell Appendage" violates article VI, section 6 of the Constitution. The Cantwell Appendage renders House District 36 non-compact without adequate justification. House District 36 reaches across a local borough boundary, within which voters are by law socio-economically integrated with other borough voters,[7] to extract Cantwell residents from District 30 and place them in House District 36,

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

[7] *See* AS 29.05.031(a)(1) (requiring "social, cultural, and economic" integration before area may be incorporated as borough or unified municipality); *In re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002) (recognizing same); *Hickel*

based primarily on the proposition that an apparent minority of Cantwell residents — shareholders of the Alaska Native Claims Settlement Act regional corporation headquartered in House District 36 — are more socio-economically integrated with similar shareholder residents in House District 36. But the Board's briefing about House Districts 3 and 4 argues: "Nothing in [article VI, section 6] states that the Board should disregard compactness to increase an already socio-economically integrated area's integration."[8] The Board mentions in its briefing that House District 30 was about 2% overpopulated and that moving the roughly 200 Cantwell residents eliminated about half the overage to the constitutionally targeted house district population of 18,335. This rendered both House Districts about 1% overpopulated. But House District 30's approximately 2% overpopulation with the Cantwell residents included, and House District 36's nearly perfect population without the Cantwell residents included, are well within constitutionally allowable parameters under our case law.[9] We therefore REVERSE the superior court's

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v. Se. Conf., 846 P.2d 38, 51-52 (Alaska 1992) (recognizing same).

[8] *Cf. Hickel*, 846 P.2d at 62 ("The requirements of article VI, section 6 shall receive priority *inter se* in the following order: (1) contiguousness and compactness, (2) relative socioeconomic integration, (3) consideration of local government boundaries, (4) use of drainage and other geographic features in describing boundaries."). At oral argument the Board asserted that there is no required priority among the constitutional requirements of article VI, section 6 and that the Board has broad discretion to balance those requirements. The Board did not acknowledge this aspect of *Hickel* nor did the Board suggest anywhere in its briefing or during oral argument that *Hickel* was wrongly decided or that our long-standing precedent should be overruled.

[9] The federal "Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable," though some deviation is expected and permissible.

determination to this limited extent, and remand to the superior court to remand this aspect of the house districts to the Board to correct the constitutional error.

Senate District K

The superior court determined that Senate District K was unconstitutional on the grounds of equal protection,[10] due process,[11] and violating the public hearings

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Reynolds v. Sims, 377 U.S. 533, 577, 579-81 (1964); U.S. Const. amend. XIV, § 1. For example, keeping political subdivisions, such as boroughs, intact may justify some population deviation. *Reynolds*, 377 U.S. at 580-81.

We previously have held that under the Alaska Constitution deviations below 10% were minimal and required no justification absent improper motive. *See Hickel*, 846 P.2d at 47-48; *cf. Braun v. Borough*, 193 P.2d 719 (2008) (analyzing deviation in borough redistricting context). Although technological advances often will make it practicable to achieve even lower deviations, and under the Alaska Constitution the Board must make a good faith effort to do so, *see In re 2001 Redistricting Cases*, 44 P.3d at 146, we have upheld deviations greater than 1%, *see In re 2001 Redistricting Cases*, 47 P.3d 1089, 1094 (Alaska 2002). Eliminating the Cantwell Appendage would improve the compactness of District 36 and keep together voters in the same borough in District 30, and there is no showing that doing so would have more than a de minimis effect on the statewide House Districts' average population deviation. The resulting roughly 2% population deviation in District 30 thus is justified.

[10] *See* Alaska Const. art. I, § 1; *Kenai Peninsula*, 743 P.2d at 1366 ("In the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection, namely that of 'one person, one vote' — the right to an equally weighted vote — and of 'fair and effective representation' — the right to group effectiveness or an equally powerful vote." (quoting John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 163-64 (1984))).

[11] *See* Alaska Const. art. I, § 7; *Haggblom v. City of Dillingham*, 191 P.3d 991, 995 (Alaska 2008) ("At a minimum, due process requires that the parties receive notice and an opportunity to be heard.").

requirement.[12] The Board challenges this determination. We note that the superior court did not rule that the underlying house districts were unconstitutional and that no party asserts that the underlying house districts are unconstitutional. The superior court's determination relates solely to the senate pairing of house districts.[13] We AFFIRM the superior court's determination that the Board's Senate K pairing of house districts constituted an unconstitutional political gerrymander violating equal protection under the Alaska Constitution,[14] and we therefore AFFIRM the superior court's remand to the Board to correct the constitutional error.

Conclusion

This matter is REMANDED to the superior court for action consistent with this order. We do not retain jurisdiction.

Entered at the direction of the court.

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[12] *See* Alaska Const. art. VI, § 10 ("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.").

[13] *See* Alaska Const. art. VI, § 4 (requiring Redistricting Board to create 40 separate house districts and 20 senate districts, each composed of two house districts).

[14] *See Hickel*, 846 P.2d at 45 & n.11 (explaining Constitution's contiguity, compactness, and socio-economic integration requirements "were incorporated by the framers of the reapportionment provisions to prevent gerrymandering," including political gerrymandering); *In re 2011 Redistricting Cases*, 274 P.3d 466, 468 (Alaska 2012) ("The *Hickel* process also diminishes the potential for partisan gerrymandering and promotes trust in government.").

Clerk of the Appellate Courts

M. Montgomery

Meredith Montgomery

EASTAUGH, Senior Justice, concurring.

I agree in full with the court's resolution of these petitions. But I write separately because I have doubts about whether *Hickel v. Southeast Conference*[1] correctly described the priorities for applying the contiguity, compactness, and socio-economic integration criteria.[2] If I were reading the constitution in a vacuum, I would not necessarily conclude that the delegates agreed or that the Alaska Constitution's text requires that the first two criteria should have priority over the third. But there was no challenge to *Hickel*'s description of those priorities in this case, nor any contention its description should not be given stare decisis effect. Moreover, my doubts do not affect the outcome of any of these petitions, even as to the "Cantwell Appendage," because the asserted increase in socio-economic integration in House District 36 does not outweigh the diminution in that district's compactness.

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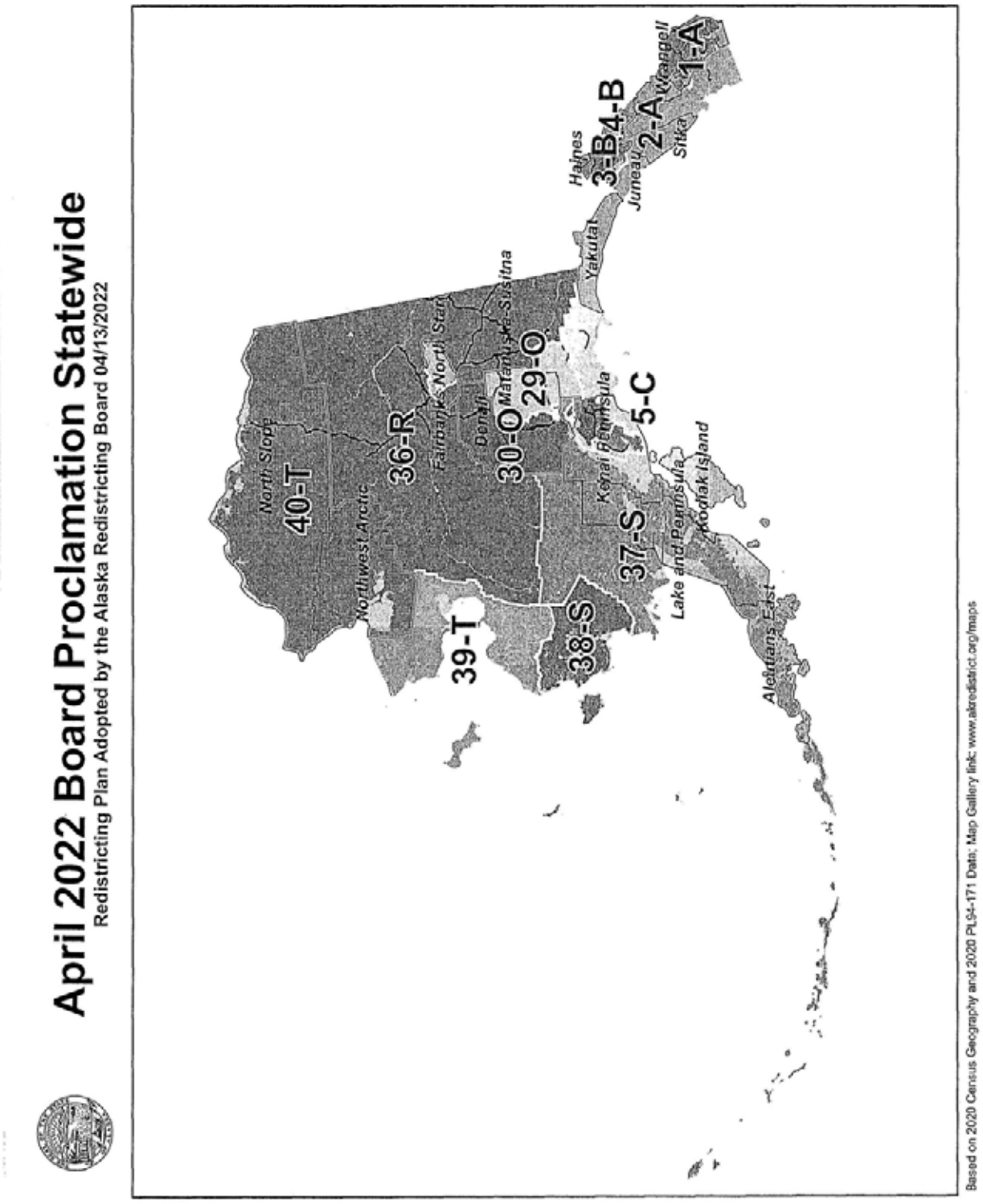
[1] 846 P.2d 38, 62 (Alaska 1992).

[2] *See id.* at 44-47, 62 (describing priorities for applying contiguity, compactness, and socio-economic integration criteria).



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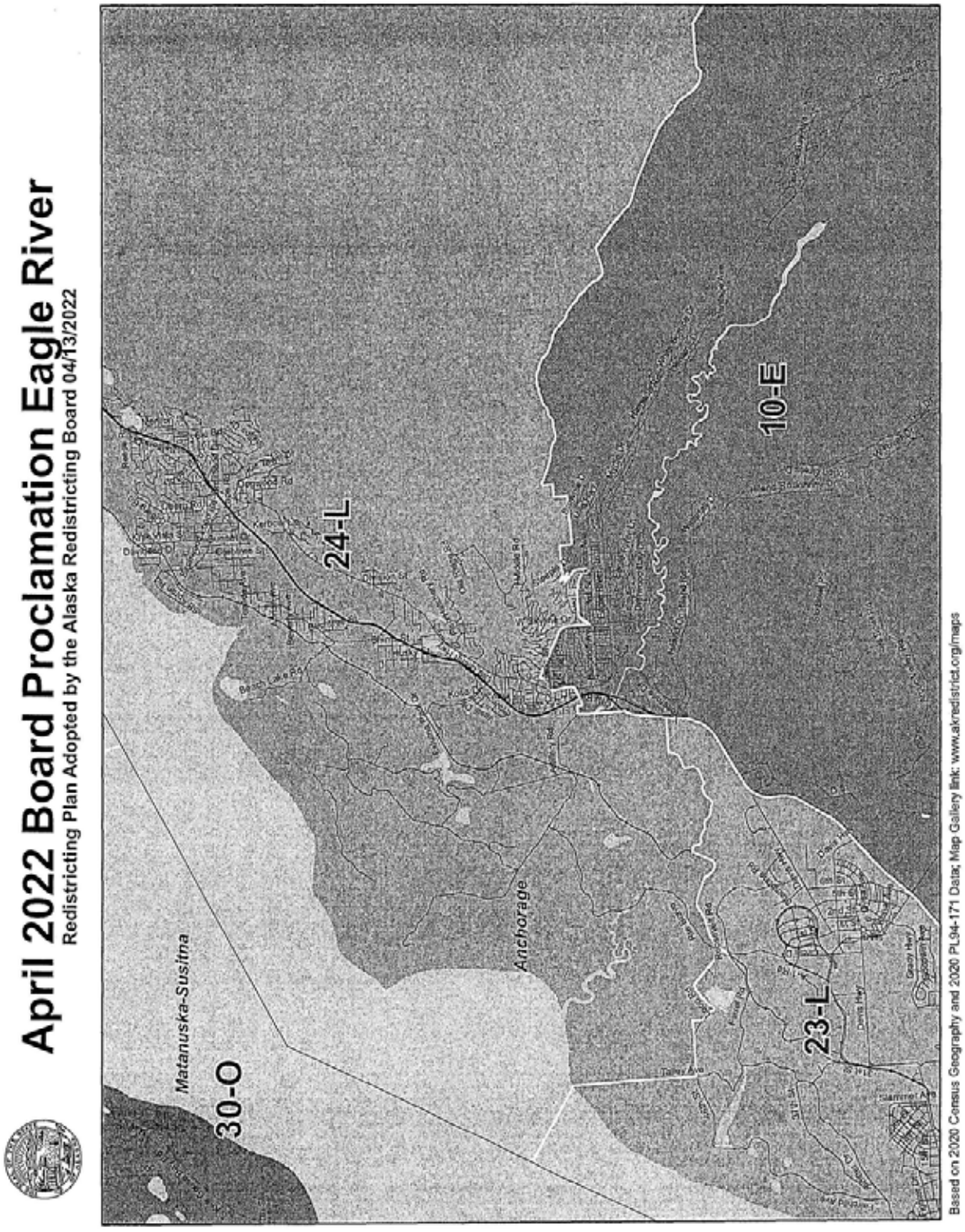

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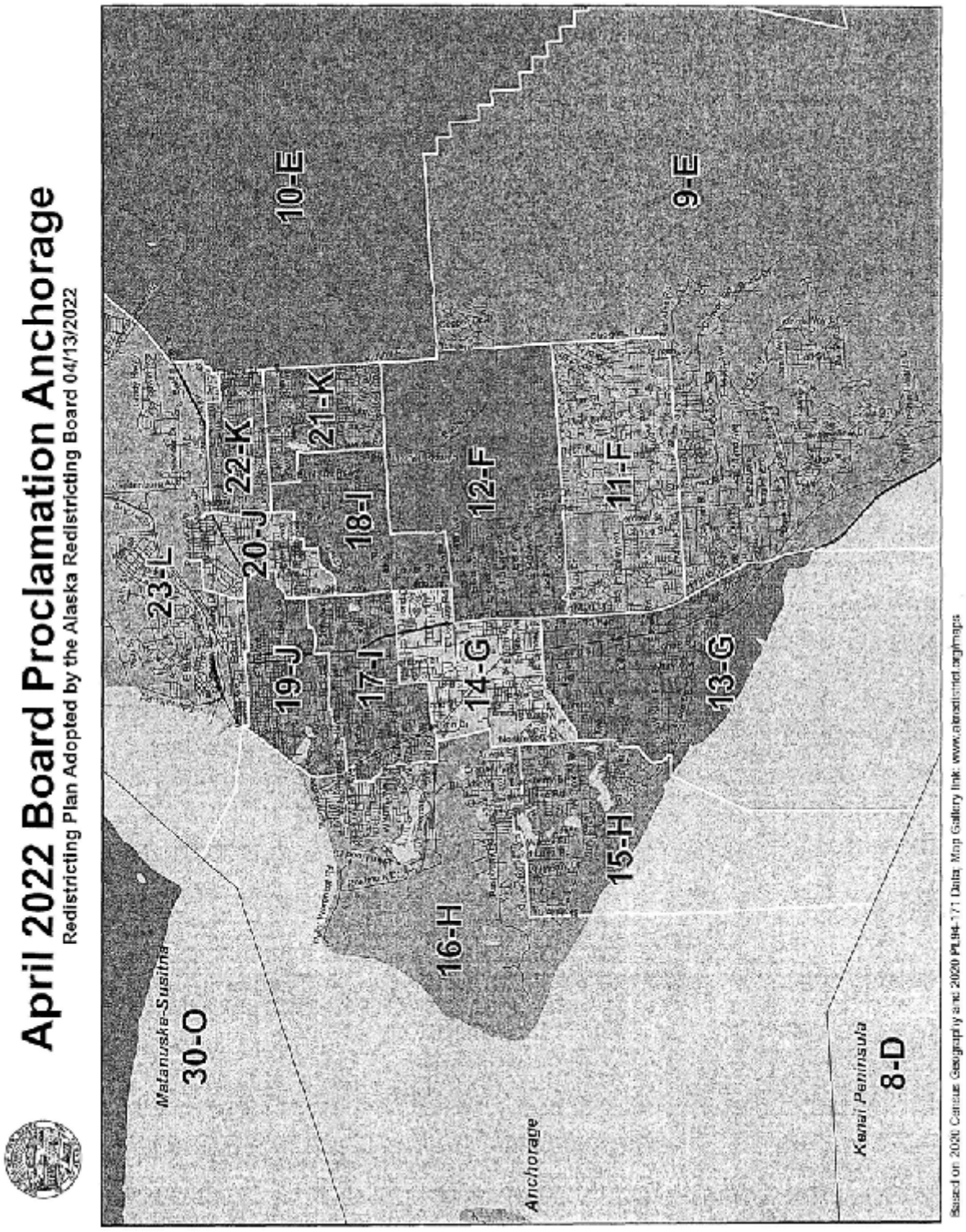

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In the Supreme Court of the State of Alaska

In the Matter of the 2021 Redistricting Cases
(Alaska Redistricting Board/Girdwood Plaintiffs/East Anchorage Plaintiffs)

Supreme Court No. **S-18419**

Order
Petition for Review

Date of Order: **5/24/2022**

Trial Court Case No. **3AN-21-08869CI**

Before: Winfree, Chief Justice, Borghesan and Henderson, Justices, and Matthews and Eastaugh, Senior Justices.*

On February 15, 2022 the superior court remanded the 2021 Proclamation of Redistricting to the Alaska Redistricting Board for further proceedings on, *inter alia*, the Board's proposed Senate District K.[1] After considering four petitions for review[2] on an expedited basis[3] we issued an order affirming the superior court's conclusion that Senate District K was an unconstitutional political gerrymander and remanding to the

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* Sitting by assignments made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

[1] *See generally* Alaska Const. art. VI (providing for creation of redistricting board, redistricting process leading to redistricting proclamation, and challenges to proclamation in superior court and then this court).

[2] *See* Alaska R. App. P. 216.5(h) (providing for petitions for review of superior court decision remanding redistricting case to the Redistricting Board).

[3] *See* Alaska Const. art. VI, § 11 (providing that redistricting matter "shall have priority over all other matters pending before the . . . court"); Alaska R. App. P. 216.5(i) (same).

superior court to remand to the Board for further proceedings to correct the unconstitutional proclamation plan.[4]

After remand the Board approved an amended proclamation plan on April 13, 2022. The amended plan was challenged in superior court by both the original East Anchorage Plaintiffs and three Alaska residents referred to as the Girdwood Plaintiffs. On May 16, 2022 the superior court decided, in relevant part, that the Board's Senate Districts E and L were a continuing unconstitutional political gerrymander, that the matter be remanded to the Board to correct the constitutional deficiency, and that the Board adopt a specified interim proclamation plan for the 2022 elections in light of the upcoming June 1 candidate filing deadline and the inability to have a new final proclamation plan approved before that date.[5]

The Board petitioned for review of the superior court's decision, challenging both the ruling on the amended proclamation plan's unconstitutionality and the specified interim plan for the 2022 elections. As with the earlier petitions for review, we ordered expedited briefing;[6] we also entered a stay of the superior court's May 16, 2022 order pending further order of this court.[7]

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[4] *In re 2021 Alaska Redistricting Cases*, No. S-18332 (Alaska Supreme Court Order, March 25, 2022).

[5] *See* AS 15.25.040(a) (setting date for candidate filings).

[6] *In re 2021 Alaska Redistricting Cases*, No. S-18419 (Alaska Supreme Court Order, May 18, 2022).

[7] *In re 2021 Alaska Redistricting Cases*, No. S-18419 (Alaska Supreme Court Order, May 19, 2022).

Having considered the parties' briefing, we GRANT review of the Board's petition.[8] To now further expedite the redistricting process, and without seeing the need for oral argument, we set out in summary fashion our decision on the Board's petition for review with a formal opinion explaining our reasoning to follow:

Overview

As presented to us for appellate review, this matter does not involve a challenge to the Board's compliance with article VI, section 6 of the Alaska Constitution.[9] Nor does this matter involve a claim of improper house district population

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[8] Alaska Appellate Rule 403(a)-(g) governs petitions for review and generally contemplates a process of a party petitioning for review of a trial court ruling, describing why the ruling is incorrect and why immediate review is necessary, and opposing parties then filing responses; the appellate court has an opportunity to consider whether immediate review is warranted and may order full briefing and oral argument on legal issues presented if appropriate. Given the expedited and weighty nature of redistricting matters, we allowed full briefing on the merits of the Board's challenges to the superior court's order in about two days' time for each side. We thank the parties and counsel for their cogent presentation of arguments in such an expedited fashion.

[9] Article VI, section 6 instructs:

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

deviations.[10] The issue before us is whether the Board's pairing of certain house districts in senate districts[11] violates the Alaska Constitution's equal protection guarantee, specifically the right to fair and effective representation.[12]

Senate Districts E and L

The superior court concluded that the Board's amended proclamation plan reflected the Board's continued intent to discriminate — on a partisan basis — in favor of Eagle River voters by selectively pairing two Eagle River house districts with non-Eagle River house districts, giving Eagle River voters an opportunity to elect two senators in Senate Districts E and L, to the detriment of voters in the non-Eagle River

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See Hickel v. Se. Conf., 846 P.2d 38, 45 & n.11 (Alaska 1992), *as modified on denial of reh'g* (Mar. 12, 1993) (explaining Constitution's contiguity, compactness, and socio-economic integration requirements "were incorporated by the framers of the reapportionment provisions to prevent gerrymandering," including political gerrymandering).

[10] The federal "Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable," though some deviation is expected and permissible. *Reynolds v. Sims*, 377 U.S. 533, 577, 579-81 (1964); U.S. Const. amend. XIV, § 1.

[11] *See* Alaska Const. art. VI, § 4 (requiring redistricting board to create 20 senate districts, each composed of two house districts).

[12] *See* Alaska Const. art. I, § 1; *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366 (Alaska 1987) ("In the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection, namely that of 'one person, one vote' — the right to an equally weighted vote — and of 'fair and effective representation' — the right to group effectiveness or an equally powerful vote." (quoting John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 163-64 (1984))).

house districts. The Board offers several arguments challenging the superior court's decision.

1. Burden of persuasion

The Board contends that the superior court erred as a matter of law by placing the burden of persuasion on the Board to prove it was not illegally discriminating in favor of Eagle River voters and against other voters. This argument is specious. The superior court expressly and clearly stated that it was not placing the burden of persuasion on the Board, but rather on the proclamation plan challengers. The court stated that it was a matter of first impression whether the burden of persuasion should shift after a prior determination of illegal discrimination by the Board, but the court declined to take that step, leaving the question for us to decide if appropriate. The superior court's (1) considering the previous determination of illegal discrimination as a factor in the multi-factor legal test for an equal protection claim, and (2) deciding the East Anchorage and Girdwood Plaintiffs met their burden of persuasion, does not mean the court wrongly placed the burden of persuasion on the Board.

2. Hard look analysis

The Board argues that the superior court erred as a matter of law by continuing to use the "hard look" analysis we rejected in our earlier order.[13] After

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[13] The hard look doctrine, which we previously have applied to the Board, determines whether a proclamation plan — like a regulation — is reasonable and primarily concerns whether the Board "has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making." *See In re 2001 Redistricting Cases*, 44 P.3d at 143-44, 144 n.5 (quoting *Interior Alaska Airboat Ass'n v. State, Bd. of Game,* 18 P.3d 686, 690 (Alaska 2001)) (applying hard look analysis to Board and remanding house districts for reconsideration because Board had not considered certain salient issues).

carefully reviewing the superior court's decision, we conclude that the superior court examined whether the Board took a hard look at salient problems raised by public comments rather than merely counting comments and determining whether the Board followed the majority view. This is in line with the hard look doctrine, and we see no legal error.

3. Equal protection test/conclusion

The Board argues that the superior court wrongfully added a federal law overlay to the multi-factor test used to determine whether redistricting violates equal protection in this context.[14] We disagree. The superior court looked to federal law to assist in determining, as a matter of first impression, whether a prior illegal redistricting discrimination finding may be relevant to determining whether subsequent illegal redistricting discrimination occurred. We see no legal error in the superior court's determination that prior illegal redistricting discrimination may be a relevant factor when, as in this matter, the challenge to the subsequent redistricting plan is based on the

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[14] *See Kenai Peninsula*, 743 P.2d at 1372 ("Under such a test we look both to the process followed by the Board in formulating its decision and to the substance of the Board's decision in order to ascertain whether the Board intentionally discriminated against a particular geographic area. Wholesale exclusion of any geographic area from the reapportionment process and the use of any secretive procedures suggest an illegitimate purpose. District boundaries which meander and selectively ignore political subdivisions and communities of interest, and evidence of regional partisanship are also suggestive. The presentation of evidence that indicates, when considered with the totality of the circumstances, that the Board acted intentionally to discriminate against the voters of a geographic area will serve to compel the Board to demonstrate that its acts aimed to effectuate proportional representation. That is, the Board will have the burden of proving that any intentional discrimination against voters of a particular area will lead to more proportional representation.").

same contextual framework and house district pairing for senate districts.

The Board also contends that the superior court came to the wrong conclusion after applying its equal protection analysis, but we disagree. We AFFIRM the superior court's determination that the Board again engaged in unconstitutional political gerrymandering to increase the one group's voting power at the expense of others.

Interim Plan

The Board adopted two potential proclamation plans for public presentation and comment and for adoption as the amended proclamation plan, referred to as Option 2 and Option 3B. The Board adopted Option 3B. After ruling that the Board-adopted Option 3B was unconstitutional, the superior court ordered the Board to implement Option 2 as the interim plan for the upcoming 2022 elections to enable legislative candidates to file for office by the June 1 deadline. Because we agree with the superior court that the Board's proclamation plan — Option 3B — is unconstitutional, the issue of an interim plan remains.

The Board seemingly argues that the superior court had no authority to order the Board to adopt Option 2 as the interim proclamation plan. The Board presumably believed Option 2 fulfilled constitutional requirements, or it would not have adopted it for public presentation and consideration for a proclamation. We are about a week short of June 1 and the Board has made no known effort to prepare or present to us an interim plan other than Option 2.[15] We therefore AFFIRM the superior court's

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[15] *Cf. In re 2011 Redistricting Cases*, 274 P.3d 466, 468-69 (Alaska 2012) (inviting board to submit proposed interim plan for our approval in light of upcoming election deadlines when remanding final plan to board for further proceedings).

order that the Board adopt the Option 2 proclamation plan as an interim plan for the 2022 elections.

Conclusion

We DISSOLVE THE STAY of the superior court's rulings that (1) the Board's amended proclamation is unconstitutional and (2) the Board adopt the specified interim plan for the 2022 elections. The superior court's remand to the Board for further proceedings on a new proclamation plan for elections after 2022 REMAINS STAYED.

Entered at the direction of the court.

Clerk of the Appellate Courts

M. Montgomery

Meredith Montgomery

cc: Supreme Court Justices
Judge Matthews
Trial Court Clerk - Anchorage

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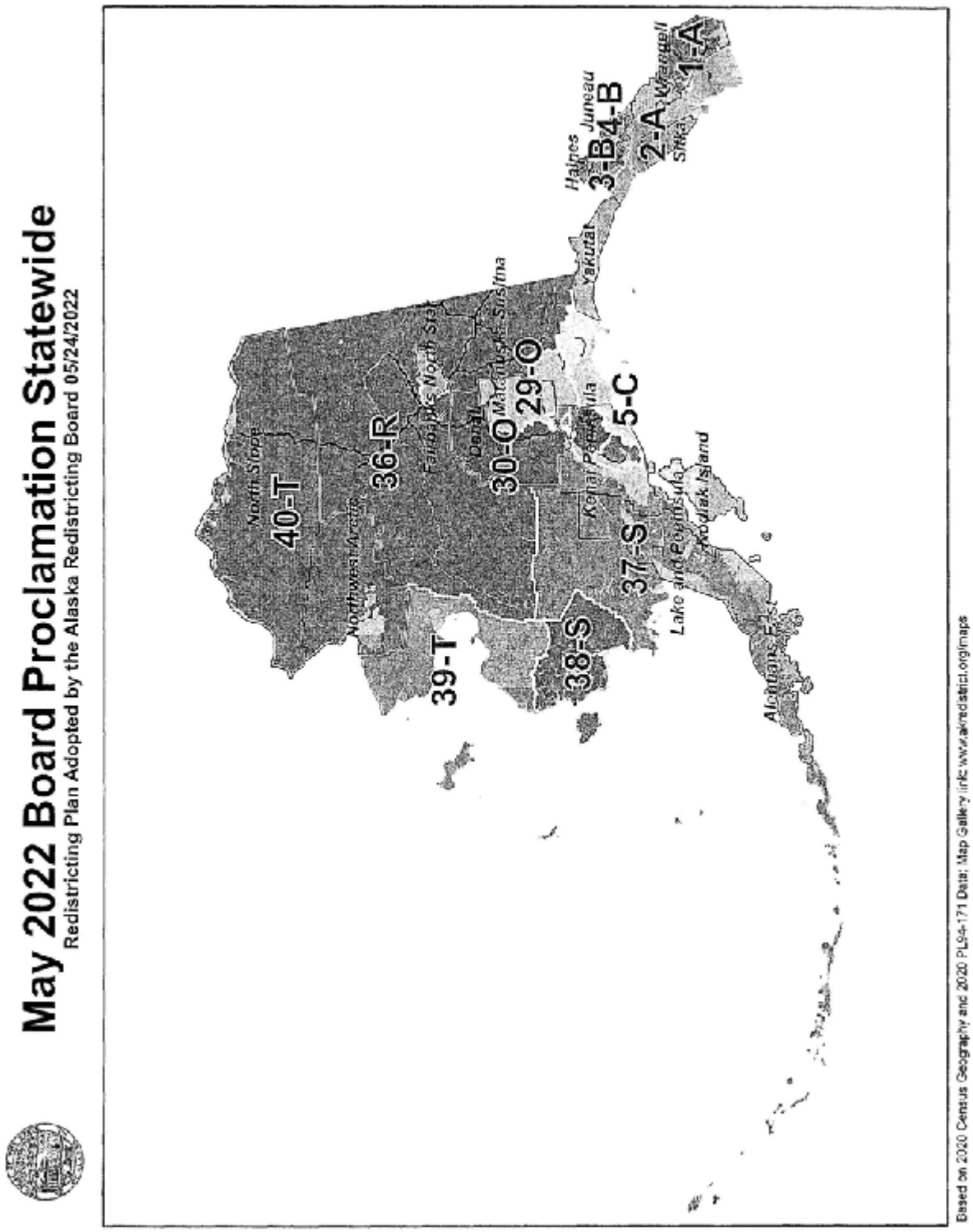

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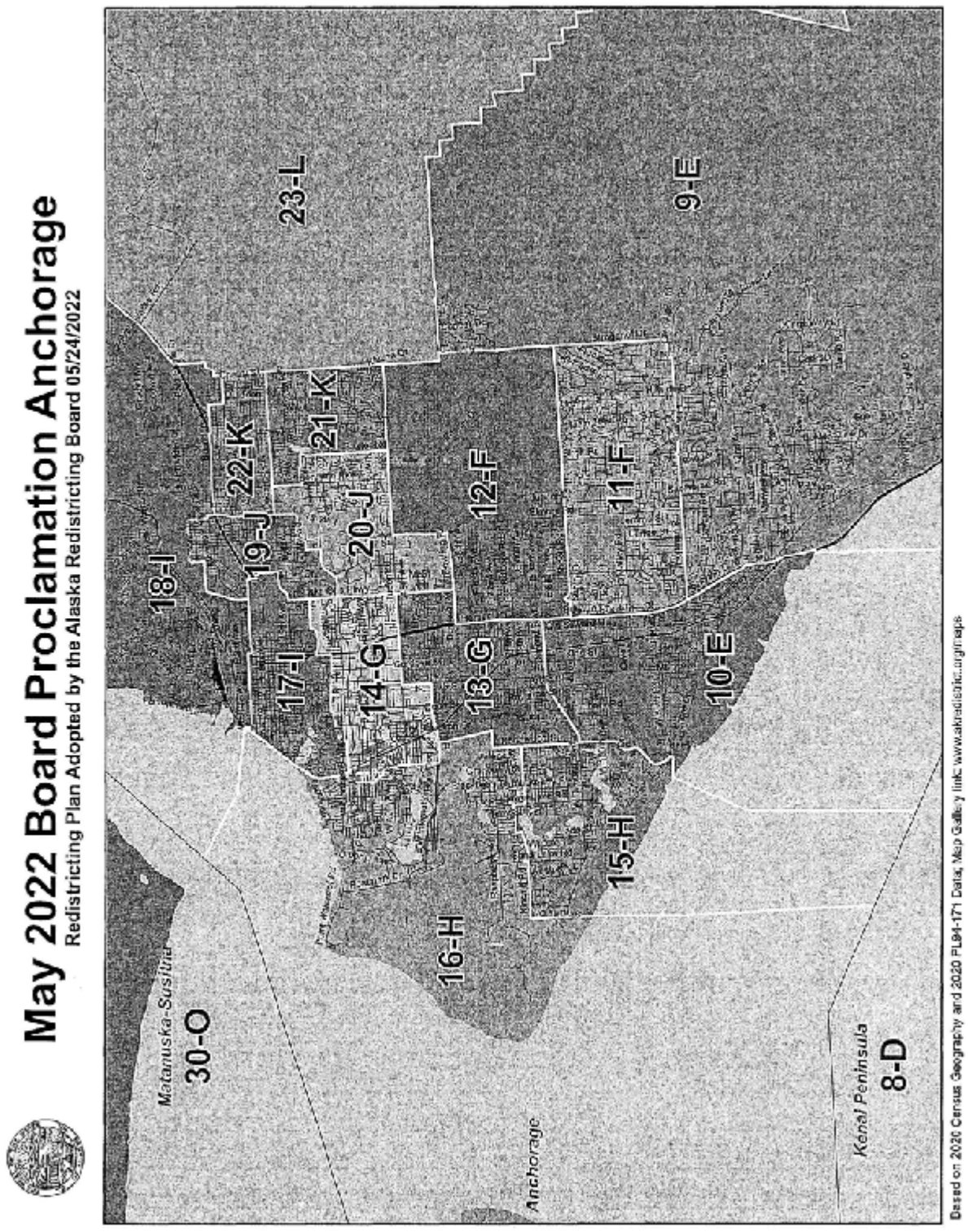

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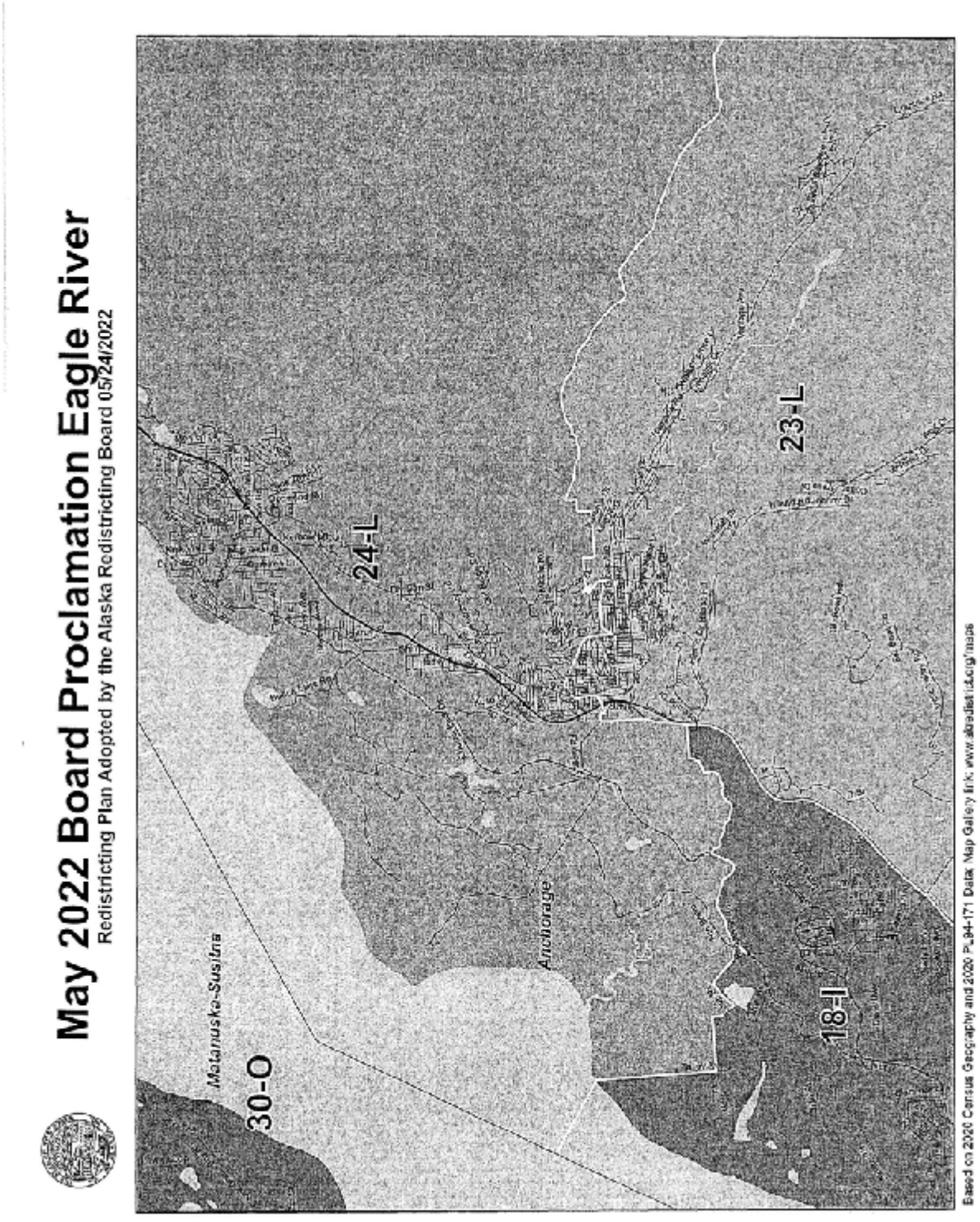

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Szeliga v. Lamone

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KATHRYN SZELIGA, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
Defendants	*	CASE NO.: C-02-CV-21-001816

* * * * * * * * * * * * * * * *

NEIL PARROTT, et al.,	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
Defendants	*	CASE NO.: C-02-CV-21-001773

* * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Introduction

Partisan gerrymandering refers to the drawing of districting lines to favor the political party in power, and "[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Rucho v. Common Cause*, — U.S. —,—, 139 S. Ct. 2484, 2499 (2019).[1] *Rucho* is pivotal for the discussion of why this trial court and, potentially, the Court of Appeals[2] are

[1] Gerrymandering based on race is not an issue in this case, so that statutes such as the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified, as amended, at 52 U.S.C. § 10101, *et seq.*), and cases solely addressing this conundrum are not implicated directly.

(continued . . .)

grappling with the issue of the constitutionality of the 2021 Congressional map, because the Supreme Court demurred in the case from addressing, on the basis of the "political question" doctrine, the lawfulness of partisan gerrymandering. *Id.* at —, 2506–07. Chief Justice Roberts, the author of *Rucho*, suggested, however, that, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at —, 2507.

Background

Two consolidated cases in issue in the instant case are constitutional challenges to the Maryland Congressional Districting Plan enacted in 2021, hereinafter referred to as "the 2021 Plan." In their Complaint, the 1773 Plaintiffs[3] allege violations of Section 4 of Article III of the Maryland Constitution, which provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions[,]

(. . . continued)

[2] A direct appeal to the Court of Appeals is available pursuant to Section 12–203 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.), which provides:

> (a) *In general.* — A proceeding under this subtitle shall be conducted in accordance with the Maryland Rules, except that:
>
> (1) the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require;
>
> (2) on the request of a party or sua sponte, the chief administrative judge of the circuit court may assign the case to a three-judge panel of circuit court judges; and
>
> (3) an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the circuit court.
>
> (b) *Expedited appeal.* — The Court of Appeals shall give priority to hear and decide an appeal brought under subsection (a)(3) of this section as expeditiously as the circumstances require.

[3] The named Plaintiffs in the consolidated action, Case No. C-02-CV-21-001773, are Neil Parrott, Ray Serrano, Carol Swigar, Douglas Raaum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, and Sallie Taylor; hereinafter "the 1773 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

MD. CONST. art. III, § 4, as well as Article 7 of the Maryland Declaration of Rights, which declares:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

MD. CONST. DECL. OF RTS. art. 7. The 1816 Plaintiffs[4] also allege violations of Article 7, but also add Article 24 of the Declaration of Rights, which provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land[,]

MD. CONST. DECL. OF RTS. art. 24, as well as Article 40, which declares:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege[,]

MD. CONST. DECL. OF RTS. art. 40, and Section 7 of Article I of the Maryland Constitution, which provides:

> The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.

MD. CONST. art. I, § 7.

[4] The named Plaintiffs in Case No. C-02-CV-21-001816 are Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, and Michelle Kordell; hereinafter "the 1816 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

Defendants in both actions are Linda H. Lamone, the Maryland State Administrator of Elections; William G. Voelp, the Chairman of the Maryland State Board of Elections; and the Maryland State Board of Elections, which is identified as the administrative agency charged with "ensur[ing] compliance with the requirements of Maryland and federal election laws by all persons involved in the election process."[5]

Case No. C-02-CV-21-001816

On December 23, 2021, the 1816 Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. On January 20, 2022, the Democratic Congressional Campaign Committee ("DCCC") filed a Motion to Intervene in the matter, along with its proposed Answer to the Plaintiffs' Complaint. On February 2, 2022, the Defendants filed their Motion to Dismiss or, in the Alternative, for Summary Judgment.[6] The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 3, 2022 and subsequently filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, on February 11, 2022. In the meantime, the Defendants also filed their response to the DCCC's Motion to Intervene. The Court heard argument on the Defendants' Motion to Dismiss on February 16, 2022 and held the matter *sub curia*. Simultaneously, the Court issued its Memorandum Opinion and Order denying the DCCC's Motion to Intervene.

Several days later, on February 22, 2022, the Court issued a Consolidation Order, which consolidated Case No. C-02-CV-21-001816 with another similar case, Case No. C-02-CV-

[5] *About SBE*, THE STATE BD. OF ELECTIONS, https://perma.cc/9GUT-X5KM (last visited March 23, 2022).

[6] It should be noted that the Defendants have asserted that both Case No. C-02-CV-21-001816 and Case No. C-02-CV-21-001773 are non-justiciable "political questions." The Defendants, however, conceded that should the standards in Article III, Section 4 apply to Congressional redistricting, the matter is justiciable.

21001773, and identified Case No. C-02-CV-21-001816 as the "lead" case. On the same day, the Court denied three requests for special admission of out-of-state attorneys on behalf of the DCCC. On February 23, 2022, the Court ultimately issued its Order disposing of the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, and dismissed Count II: Violation of Purity of Elections, with prejudice. The counts that remained included Counts I, III, and IV of the 1816 Complaint, which involved violations of Articles 7 (Free Elections), 24 (Equal Protection), and 40 (Freedom of Speech) of the Maryland Declaration of Rights, respectively. The 1816 Plaintiffs ask for a declaration that the 2021 Plan is unconstitutional under Articles 7, 24, and 40 of Maryland's Declaration of Rights and Section 7 of Article I of the Maryland Constitution. Additionally, Plaintiffs seek to permanently enjoin the use of the 2021 Plan and ask for an order to postpone the filing deadline for candidates to declare their intention to compete in 2022 Congressional primary elections until a new district map is prepared.

Case No. C-02-CV-21-001773

On December 21, 2021, the 1773 Plaintiffs filed their Complaint for Declaratory and Other Relief Regarding the Redistricting of Maryland's Congressional Districts. On January 20, 2022, the DCCC filed a Motion to Intervene in the matter, along with its proposed Motion to Dismiss the Plaintiffs' Complaint. The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 4, 2022. Subsequently, on February 11, 2022, the Plaintiffs filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, in related Case No. C-02-CV-21-001816. On February 15, 2022, the DCCC filed its Reply in Support of its Motion to Intervene. Several days later, on February 19, 2022, the Defendants filed a Motion to Dismiss the Complaint. The Plaintiffs filed their Opposition to the Motion to

Dismiss on February 20, 2022. On February 22, 2022, the Court issued a Consolidation Order (referenced above) and denied the DCCC's Motion to Intervene and the three requests for special admission of out-of-state attorneys on behalf of the DCCC. A hearing on the Defendants' Motion to Dismiss took place on February 23, 2022. Under this Court's February 23rd Order, which dismissed Count II of the 1816 Complaint, both counts in the 1773 Complaint remained.

The 1773 Plaintiffs ask for a declaration that the 2021 Plan is unlawful, as well as a permanent injunction against its use in Congressional elections. Additionally, the 1773 Plaintiffs ask the Court to order a new map be prepared before the 2022 Congressional primaries or, in the alternative, order that an alternative Congressional district map, which was prepared by the Governor's Maryland Citizens Redistricting Commission,[7] be used for the 2022 Congressional elections.

The parties submitted proposed findings of fact prior to trial on March 11, 2022. Simultaneously, the 1816 and 1773 Plaintiffs submitted a Joint Motion in Limine as to exclude portions of testimony from Defendants' experts, Dr. Allan J. Lichtman and Mr. John T. Willis. During the first day of trial on March 15, 2022, the parties submitted Stipulations of Fact and the Court admitted the stipulations as Exhibit 1. The Court then placed, on the record, an agreement between the parties about relevant judicial admissions by the Defendants relative to the Defendants' Answer. On the last day of trial on March 18, 2022, the State submitted a stipulation

[7] The Maryland Citizens Redistricting Commission was established by Governor Lawrence J. Hogan, Jr., in January of 2021. Exec. Order No. 01.01.2021.02 (Jan. 12, 2021). The Commission, pursuant to the Order, was tasked with preparing plans for the state's Congressional districts and its state legislative districts, which would be submitted by the Governor to the General Assembly. *Id.* The Commission submitted its Final Report to the Governor in January 2022. *Final Report of the Maryland Citizens Redistricting Commission*, MD. CITIZENS REDISTRICTING COMM'N (Jan. 2022), https://perma.cc/UUX5-6J72.

that the 2021 Plan did, in fact, pair Congressmen Andy Harris and Congressmen Kweisi Mfume in the same district – the Seventh Congressional District.[8]

With respect to the Plaintiffs' Motion in Limine, which raised the issue of a *Daubert* challenge as well as alleged late disclosure by the Defendants' experts as to various opinions, the trial judge heard argument during trial and ruled that the allegations regarding late disclosure were denied. With respect to the *Daubert* motion regarding the States' expert witnesses, it was eventually withdrawn by the Plaintiffs on March 18, 2022.

In addition, the Defendants moved to strike three questions asked by the trial judge of Dr. Thomas L. Brunell, after cross examination and before re-direct and re-cross examination, and the responses thereto. After a hearing in open court on March 18, 2022, the judge denied the motion to strike the three questions of Dr. Brunell and his responses thereto.

The Motion to Dismiss

In evaluating the Constitutional claims posited in Case Nos. C-02-CV-21-001816 and C02-CV-21-001773, the trial court has been guided in its efforts by the words of Chief Judge Robert M. Bell, when he wrote in 2002, that courts "do not tread unreservedly into this 'political thicket'; rather, we proceed in the knowledge that judicial intervention . . . is wholly unavoidable." *In re Legislative Districting of State*, 370 Md. 312, 353 (2002). Chief Judge Bell recognized that when the political branches of government are exercising their duty to prepare a lawful redistricting plan, politics and political decisions will impact the process. *Id.* at 354; *id.* at 321 ("[I]n preparing the redistricting lines . . . the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they

[8] *See* Stipulation No. 60, *infra* p. 57.

may pursue a wide range of objectives[.]"). Yet, the consideration of political objectives "does not necessarily render the process, or the result of the process, unconstitutional; rather, that will be the result only when the product of the politics or the political considerations runs afoul of constitutional mandates." *Id.* (internal citations omitted).

In considering whether the various counts of the Complaints survived the Motion to Dismiss, the trial court applied the following standard of review[9]:

"Dismissal is proper only if the facts alleged fail to state a cause of action." *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). Under Maryland Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." In considering a motion to dismiss for failure to state a cause of action pursuant to Maryland Rule 2-322(b)(2), a trial court must assume the truth of all well-pleaded relevant and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom. *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 333 (1993); *Odyniec v. Schneider*, 322 Md. 520, 525 (1991). Whether to grant a motion to dismiss "depends solely on the adequacy of the plaintiff's complaint." *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999).

> "[I]n considering the legal sufficiency of [a] complaint to allege a cause of action . . . we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." Mere conclusory charges that are not factual allegations may not be considered. Moreover, in determining whether a petitioner has alleged claims upon which relief can be granted, "[t]here is ... a big difference between that which is necessary to prove the [commission] and that which is necessary merely to allege [its commission][.]"

[9] The trial court did not apply the "plausibility" standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), commonly referred to as "the *Twombly-Iqbal* standard," which may be considered a more intense standard of review. The State disavowed that it was positing its application.

Lloyd v. Gen. Motors Corp., 397 Md. 108, 121-22 (2007) (quoting *Sharrow v. State Farm Mutual Ins. Co.*, 306 Md. 754, 768, 770 (1986)) (alterations in original).

There are no provisions in the Maryland Constitution explicitly addressing Congressional districting. The only statutes in Maryland that bear on Congressional redistricting include Section 8–701 through 8–709 of the Election Law Article of the Maryland Code. Section 8–701 states that Maryland's population count is to be used to create Congressional districts, that the State of Maryland shall be divided into eight Congressional districts, and that the description of Congressional districts include certain boundaries and geographic references.[10] Sections 8–702 through 8–709 identify the respective counties included within each of the eight Congressional districts according to the current Congressional map in effect.[11] None of the statutory provisions includes standards or criteria by which Congressional districting maps must be drawn.[12]

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[10] Section 8-701 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.) provides:

> (c) *Boundaries and geographic references.* — (1) The descriptions of congressional districts in this subtitle include the references indicated.
>
> (2) (i) The references to:
>
> 1. election districts and wards are to the geographical boundaries of the election districts and wards as they existed on April 1, 2020; and
>
> 2. precincts are to the geographical boundaries of the precincts as reviewed and certified by the local boards or their designees, before they were reported to the U.S. Bureau of the Census as part of the 2020 census redistricting data program and as those precinct lines are specifically indicated in the P.L. 94-171 data or shown on the P.L. 94171 census block maps provided by the U.S. Bureau of the Census and as reviewed and corrected by the Maryland Department of Planning.
>
> (ii) Where precincts are split between congressional districts, census tract and block numbers, as indicated in P.L. 94-171 data or shown on the P.L. 94-171 census block maps provided by the U.S. Bureau of the Census and referred to in this subtitle, are used to define the boundaries of congressional districts.

[11] MD. CODE ANN., ELEC. LAW §§ 8-701 through 8-709.

[12] During the hearing on the State's Motion to Dismiss, the Court asked the parties to provide supplemental briefings regarding the significance, or not, of two historical laws, which prescribed the application of the (continued . . .)

In ruling on the Defendants' Motion to Dismiss the Complaints, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the 1773 Complaint stated a claim upon which relief can be granted. Article III, Section 4, of the Maryland Constitution does embody standards by which the 2021 Congressional Plan can be evaluated to determine whether unlawful partisan gerrymandering has occurred. The standards of Article III, Section 4 are applicable to the evaluation of the 2021 Plan based upon the interpretation of the Section's language, purpose, and legislative intent.

With respect to the 1773 Complaint and the 1816 Complaint, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that can reasonably be drawn

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(. . . continued)
"constitution and laws of this state for the election of delegates to the house of delegates," to Congressional elections. The first law, enacted in 1788, in relevant part, provided:

> And be it enacted, That the election of representatives for this state, to serve in the congress of the United States, shall be made by the citizens of this state qualified to vote for members of the house of delegates, on the first Wednesday of January next, at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, prescribed by the constitution and laws of this state for the election of delegates to the house of delegates[.]

1788 Laws of Maryland, Chapter X, Section III (Vol. 204, p. 318). The second law, enacted in 1843, provided:

> Sec. 5. And be it enacted, That the regular election of representatives to Congress from this State, shall be made by the citizens of this State, qualified to vote for members to the House of delegates, and each citizen entitled as aforesaid, shall vote by ballot, on the first Wednesday in October, in the year eighteen hundred and forty-five, and on the same day in every second year thereafter, at the places in the city of Baltimore, and in the city of Annapolis, and in the several counties, and Howard District of this State, as prescribed by the constitution and laws of this State, for the election of members to the house of delegates.
>
> 1843 Laws of Maryland, Chapter XVI, Section 5 (Vol. 595, p. 13).

The parties' responses, collectively, indicated that they ascribed little or no significance to the language, which suggested that the first Congressional elections in Maryland were conducted via the application of election rules prescribed, in part, in the State Constitution.

therefrom and determined that the strictures of Article III, Section 4 are, alternatively, applicable to the 2021 Plan because of the free elections clause, MD. CONST. DECL. OF RTS. art. 7, as well as with respect to the 1816 Complaint, the equal protection clause, MD. CONST. DECL. OF RTS. art. 24; each, individually, provide a nexus to Article III, Section 4 to determine the lawfulness of the 2021 Plan.[13]

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[13] The trial court ultimately dismissed with prejudice Section 7 of Article I of the Maryland Constitution. Article I, Section 7 provides that, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." The 1816 Plaintiffs argued that this provision was violated because the General Assembly failed to pass laws concerning elections that are fair and even-handed, and that are designed to eliminate corruption. *1816 Compl.* ¶ 66. The State took the position that Section 7 of Article 1 was not intended to restrain acts of the General Assembly, but rather, that the provision acted as "an exclusive mandate directed to the General Assembly to establish the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud." *1816 Mot. Dismiss* at 31.

The term "purity" in the Section is undefined and therefore, ambiguous. No case referring to the Section has defined what purity means. *Cnty. Council for Montgomery Cnty. v. Montgomery Ass'n, Inc.*, 274 Md. 52 (1975); *Anderson v. Baker*, 23 Md. 531 (1865) (concurring opinion); *see also Hanrahan v. Alterman*, 41 Md. App. 71 (1979); *Hennegan v. Geartner*, 186 Md. 551 (1946); *Smith v. Higinbothom*, 187 Md. 115 (1946); *Kenneweg v. Allegany Cnty. Comm'rs*, 102 Md. 119 (1905). When asked at oral argument to give the term a meaning applicable to elections, Counsel for the 1773 Plaintiffs could only say "purity means purity."

The phrase "purity" of elections was added to the Maryland Constitution of 1864, where the explicit language directed the General Assembly to preserve the "purity of elections." MD. CONST. of 1864, art. III, § 41 (directing the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters"). The provision focused on voter registration, with the purpose of excluding ineligible voters from the election process.

The language of what is now Article I, Section 7, has changed since its enactment in the Maryland Constitution of 1864. Article III, § 41 of the Constitution of 1864, in whole, directed the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters, and by such other means as may be deemed expedient, and to make effective the provisions of the Constitution disfranchising certain persons, or disqualifying them from holding office." Article III, § 41, was renumbered in the 1867 amendment, to Article III, Section 42, which provided, [t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. of 1867, art. III, § 42. Article III, § 42, was, again, renumbered and amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978, to Article I, § 7, which now provides, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. art. 1, § 7.

Cases interpreting Article I, Section 7, have applied the Section to the registration of voters, *Anderson*, 23 Md. at 586 (concurring opinion), improper financial campaigns contributions, *Cnty. Council for Montgomery Cnty.*, 274 Md. at 60–65; *see also Higinbothom*, 187 Md. at 130 ("The Corrupt Practices Act is a remedial measure and should be liberally construed in the public interest to carry out its purpose of preserving the purity of elections.").

From its legislative history, the language of "purity of elections" referred to questions involving the *individual* candidate and the *individual* voter. The only assumption tendered by the 1816 Plaintiffs to support that partisan gerrymandering affected the "purity" of elections was that such gerrymandering was *ipso facto* corrupt.

(continued . . .)

With respect to the 1816 Complaint, alternatively, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the Complaint stated a cause of action under each of the equal protection clause, MD. CONST. DECL. OF RTS. art. 24, and the free speech clause, MD. CONST. DECL. OF RTS. art. 40, which subjects the 2021 Plan to strict scrutiny by this Court.

Alternatively, with respect to the 1773 and 1816 Complaints, this Court assumed the truth of all the well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that both Complaints stated a cause of action under the entirety of the Maryland Constitution and Declaration of Rights to determine the lawfulness of the 2021 Plan.

The Provisions in the Maryland Constitution and Declaration of Rights

In reviewing whether political considerations have run afoul of constitutional mandates in the instant case, we must undertake the task of constitutional interpretation. "Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it." *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 53 (2013) (citing *Fish Mkt. Nominee Corp. V. G.A.A., Inc.*, 337 Md. 1, 8–9 (1994)). We first look to the natural and ordinary meaning of the provision's language. *Id.* If the provision is clear and unambiguous, the Court will not infer the meaning from sources outside the Constitution itself. *Id.* "[O]ccasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language," including "archival legislative history." *Phillips v. State*, 451 Md. 180, 196–97 (2017). Archival legislative history

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That assumption has not been borne out by review of over 200 cases addressing partisan gerrymandering, none of which characterized the practice as "corrupt."

includes legislative journals, committee reports, fiscal notes, amendments accepted or rejected, the text and fate of similar measures presented in earlier sessions, testimony and comments offered to the committees that considered the bill, and debate on the floor of the two Houses (or the Convention). *State v. Phillips*, 457 Md. 481, 488 (2018).

The rules of statutory construction are well known. Yet, when applying the rules of statutory construction to the interpretation of constitutional provisions, the approach is more nuanced. That approach was described in *Johns Hopkins Univ. v. Williams*, 199 Md. 382 (1952):

> [C]ourts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the time it was framed, the common usage well known to the people, and the history of the growth or evolution of the particular provision under consideration. In aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.

Id. at 386–87.

To construe a constitution, "a constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth." *Snyder ex rel. Snyder*, 435 Md. at 55 (quoting *Bernstein v. State*, 422 Md. 36, 56 (2011)). Similarly, we do not read the constitution as a series of independent parts; rather, constitutional provisions are construed as part of the constitution as a whole. *Id.* Further, if a constitutional provision has been amended, the amendments "bear on the proper construction of the provision as it currently exists," and in such a situation, 'the intent of the amenders … may become paramount." *Norino Properties, LLC v. Balsamo*, 253 Md. App. 226, (2021) (quoting *Phillips*, 457 Md. at 489). We keep in mind that the courts shall construe a constitutional provision in such a manner that accomplishes in our modern society the purpose for which the provisions were adopted by the drafter, and in doing so, the provisions "will be

given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee." *Bernstein v. State*, 422 Md. 36, 57 (2011) (quoting *Johns Hopkins Univ.*, 199 Md. at 386).

We recognize that "a legislative districting plan is entitled to a presumption of validity" but "that the presumption "may be overcome when compelling evidence demonstrates that the plan has subordinated mandatory constitutional requirements to substantial improper alternative considerations."" *In re Legislative Districting of State*, 370 Md. at 373 (quoting *Legislative Redistricting Cases*, 331 Md. 574, 614 (1993)).

Article III, Section 4 of the Maryland Constitution

Article III, Section 4 of the Maryland Constitution provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

MD. CONST. art. III, § 4. The 1773 Plaintiffs assert a direct claim under Article III, Section 4, of the Maryland Constitution and urge that the plain meaning of the term "legislative district" corresponds to any legislative district in the State, which must be subject to the standards of adjoining territory, compactness, and equal population with due regard given to natural boundaries of political subdivisions. The 1773 Plaintiffs allege the new Congressional districts under the 2021 Plan violate the requirements of Article III, Section 4. *1773 Compl.* ¶¶ 93– 97.[14]

Defendants claim that the text of Article III, Section 4, is limited to State legislative districting because the term "legislative districts" refers "unambiguously to State legislative districts" whenever it appears in other provisions of the Constitution, and that when Congress is referred to the "c" is capitalized. *1773 Defs.' Mot. Dismiss* at 2. The Defendants argue that although a 1967 constitutional convention proposed a draft that included Constitutional standards for both state districts and Congressional districting, the voters rejected the draft and that the General Assembly drew the current Article III, Section 4 without reference to Congressional redistricting to enable the 1969 amendments to the Constitution to be adopted. *1816 Defs.' Mot. Dismiss* at 19–22.

[14] The 1816 Plaintiffs do not assert a claim under Article III, Section 4, of the Maryland Constitution. *1816 Opp'n Mot. Dismiss* at 10 n.3.

The term "legislative district" is the gravamen of analysis. There is no definition of the term "legislative district" in the Maryland Constitution or Declaration of Rights. Absent a definition, in light of the differing ways the term could be applied, *i.e.*, as State legislative districts and/or Congressional districts, the language is ambiguous.[15]

The "compactness" requirement was added to then extant Article III, Section 4, by the General Assembly in 1969 and ratified by the voters in 1970 (the "1970 Amendment"), as part of a series of amendments to the entirety of Article III. *See* 1969 Md. Laws ch. 785, ratified Nov. 3, 1970 (proposing the repeal of MD. CONST., art. III, §§ 2, 4, 5, and 6, and replacement with new §§ 2 through 6). Its framers recognized that "compactness requirement in state constitutions is intended to prevent political gerrymandering." *Matter of Legislative Districting of State* ("*1984 Legislative Districting*"), 299 Md. 658, 687 (1984). Prior to this amendment, Article III, Section 4 required districts to be "as near as may be, of equal population" and "always consist of contiguous territory," and only applied to the "existing Legislative Districts of the City of Baltimore." MD. CONST. art. III, § 4 (1969).[16]

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[15] The State has posited the importance of the exclusion of the word "Congress" in Article III, Section 4 to specifically include reference to Congressional districts. Neither the word Congress nor State, General Assembly, Senate, or House of Delegates appears in Article III, Section 4, unlike other Constitutional provisions or importantly, in Section 4 itself. *See, e.g.*, MD. CONST. art. I, § 6 (using the term "Congress"); art. III, § 10 (using the term "Congress"); art. IV, § 5 (using the term "Congress"); art. XI-A, § 1 (using the term "congressional election"); art. XVII, § 1 (using the term "congressional elections"); art. III, § 3 (using the terms "State," "Senate" and "House of Delegates"); art. III, § 5 (using the terms "State," "General Assembly," "Senate," and "House of Delegates"); art. III, § 6 (using the terms "General Assembly" and "delegate"); art. III, § 13(b) (using the terms "Legislative" and "Delegate district"); and art. XIV, § 2 (using the terms "General Assembly," and "Legislative District of the City of Baltimore").

[16] Prior to 1966, Baltimore City was the only jurisdiction in the State in which Delegates were elected to represent discreet legislative districts; Delegates representing other counties were elected by the voters of those counties at large. *See* MD. CONST. art. III, § 5 (1965) ("The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the Legislative Districts of Baltimore City, respectively . . . ."); 1965 Md. Laws special session, chs. 2, 3 (requiring the first time that counties allocated more than eight delegates be divided (continued . . .)

The present complete version of Article III, Section 4 was enacted in 1972 and ratified by the voters on November 7, 1972. In enacting the present version in 1972, the General Assembly "is presumed to have full knowledge of prior and existing law on the subject of a statute it passes." *Id.*; *see also Bowers v. State*, 283 Md. 115, 127 (1978) ("[T]he Legislature is presumed to have had full knowledge and information as to prior and existing law on the subject of a statute it has enacted."); *Harden v. Mass Transit Admin.*, 277 Md. 399, 406-07 (1976) ("The General Assembly is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.").[17] With respect to this knowledge, it is clear that they were aware of

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into districts). The "contiguity" or "equal population" requirements of the early Article III, § 4, did not apply to any "legislative district" outside of Baltimore City.

[17] The State agreed during oral argument on the Motion to Dismiss that cases of the Supreme Court in the 1960s regarding redistricting informed the adoption of the present version of Article III, Section 4:

> THE COURT: In doing research on Article III, Section 4, of the Maryland Constitution, it has come to the Court's attention that one of the reasons for enacting this provision was the Legislature's knowledge—which we presume—of the Supreme Court's cases. That is my understanding, is it yours?
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> MR. TRENTO, ON BEHALF OF THE STATE: Yes, Your Honor, the Supreme Court's cases were in the front and center of the minds of the 1967 Constitutional Convention. In that Convention, the sweep of amendments to Article III, Sections 3 through 6, were expressly undertaken to address the Supreme Court jurisprudence from the 1960s.

Mot. Dismiss Hearing, 02/23/2022. In the 1967 Constitutional Convention, the Supreme Court cases referencing legislative redistricting were prominent. The delegates in the Proceedings and the Debates of the 1967 Constitutional Convention referenced prior Supreme Court jurisprudence on numerous occasions: *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 3255; 104 MD. STATE ARCHIVES 2267, 10853. During the 1967 Constitutional Convention, Delegate John W. White, in response to a question regarding his intent regarding a provision stated:

> DELEGATE WHITE: What I am trying to do is to have all of Maryland line up with the position of the Supreme Court of the United States, which has said that one person should have one vote.

Proceedings and Debates of the 1967 Constitutional Convention, 104 MD. STATE ARCHIVES 7879,

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Baker v. Carr, 369 U.S. 186 (1962), involving state legislative districts,[18] as well as *Wesberry v. Sanders*, 376 U.S. 1 (1964), a Congressional districting case.[19]

With reference to Supreme Court jurisprudence that is the context of the 1967 to 1972 Amendments to Article III, Section 4, one early case—*Baker v. Carr*—involved the apportionment of the Tennessee legislature. The federal district court dismissed the complaint in apparent reliance on the legal process theory of political justiciability, but the Supreme Court reversed. *Baker v. Carr*, 179 F. Supp. 824, 828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962). Importantly, the Supreme Court's decision only dealt with procedural issues: jurisdiction, standing, and justiciability. *Baker*, 369 U.S. at 198–237. It held by a 6–2 vote that the court had jurisdiction, plaintiffs had standing, and the challenge to apportionment did not present a nonjusticiable "political question." *Id.* at 204, 206, 209.

The Supreme Court, thereafter, confronted the apportionment of Congressional districts in *Wesberry v. Sanders* in 1964 and held that Congressional apportionment cases were justiciable, noting that there is nothing providing "support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6–7. The Court ultimately applied the "one-person, one-vote" rule to apportionment of

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https://perma.cc/JG3T-KV3J (last visited March 23, 2022). During the Proceedings and Debates of the 1967 Constitutional Convention, the delegates proposed constitutional amendments regarding Congressional districting, however, the amendments failed subsequent enactment and were, ultimately, not included in the adopted 1970 and 1972 versions of Article III, Section 4.

[18] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 499.

[19] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES 10863–64.

Congressional districts, explaining that "the [Constitutional] command that representatives be chosen by people of the several states means that as nearly as practicable one man's vote in a Congressional election is to be worth as much as another's." *Id.* at 7–8. The Court believed that "a vote worth more in one district that in another would run . . . counter to our fundamental ideas of democratic government." *Id.* at 8. The opinion rested on the interpretation of the Elections Clause in Article I, Section 4 of the Constitution. *Id.* at 6–7.

On April 7, 1969, another Congressional districting case was decided. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), a decision involving Congressional districting in Missouri, the Supreme Court held that the "as nearly as practicable" standard "requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick*, 394 U.S. at 530–31.

The context, therefore, of the 1967 through 1972 amending process of Article III, Section 4, was the Supreme Court cases in which state legislative districts, but also Congressional districts, were decided.

The State posits, however, that the Legislature really intended on omitting Congressional districts in the later versions of Article III, Section 4 enacted in 1969 and 1972 because an earlier version from 1967 of Section 4 included a specific reference to Congressional districts, *see* PROPOSED CONST. OF 1967–68, §§ 3.05, 3.07, 3.08, 605 MD. STATE ARCHIVES 9–10, and another section that had a specific reference to the State, *see* PROPOSED CONST. OF 1967–68, § 3.04, 605 MD. STATE ARCHIVES 9. The failed passage of the earlier draft Constitution, which included these phrases, however, does not have any bearing on the analysis of what the Legislature

intended in adopting the 1970 or 1972 versions of Article III, Section 4, because "[f]ailed efforts to amend a proposed bill, however, are not conclusive proof usually of legislative will. . . . This is because there can be a myriad of reasons that could explain the Legislature's decision not to incorporate a proposed amendment." *Antonio v. SSA Sec., Inc.*, 442 Md. 67, 87 (2015). Most importantly, "[i]f the framers desired" to exclude Congressional redistricting from Article III, Section 4, "they knew how to do so." *Schisler v. State*, 394 Md. 519, 594–95 (2006).[20]

The Legislature, keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts. As a result, "legislative districts" includes Congressional districts. A claim, thus, has been stated under Article III, Section 4.

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[20] Interestingly, the early language in a bill introduced in 1972 included the words Senators and Delegates to alter Article III, Section 4:

> Each legislative district shall consist of adjoining territory and shall be compact in form. The ratio of the number of Senators to population shall be substantially the same in each legislative district; the ratio of the number of Delegates to population shall be substantially the same in each legislative district. Nothing herein shall be construed to require the election of only one Delegate from each legislative district.

Amendments to Maryland Constitutions, 380 MD. STATE ARCHIVES, 489. The final adopted version contained no mention of, nor reference to, "Senator" or "Delegate."

Nexus Between Articles 7 and 24 of the Declaration of Rights and Article III, Section 4 of the Constitution

The standards of Article III, Section 4 are also applicable on an alternate basis, to evaluate the constitutionality of the 2021 Plan because the Free Elections Clause, Article 7 of the Maryland Declaration of Rights, which has been alleged in the 1773 and 1816 Complaints, as well as the Equal Protection Clause, Article 24 of the Maryland Declaration of Rights, as averred in the 1816 Complaint, each implicate the use of the Section 4 criteria. Assuming either clause is applicable,[21] its application to the lawfulness of the 2021 Plan can only be made manifest by use of the standards in Article III, Section 4.

The methodology of drawing a nexus between a "standards" clause and its facilitating constitutional provision is exactly what Judge John C. Eldridge, writing on behalf of the Court, did in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), between the Free Elections Clause and Section 1 of Article I of the Constitution[22] as well as the Equal Protection Clause and Section 2 of Article I of the Constitution.[23]

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[21] The applicability of the Free Elections Clause and the Equal Protection Clause will be addressed separately, *infra*.

[22] Article I, Section 1 of the Maryland Constitution, provides:

> All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

[23] Article I, Section 2 of the Maryland Constitution, provides:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter

(continued . . .)

Green Party involved the constitutional validity of various provisions of the Election Code which governed the method by which a party, other than a "principal political party," could nominate a candidate for a Congressional seat. *Id.* at 140. The Green Party, however, had been notified that the name of its candidate could not be placed on the ballot because the Board of Elections was unable to verify a number of signatures on the nominating petition and, as a result, the petition contained less than the number required to vote. *Id.* at 137. The Board posited a number of reasons for denying the adequacy of the number of signatures, but the seminal reason addressed in the opinion was that many of the petition signatures were those who appeared on an inactive voter registry, which did not qualify them to sign a petition as a "registered voter" pursuant to Section 1–101(gg) of the Election Code.

In addressing whether the Free Elections Clause was violated by the provision regarding an inactive voter registry, Judge Eldridge applied the standards in Article I, Section 2 of the Constitution, which, he explained, "contemplates a *single* registry for a particular area, containing the names of *all* qualified voters[.]" *Id.* at 142. (italics in original). Remarking that the statute created a class of "second class" citizens comprised of inactive voters, Judge Eldridge determined that Article 7 had been violated. *Id.* at 150. In so doing, his determination was premised on a line of cases in which adherence with the strictures of the Free Elections Clause was informed by standards set forth in Constitutional Clauses. *Id.* at 144 (citing *Gisriel v. Ocean*

(. . . continued)

> held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

City Bd. of Supervisors of Elections, 345 Md. 477 (1997) (rejecting provision in an Ocean City Charter that failure to vote in two previous elections rendered a person unqualified to vote in municipal elections, based on Sections 1 and 4 of Article of the Constitution and Article 7 of the Declaration of Rights); *State Admin. Bd. of Election Laws v. Bd. of Supervisors of Balt. City*, 342 Md. 586 (1996) (holding that "having voted frequently in the past is not a qualification for voting," under Article I, Section 1 of the Constitution and Article 7 of the Declaration of Rights); *Jackson v. Norris*, 173 Md. 579 (1937) (recognizing nexus between the Free Elections Clause and the mandate in Section 1 of Article 1 of the Constitution, that "elections shall be by ballot")). Judge Eldridge also utilized the standards in Section 1 of Article I to determine that a registry of inactive voters was "flatly inconsistent" with Article 24 of the Declaration of Rights, the Equal Protection Clause.[24] *Id.* at 150.

It is clear, then, that our Free Elections Clause, as well as the Equal Protection Clause implicate the use of standards contained in the Constitution in order to determine a violation of each. So is the case in their application in the instant case, in which implementation of their provisions can be determined in reference to Article III, Section 4.[25]

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[24] As discussed, *infra*, Judge Eldridge also utilized the Equal Protection Clause, Article 24, to evaluate whether the requirement that the Green Party, as a non-principle party, was constitutionally required to submit not only 10,000 signatures on a petition to be recognized as a political party and then provide a second petition to nominate its candidate.

[25] The Supreme Court of Pennsylvania, in *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1 (2018), utilized a framework similar to that implemented in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), when it looked to standards delineated in Article 2, Section 16 of its Constitution – defining criteria to be used in drawing state legislative districts – in order to measure Congressional District Plan, which had been enacted by its Legislature, complied with the Free Elections Clause contained in Pennsylvania's Declaration of Rights.

Article 7 of the Maryland Declaration of Rights

Article 7 of the Maryland Declaration of Rights, entitled "Elections to be free and frequent; right of suffrage," provides:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The 1816 Plaintiffs assert that the 2021 Plan violates the Free Elections Clause in several ways, including that the 2021 Plan "unlawfully seeks to predetermine outcomes in Maryland's congressional districts." They also allege that the 2021 Plan violates Article 7, because it is not based upon "well-established traditions in Maryland for forming congressional districts[,]" including compactness, adjoining territory, and respect for natural and political boundaries. They specifically allege that the boundary of the First Congressional District, which they aver is the only district in which a Republican is the incumbent, was redrawn "to make even that district a likely Democratic seat." As a result, they allege that "the citizens of Maryland, including Plaintiffs, with a right to an equally effective power to select the congressional representative of their choice," have been deprived of their right to elections, which are "free." They contend that Article 7 "prohibits the State from rigging elections in favor of one political party[,]" and conclude that, "any election that is poisoned by political gerrymandering and the intentional dilution of votes on a partisan basis is not free."

The 1773 Plaintiffs assert that the 2021 Plan "subordinate[s]" the requirement, under Article 7 of the Declaration of Rights, that elections be "free and frequent" to "improper considerations," namely the manipulation of Congressional district boundaries so that they will

be unable "to cast a meaningful and effective vote for the candidates they prefer." Additionally, these Plaintiffs allege that Congressional district boundaries that are not based on criteria, such as compactness and the minimization of crossing political boundaries, result in elections that are inherently not "free" and, therefore, violate Article 7.

The State, conversely, argued that the 2021 Congressional Plan does not violate the Free Elections Clause of Article 7, because that Section applies only to state elections. The State observes that the capitalization of "L" in "Legislature," is a direct reference to the General Assembly. Additionally, the State asserts that the legislative history of Article 7, particularly surrounding debates regarding the frequency of elections, indicates that the Free Elections Clause could not apply to federal elections, "for which the State is powerless to control the frequency."

With respect to the use of a capital "L" in "Legislature," in the Free Elections Clause, as reflecting only a reference to the state legislature, the State's contention is belied by its own language. Article 7, as it was originally adopted in 1776, was meant to secure a right of participation:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature. The reference to "Legislature," then, refers to the only entity for which there was any accountability through suffrage.

The purpose of the Free Elections Clause relative to partisanship, as alleged in the complaints, heretofore has not been the subject of judicial scrutiny. During the Constitutional Convention of 1864, however, proposals to amend Article I of the Constitution, to create a registry of voters whereby voters would be required to pledge a loyalty oath as a prerequisite to voting were hotly debated and the effect of "partisan oppression" on free elections was explored. Proponents of the amendments sought to exclude supporters of the Confederacy, who, by the terms of the oath, would be disqualified from voting. *Proceedings and Debates of the 1864 Constitutional Convention*, Volume 1 at 1332. Those opposed to the loyalty oath argued that it would be counter to the purpose of "free elections." *Id.* at 1332. One delegate noted that the loyalty oath presupposed that,

> there are now in the State of Maryland enjoying the right of suffrage under the present constitution, ten distinct classes of persons who deserve to be disfranchised from hereafter exercising that right. They . . . are to be under a government by others, in which they are to have no voice, in which they are not to be allowed to participate in any shape or form.

Id. In the same debate, another delegate, Mr. Fendall Marbury, decried the imposition of a loyalty oath as a means of oppression, in contravention to the right to participate in free elections:

> The right of free election lies at the very foundation of republican government. It is the very essence of the constitution. To violate that right, and much more to transfer it to any other set of men, is a step leading immediately to the dissolution of all government. The people of Maryland have always in times past, guarded with more than vestal care this fundamental principle of self-government. By constitutional provisions and legislative enactments, they have sought to provide against every conceivable effort that might be made to suppress the voice of the people. They have spurned the idea of excluding any one on account of his religious or political opinions. Is it not unwise and impolitic to depart from this established policy of the State, by introducing words into our

> constitution which are calculated to revive and foster that spirit of crimination and recrimination already existing to an alarming extent between parties in this State? The word loyal has come to be, of late, a word susceptible of such various construction, and has so often been prostituted by the minions of power, to accomplish partizan ends. That to incorporate it into the constitution would be nothing more nor less than creating an engine of oppression, to be used by whatever party might hold for a time the reins of power.

Id. at 1334. Thus, inhibiting the creation of an "engine of oppression" "to accomplish party ends" by "whatever party might hold for a time the reins of power" to "suppress the voice of the people" was a purpose of the Free Elections Clause.

Our jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State. In *Jackson v. Norris*, 173 Md. 579 (1937), the Court of Appeals considered whether automated voting machines, which used ballots that restricted the choice of voters to candidates whose names were printed on the ballot, violated the Free Elections Clause. In resolving the applicability of the Free Elections Clause, the Court explained that legislative acts that were "a material impairment of an elector's right to vote[,]" were to be deemed unconstitutional. *Id.* at 585. The Court held that the ballots were violative of the Free Elections Clause, because they constrained the ability of voters to cast their vote for the candidate of their choice and, by extension infringed upon voters' right to participate in free elections. *Id.* at 603.

The pivotal goal of the Free Elections Clause, to protect the right of political participation in Congressional elections, was emphasized in *Green Party*, 377 Md. at 127, which concerned an attempt by the Green Party to get a candidate on the ballot for election to Congress, in the state's first congressional district, as discussed, *supra*. In that case, Article 7 was held to protect the right of all qualified voters within the state to sign nominating petitions in support of minor party

candidates for office, regardless of whether they had been classified as "inactive voters." In this regard, the decision in *Green Party* recognized that the Free Elections Clause afforded a greater protection of the citizens of Maryland in a Congressional election context, than is provided under the Federal Constitution, in the First, Fifth, Ninth, and Fourteenth Amendments, which also had been alleged in the Complaint. *Green Party*, 377 Md. at 150.[26]

Clearly, the 1773 and 1816 Complaints, with respect to Article 7 of the Declaration of Rights, the Free Elections Clause, have stated a cause of action and survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

[26] In interpreting similar phraseology that "Elections shall be free and equal," the Supreme Court of Pennsylvania, in *League of Women Voters of Pa.*, determined that the state's Free Elections Clause required that "each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives." 645 Pa. at 117. The Court concluded that, in order to comply with the strictures of the Free Elections Clause, Congressional district maps be drawn in order to "provide[] the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *Id.*

Article 24 of the Maryland Declaration of Rights, Equal Protection

Article 24 of the Maryland Declaration of Rights, entitled "Due process," provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Although Article 24 does not contain language of "equal protection," the Court of Appeals has long held that "equal protection" is embodied in it: "we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights. *Att'y Gen. of Md. v. Waldron*, 289 Md. 683 (1981); *Bd. of Supervisors of Elections of Prince George's Cnty. v. Goodsell*, 284 Md. 279, 293 n.7 (1979) ("[W]e have regularly proceeded upon the assumption that the principle of equal protection of the laws is included in Art. [24] of the Declaration of Rights.").

The 1816 Plaintiffs assert that the 2021 Plan violates Article 24 by unconstitutionally discriminating against Republican voters, including Plaintiffs, and infringing on their fundamental right to vote. Specifically, these Plaintiffs assert that the 2021 Plan intentionally discriminates against Plaintiffs by diluting the weight of their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their Congressional representatives. These Plaintiffs add that the 2021 Plan unconstitutionally degrades Plaintiffs' influence on the political process and infringes on their fundamental right to have their votes count fully. The State, in response, asserts that the Plaintiffs have offered no basis for an interpretation broader than that by the Supreme Court of the Fourteenth Amendment

in *Rucho*. The State posits, though, that the scope of equal protection in Maryland is the same as that which is embodied in the federal constitution in the Fourteenth Amendment.

The essence of equal protection is that "all persons who are in like circumstances are treated the same under the laws." *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983). The treatment of similarly situated people under the law, clearly, cannot be denied in Maryland, in derogation of the Fourteenth Amendment; it also is clear that Maryland can afford greater protection to its citizens under Article 24 of the Declaration of Rights. In this regard, we need only look at various cases of the Court of Appeals in which the Court was clear that Article 24 and the equal protection clause of the Fourteenth Amendment are "independent and capable of divergent application." *Waldron*, 289 Md. at 704; *see also Md. Aggregates Ass'n, Inc. v. State*, 337 Md. 658, 671 n.8 (1995) (explaining the relationship between applications of equal protection guarantees under the Fourteenth Amendment and Article 24 of the Declaration of Rights); *Verzi v. Balt. Cnty.*, 333 Md. 411, 417 (1994) (stating that "'a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.'" (quoting *Waldron*, 289 Md. at 715)); *Hornbeck*, 295 Md. at 640 (stating that "the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other.").

Notably, in *In re 2012 Legislative Districting*, 436 Md. 121 (2013), Chief Judge M. Bell, writing for the Court of Appeals, assumed that Article 24 could embody a greater right than is afforded under the Fourteenth Amendment when he said: "The potential violation of Article 24 of the Maryland Declaration of Rights is not discussed at length in this case because the petitioners do not assert any greater right under Article 24 than is accorded under both the

Federal right and the population equality provision of Article III, § 4 of the Maryland Constitution." *Id.* at 159 n.25.

The State, however, during argument regarding the Motion to Dismiss, attempted to distinguish what the Court of Appeals said in Footnote 25 in the 2012 redistricting case, by urging that the pivotal quote was addressing only a racial gerrymandering issue, rather than partisan gerrymandering. It is notable, however, that in deriving the notion that Article 24 could embody a greater breadth of protection than is afforded by the Fourteenth Amendment, the Court of Appeals cited to *Md. Aggregates Ass'n*, *supra*, (quoting *Murphy v. Edmonds*, 325 Md. 342, 354–55 (1992)), neither of which involved any racial differentiation.

Obviously, it cannot be lost to anyone that Article 24 was assumed to be applicable in a redistricting context in the 2012 redistricting case. *Id.* Article 24, moreover, has also been applied in various election and voting right contexts prior to 2012. *See Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2007) (Presidential elections); *DuBois v. City of College Park*, 286 Md. 677 (1980) (election for City Council); *Goodsell*, 284 Md. at 281 (election for County Executive).

Moreover, in *Green Party*, which is of particular significance to the instant case, Judge John C. Eldridge, writing for the Court, addressed whether a statutory scheme comported with equal protection under Article 24 and analyzed the issue using two distinct approaches, both of which are applicable in the instant case.

In 2000, the Maryland Green Party sought to place its candidate on the ballot for the U.S. House of Representatives seat in Maryland's first congressional district. *Green Party*, 377 Md. at 136. The Green Party needed initially to be recognized as a political party within the state,

which, pursuant to Section 4–102 of the Election Code, required it to submit a petition to the State Board of Elections that included "the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the 1st day of the month in which the petition is submitted." *Id.* at 135–36. In August of 2000, the Green Party's petition was accepted, and it became "a statutorily-recognized 'political party[.]'" *Id.* at 135 n.3 (quoting Section 1–101(aa) of the Election Code).

In order to nominate a candidate, however, the Green Party was then required to submit a second petition to the Board of Elections, which, pursuant to Section 5–703(e) of the Election Code, was to be accompanied by signatures of "not less 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought[.]" *Id.* at 137 n.6. "On August 7, 2000, the [Green Party] submitted a timely nominating petition containing 4,214 signatures of voters purporting to be registered in Maryland's first congressional district," *id.* at 137, but the petition was rejected by the Board of Elections. Alleging that "it could verify only 3,081 valid signatures, fewer than the 3,411 required by Maryland's 1% nomination petition requirement," the Board reasoned that "many signatures were 'inactive' voters" and ineligible to sign nominating petitions. *Id.* The basis for the Board's rationale was that, under the provisions of Section 3–504 of Election Code, if a sample ballot, which "the local boards customarily mail out . . . to registered voters prior to an election[,]" were "returned by the postal service" and the voter then "fail[ed] to respond to [a] confirmation notice," the voter's name would be placed on "the 'inactive voter' registration list." *Id.* at 147. Persons on the inactive voter list, pursuant to Sections 3–504(f)(4) of the Election Code, would "not be counted as part of the registry [of voters]," and under Section 3–504(f)(5), their

signatures were not to "be counted . . . for official administrative purposes as petition signature verification[.]" *Id.* at 150.

In addressing the constitutionality of Section 3–504 of the Election Code, which established an inactive voter registry, which essentially disenfranchised voters, Judge Eldridge applied the standards of Section 2 of Article I of the Constitution, which required:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

In applying the standards of Section 2, Judge Eldridge declared Section 3–504 of the Election Code unconstitutional, because that Section "create[d] a group of 'second-class citizens' comprised of persons who are 'inactive' voters and thus not eligible to sign petitions[,]" and was "flatly inconsistent with Article 24 of the Declaration of Rights. *Id.* at 150. In explaining how the inactive voter list failed to comport with the Constitutional standards, Judge Eldridge explained that Section 2 of Article I, which instructs the General Assembly to create a uniform registry of voters,

> contemplates a single registry for a particular area containing the names of all qualified voters, leaving the General Assembly no discretion to decide who may or may not be listed therein, no discretion to create a second registry for inactive voters, and no authority to decree that an "inactive" voter is not a "registered voter" with the rights of a registered voter.

Id. at 143. A nexus between the Equal Protection Clause and a standards clause, therefore, was established.

Judge Eldridge, thereafter, explored another methodology to apply equal protection to evaluate Green Party's claim that the required submission of two petitions in order to nominate its candidate violated Article 24, because it treated principal political parties differently from minor political parties. *Id.* at 159. The Green Party had argued that "once a group has submitted the required 10,000 signatures to receive official recognition as a political party , . . . no further showing of support should be necessary for the name of a minor political party's candidate to be on the ballot." *Id.* at 153. The Board of Elections countered that the second petition was necessary to ensure that a minor party had "a significant modicum of public support," in order to prevent "frivolous" candidates from appearing on ballots. *Id.* at 153–54.

In addressing the question, Judge Eldridge approached the issue through the strict scrutiny lens and required the State to present a compelling interest. In so doing, he determined that the requirement that the Green Party submit one petition to form a political party and then a second petition to nominate a candidate, "discriminates against minor political parties in violation of the equal protection component of Article 24[.]" *Id.* at 156–57. Having identified the two-petition requirement as discriminatory, Judge Eldridge considered "the extent and nature of the impact on voters, examined in a realistic light," in order to determine the appropriate standard of review of the five-year registration requirement. *Id.* at 163 (quoting *Goodsell*, 284 Md. at 288). He then determined that, "the double petitioning requirement set forth by the Maryland Election Code denies ballot access to a significant number of minor political party candidates. On that basis, the challenged statutory provisions' impact on voters is substantial." *Id.*

Clearly, the 1816 Complaint, with respect to the equal protection principles embodied within Article 24 of the Declaration of Rights, has stated a cause of action to survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

Article 40 of the Maryland Declaration of Rights

The 1816 Plaintiffs' cause of action under Article 40 of the Maryland Declaration of Rights survived the Motion to Dismiss. Article 40, which pertains to freedom of speech and freedom of the press, provides:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

MD. CONST. DECL. OF RTS. art. 40.

In their Complaint, the 1816 Plaintiffs allege that the 2021 Plan violates Article 40 by "burdening protected speech based on political viewpoint." Specifically, they allege, the 2021 Plan benefits certain preferred speakers (Democratic voters), while targeting certain disfavored voters (e.g., Republican voters, including Plaintiffs) because of disagreement on the part of the 2021 Plan's drafters with views Republicans express when they vote. *1816 Compl.* at ¶ 79. Plaintiffs aver that the 2021 Plan subjects Republican voters, including them, to disfavored treatment by "cracking"[27] them into specific congressional districts to dilute Republican votes and ensure that they are not able to elect a candidate who shares their views. *1816 Compl.* at ¶ 80. Therefore, Plaintiffs contend that the 2021 Plan has the effect of suppressing their political views and expressions and retaliates against them based on their political speech. *Id.* at ¶ 81.

Defendants argued in their Motion to Dismiss that the Plaintiffs' claims under Article 40 purport to "parrot" free speech claims that are the same as those offered under the First Amendment to the United States Constitution, which the Supreme Court has rejected in the

[27] "A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others." *Rucho v. Common Cause*, ____ U.S. ____,____, 139 S. Ct. 2484, 2492 (2019).

redistricting context. *See Rucho*, 139 S. Ct. at 2506–07. Defendants further assert that the because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as "coextensive" with its federal counterpart and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, the free speech cause of action should have been dismissed. *1816 Mot. Dismiss* at 3; *see generally 1816 Mot. Dismiss*, Section III.C.

Article 40 of the Maryland Declaration of Rights adopted in 1776, preceded its federal counterpart, adopted in 1788, thereby contributing to the foundations of the latter. Article 40 of Maryland's Declaration of Rights has been generally regarded as coextensive with the First Amendment, but the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation. *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621 (2002) ("Many provisions of the Maryland Constitution . . . do have counterparts in the United States Constitution. We have often commented that such state constitutional provisions are *in pari materia* with their federal counterparts or are the equivalent of federal constitutional provisions or generally should be interpreted in the same manner as federal provisions. Nevertheless, we have also emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart."); *see also State v. Brookins*, 380 Md. 345, 350 n. 2 (2004) ("While Article 40 is often treated *in pari materia* with the First Amendment, and while the legal effect of the two provisions is substantially the same, that does not mean that the Maryland provision will always be interpreted or applied in the same manner as its federal counterpart." (citing *Dua*, 370 Md. at 621)). The Court of Appeals has not shied away from "departing from the United States Supreme Court's

analysis of the parallel federal right" when necessary "[to] ensure[] that the rights provided by Maryland law are fully protected." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550 (2013).

A violation of the free speech provision of Article 40 is implicated when there is interference with a citizen's right to vote, which is a fundamental right. *Hornbeck*, 295 Md. at 641 (explaining that the right to vote is a fundamental right). We apply strict scrutiny when a legislative enactment infringes upon or interferes with personal rights or interests deemed to be "fundamental." *Id.* at 641. When a legislative act, such as the 2021 Plan, creates Congressional districts that dilute the influence of certain voters based upon their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here a fundamental right. As a result, this Court, under Article 40, will apply strict scrutiny to the 2021 Plan.

Fundamental Principles Underlying the Maryland Constitution and the Declaration of Rights

The final basis upon which the Plaintiffs have stated a cause of action on which relief can be granted is through the lens of the entirety of our Constitution and Declaration of Rights, which provides a framework to determine the lawfulness of the 2021 Plan based upon their fundamental principles.[28] *Snyder ex rel. Snyder*, 435 Md. at 55 ("In construing a constitution, we have stated 'that a constitution is to be interpreted by the spirit which vivifies[.]'" (quoting *Bernstein*, 422 Md. at 56)).

Plaintiffs argue that partisan gerrymandering is inconsistent with the principles embodied by the Free Elections Clause, the Equal Protection Clause, and the Free Speech Clause of the Declaration of Rights, because it usurps the power of the people to choose those who represent them in government and puts that power solely within the purview of the Legislature. *1816 Compl.* ¶ 2 ("Indeed, the 2021 Plan defies the fundamental democratic principle that voters should choose their representatives, not the other way around."). They posit that usurping the power of voters to elect members of Congress violates the general principles upon which the structure of Maryland's Government and its Constitution were founded.

In response, Defendants posit that judicially manageable standards do not exist under the Maryland Constitution, and further, applicable statutes adjudicating claims regarding Congressional districts do not exist in Maryland. *1816 Mot. Dismiss* at 3. As a result, Defendants

[28] *Whittington v. Polk*, 1 H. & J. 236, 241 (Md. Gen. 1802), in dictum, established in Maryland the idea of judicial review – that the courts are the primary interpreters and enforcers of the constitution. The General Court of Maryland explained that if an act of the Legislature is repugnant to the constitution, the courts have the power, and it is their duty, so to declare it. *Id.* The General Court realized that the "power of determining finally on the validity of the acts of the legislature cannot reside with the legislature . . . [because] they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other." *Id.* at 243.

argue that Plaintiffs cannot seek relief under the Maryland Constitution or Declaration of Rights. *Id.* at 45. Instead, the State argues, either Congress or the General Assembly must decide to impose statutory restrictions or adopt constitutional amendments to regulate Congressional districting. *Id.* Until congressional or state action is taken, Defendants aver that Plaintiffs will continue to lack a remedy under the Maryland Constitution or Declaration of Rights. *Id.*

The Constitution and Declaration of Rights must be read together to determine the organic law of Maryland. The courts understood this rule of construction early on, explaining that "[t]he Declaration of Rights and the Constitution compose our form of government, and must be interpreted as one instrument." *Anderson v. Baker*, 23 Md. 531, 612–13 (1865). Specifically, the court in *Anderson* explained that, "[t]he Declaration of Rights is an enumeration of abstract principles, (or designed to be so,) and the Constitution the practical application of those principles, modified by the exigencies of the time or circumstances of the country." *Id.* at 627; *see also Bandel v. Isaac*, 13 Md. 202, 202–03 (1859) ("In construing a constitution, the courts must consider the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it[.]"); *and Whittington v. Polk*, 1 H & J 236, 242 (1802) (stating that, "[t]he bill of rights and form of government compose the constitution of Maryland").

More recently, the Court of Appeals has confirmed this rule of construction. In *State v. Smith*, 305 Md. 489 (1986), the court reiterated that it "bear[s] in mind that the Declaration of Rights is not to be construed by itself, according to its literal meaning; it and the Constitution compose our form of government, and they must be interpreted as one instrument." *Id.* at 511

(explaining that the Declaration of Rights announces principles on which the form of government, established by the Constitution, is based).

While it is established that the Declaration of Rights and Constitution, together, form the organic law of our State, *Whittington*, 1 H & J at 242, the analysis then requires a review of the text, nature, and history of both documents. The text of the Maryland Constitution recognizes that "all Government of right originates from the people . . . and [is] instituted solely for the good of the whole; and [that citizens] have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient." MD. CONST. DECL. OF RTS. art. 1. Its purpose "is to declare general rules and principles and leave to the Legislature the duty of preserving or enforcing them, by appropriate legislation and penalties." *Bandel*, 13 Md. at 203. Moreover, it is well understood that the rights secured under the Maryland Declaration of Rights are regarded as very precious ones, to be safeguarded by the courts with all the power and authority at their command. *Bass v. State*, 182 Md. 496, 502 (1943). The framers ensured that the Declaration of Rights would be regarded as precious by enacting subsequent constitutional provisions to safeguard those rights. In that vein, the foundational significance of the right of suffrage is memorialized in the first Article of the Constitution, which pertains to the "Elective Franchise," MD. CONST. art. I, and Article I of the Declaration of Rights, which locates the source of all "Government" in the people. MD. CONST. DECL. OF RTS. art. 1.

Popular sovereignty dictates that the "Government" of the people which "derives from them," is properly channeled when our democratic process functions to reflect the will of the people. Although the Maryland Declaration of Rights, like the Constitution, is silent with respect to the right of its citizens to challenge the primacy of political considerations in drawing

legislative districts, the Declaration of Rights does memorialize that the people are guaranteed the right to wield their power through the elective franchise, thereby safeguarding the sacred principle that the government is, at all times, for the people and by the people. MD. CONST. DECL. OF RTS. arts. 1, 7. Specifically, recognizing that the government is for the people and by the people, Article I of the Constitution describes the process of electing persons to represent them in government, which is also embodied in the principles expressed through the Free Elections Clause in Article 7.

Under the principle of popular sovereignty, we bear in mind that the Constitution as a whole "is the fundamental, extraordinary act by which the people establish the procedure and mechanism of their government." *Bd. of Supervisors of Elections for Anne Arundel Cnty. v. Att'y Gen.*, 246 Md. 417, 429 (1967); *Whittington*, 1 H & J at 242 ("This compact [the Constitution] is founded on the principle that the people being the source of power, all government of right originates from them.").

The second principle—avoiding extravagant or undue extension of power by the Legislature—was an important limitation on the Legislature, the only entity for which the Maryland citizens could vote in 1776. It is stated that "[t]he Declaration of Rights is a guide to the several departments of government, in questions of doubt as to the meaning of the Constitution, and "a guard against any extravagant or undue extension of power[.]" *Anderson*, 23 Md. at 628. The limitation on "extravagant or undue extension of power" is coextensive with the principle of popular sovereignty. For this purpose, "courts have [the] power and duty to determine [the] constitutionality of legislation." *Curran v. Price*, 334 Md. 149, 159 (1994).

In Maryland, we have long understood that "[t]he elective franchise is the highest right of the citizen, and the spirit of our institution requires that every opportunity should be afforded to its fair and free exercise." *Kemp v. Owens*, 76 Md. 235, 241 (1892). In *Kemp*, the Court of Appeals characterized the right to vote as "one of the primal rights of citizenship," *id.*, as it did in *Nader for President 2004*: "the right of suffrage" guaranteed by our Constitution "is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society." 399 Md. at 686. To safeguard the Legislature from exerting extravagant or undue extension of power, each citizen of this State is afforded the opportunity to vote and hold the Legislature accountable. MD. CONST. DECL. OF RTS. arts. 7, 24, 40. Similarly, the judicial branch of government has a responsibility to limit the Legislature from exerting extravagant or undue extension of power by enforcing the standards of legislative districting outlined in Article III, Section 4 of the Maryland Constitution and by the avoidance of extreme partisan gerrymandering.

Therefore, assuming the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom, the Plaintiffs have stated a cause of action under the fundamental principles of the Maryland Constitution and Declaration of Rights of popular sovereignty and avoiding extravagant and undue exercise of power by the Legislature.

Findings of Fact

Stipulations and Judicial Admissions[29]

1. Plaintiffs are qualified, registered voters in Maryland.

[29] Where stipulations and admissions have overlapped, the trial judge has avoided duplication by adopting the more comprehensive of the two.

2. Plaintiffs in *Szeliga v. Lamone* ("No. 1816") are:

a. Kathryn Szeliga is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Ms. Szeliga currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2011. She is a Republican elected official who represents Maryland citizens in Baltimore and Hartford Counties. She resides in District 7 of the 2021 Plan.

b. Christopher T. Adams is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Mr. Adams currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2015. Mr. Adams is a Republican elected official who represents Maryland citizens in Caroline, Dorchester, Talbot, and Wicomico Counties. He resides in District 1 of the 2021 Plan.

c. James Warner is a citizen of the United States and a resident of and registered voter in Maryland. Mr. Warner is a decorated combat veteran and former prisoner of war. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

d. Martin Lewis is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for

Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

e. Janet Moye Cornick is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 3 of the 2021 Plan.

f. Ricky Agyekum is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 4 of the 2021 Plan.

g. Maria Isabel Icaza is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 5 of the 2021 Plan.

h. Luanne Ruddell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She currently serves as Chair of the Garrett County Republican Central Committee and President of the Garrett County Republican Women's Club. Additionally, she serves on the Rules Committee for the Maryland Republican Party and is a member of the Maryland Republican Women and the National Republican Women's organizations. She resides in District 6 of the 2021 Plan.

i. Michelle Kordell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 8 of the 2021 Plan.

3. Plaintiffs in *Parrott v. Lamone* ("No. 1773") are:

a. Plaintiff Neil Parrott is a citizen of Maryland, is registered to vote as a Republican, and resides in the Sixth Congressional District of the new Plan. Mr. Parrott has registered to run for Congress in 2022 in that district. Mr. Parrott is currently a member of the Maryland House of Delegates.

b. Plaintiff Ray Serrano is a citizen of Maryland, is registered to vote as a Republican, and resides in the Third Congressional District of the new Plan.

c. Plaintiff Carol Swigar is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

d. Plaintiff Douglas Raaum is a citizen of Maryland, is registered to vote as aRepublican, and resides in the First Congressional District of the new Plan.

e. Plaintiff Ronald Shapiro is a citizen of Maryland, is registered to vote as a Republican, and resides in the Second Congressional District of the new Plan.

f. Plaintiff Deanna Mobley is a citizen of Maryland, is registered to vote as aRepublican, and resides in the Fourth Congressional District of the new Plan.

g. Plaintiff Glen Glass is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

h. Plaintiff Allen Furth is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan.

i. Plaintiff Jeff Warner is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan. Mr. Warner intends to run for Congress in 2022 in that district.

j. Plaintiff Jim Nealis is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fifth Congressional District of the new Plan.

k. Plaintiff Dr. Antonio Campbell is a citizen of Maryland, is registered to voteas a Republican, and resides in the Seventh Congressional District of the new Plan.

l. Plaintiff Sallie Taylor is a citizen of Maryland, is registered to vote as a Republican, and resides in the Eight Congressional District of the new Plan.

4. Linda H. Lamone is the Maryland State Administrator of Elections.

5. William G. Voelp is the chairman of the Maryland State Board of Elections.

6. The Maryland State Board of Elections is charged with ensuring compliance with the Election Law Article of the Maryland Code and any applicable federal law by all persons involved in the election process. It is the State agency responsible for administering state and federal elections in the State Maryland.

7. Every 10 years, states redraw legislative and congressional district lines following completion of the decennial United States census. Redistricting is necessary to ensure that districts are equally populated and may also be required to comply with other applicable federal and state constitutions and voting laws.

8. The United States Constitution provides that, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. It also states that, "[t]he Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1. The United States Constitution thus assigns to state legislatures primary responsibility for apportionment of their federal congressional districts, but this responsibility may be supplanted or confined by Congress at any time.

9. Maryland has eight congressional districts.

10. The General Assembly enacts maps for these districts by ordinary statute. While the General Assembly's congressional maps are subject to gubernatorial veto, the General Assembly can, as with any ordinary statute, override a veto.

11. In 2011, following the 2010 decennial census, Maryland's General Assembly undertook to redraw the lines of Maryland's eight congressional districts.

12. To carry out the redistricting process, then-Governor Martin O'Malley appointed the Governor's Redistricting Advisory Committee ("GRAC") in July 2011 by Executive Order. The GRAC was charged with holding public hearings around the State and drafting redistricting plans for the Governor's consideration to set the boundaries of the State's 47 legislative districts and 8 congressional districts following the 2010 Census.

13. To carry out the redistricting process, Governor O'Malley appointed the GRAC to hold public hearings and recommended a redistricting plan. As part of a collaborative approach to developing a congressional map in 2011, Governor O'Malley asked Rep. Steny Hoyer to propose a consensus congressional map among Maryland's congressional delegation.

14. Democratic members of Maryland's congressional delegation, including Representative Hoyer, were involved in developing a consensus map to provide Governor O'Malley in order to assist with the process of developing a new congressional map for Maryland.

15. The GRAC held 12 public hearings around the State in the summer of 2011 and received approximately 350 comments from members of the public concerning congressional and legislative redistricting in the State. Approximately 1,000 Marylanders attended the hearings, which were held in Washington, Frederick, Prince George's, Montgomery, Charles, Harford, Baltimore, Anne Arundel, Howard, Wicomico, and Talbot Counties, and Baltimore City.

16. The GRAC solicited submissions of alternative plans for congressional redistricting prepared by third parties for its consideration. The GRAC also solicited public comment on the proposed congressional plan that it adopted.

17. The GRAC prepared a draft plan using a computer software program called Maptitude for Redistricting Version 6.0.

18. GRAC adopted a proposed congressional redistricting plan and made public its proposed plan on October 4, 2011. No Republican member of the GRAC voted for the congressional redistricting plan that was adopted.

19. The GRAC plan altered the boundaries of district 6 by removing territory in, among other counties, Frederick County, and adding territory in Montgomery County.

20. On October 15, 2011, Governor O'Malley announced that he was submitting a plan that was substantially similar to the plan approved by the GRAC to the General Assembly.

21. One perceived consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from District 6.

22. On October 17, 2011, the Senate President introduced the Governor's proposal as Senate Bill 1 at a special session and it was signed into law on October 20, 2011 with only minor

adjustments (the "2011 Plan"). No Republican member of the General Assembly voted in favor of the 2011 Plan.

23. The 2011 Plan was petitioned to referendum by Maryland voters at the general election of November 6, 2012, pursuant to Article XVI of the Maryland Constitution.

24. On September 6, 2012, the Circuit Court for Anne Arundel County rejected contentions that the ballot language for the referendum question was misleading or insufficiently infmmative. *See Parrott, et al. v. McDonough, et al.*, No. 02-C-12-172298 (Cir. Ct. for Anne Arundel Cnty.) (the "Referendum Litigation"). On September 7, 2012, the Court of Appeals denied a petition for certiorari by the plaintiffs in that case.

25. The 2011 Plan was approved by the voters in that referendum. The language of the question on the ballot for the referendum stated:

> *Question 5*
> *Referendum Petition*
> *(Ch. 1 of the 2011 Special Session)*
> *Congressional Districting Plan*
>
> Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.
>
> **For the Referred Law**
> _ **Against the Referred Law**

26. On July 23, 2014, the Court of Special Appeals affirmed the ruling of the Circuit Court in the Referendum Litigation in an unpublished opinion. *See Parrott, et al. v. McDonough, et al.*, No. 1445, Sept. Tenn 2012 (Md. App. July 23, 2014). A true and

accurate copy of the unpublished opinion in that case is attached hereto as Exhibit XII.[30] On October 22, 2014, the Court of Appeals denied a petition for certiorari by the appellants in that case. *See Parrott, et al. v. McDonough, et al.*, No. 382, Sept. Tenn 2014 (Md. Oct. 22, 2014).

27. Republican Roscoe G. Bartlett won election as United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over his Democratic challenger: 1992 (8.3%); 1994 (31.9%); 1996 (13.7%); 1998 (26.8%); 2000 (21.4%); 2002 (32.3%); 2004 (40.0%); 2006 (20.5%); 2008 (19.0%); 2010 (28.2%).

28. Democrats Goodloe E. Byron (1970-1976) and Beverly Byron (1978-1990) won election United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over their respective Republican challenger: 1970 (3.3%); 1972 (29.4%); 1974 (41.6%); 1976 (41.6%); 1978 (79.4%); 1980 (39.8%); 1982 (48.8%); 1984(30.2%); 1986(44.4%); 1988(50.7%); 1990(30.7%). *See Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

29. The congressional districts created through the 2011 Plan were used in the 2012-2020 congressional elections. Since 2012, a Democrat has held District 6 and Maryland's congressional delegation has always included 7 Democrats and 1 Republican. The margins of victo1y for the Democrat in District 6 (John Delaney from 2012-2016; David Trone in 2018-2020) have been: 2012 (20.9%); 2014 (1.5%); 2016 (15.9%); 2018 (21.0%);

[30] The identification of exhibits attached to this Court's Opinion has been changed from alphabetical identifications, which were previously labeled by the parties in these stipulations, to roman numeral identifications, so as to avoid any confusion between the exhibits admitted at trial and the exhibits attached to this Opinion.

2020 (19.6%). *See ElectionStatistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

30. Maryland Governor Larry Hogan signed an executive order on August 6, 2015, which created the Maryland Redistricting Refo1m Commission. A true and accurate copy of the August 6, 2015 executive order is attached hereto as Exhibit I.

31. The Commission was comprised of seven members appointed by the (Republican) Governor, two members appointed by the (Republican) minority leaders in the Maryland Legislature, and two members appointed by the (Democratic) majority leaders in the Maryland Legislature. The Governor's appointees consisted of three Republicans, three Democrats, and one not affiliated with any party. The Legislature's appointments consisted of two Democrats and two Republicans.

32. After several months of soliciting input from citizens and legislators across the State, the Commission observed that Maryland's constitution and laws offer no criteria or guidelines for congressional redistricting, and that the Maryland Constitution is otherwise silent on congressional districting. The Commission recommended, among other things, that districting criteria should include compactness, contiguity, congruence, substantially equal population, and compliance with the Voting Rights Act and other applicable federal laws. The Commission also recommended the creation of an independent redistricting body, whose members would be selected by a panel of officials drawn from independent branches of government such as the judiciary, charged with reapportioning the state's districts every ten years after the decennial census. A true and accurate copy of the Commission's Final Report is attached hereto as Exhibit X.

33. During each regular session of the General Assembly between 2016 and 2020, Governor Hogan caused one or more legislative bills to be introduced that would have established a processes by which State legislative and congressional maps were created in the first instance by a purportedly independent and bipartisan commission, and ultimately by the Court of Appeals in the event that the commission-proposed maps were not approved by the General Assembly or were vetoed by the Governor. These bills were House Bill 458 and Senate Bill 380 introduced in the 2016 regular session of the General Assembly, House Bill 385 and Senate Bill 252 introduced in the 2017 regular session, House Bill 356 and Senate Bill 307 in the 2018 regular session, House Bills 43 and 44 and Senate Bills 90 and 91 in the 2019 regular session, and House Bills 43 and 90 and Senate Bills 266 and 284 in the 2020 regular session. None of these bills was voted out of committee.

34. On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (MCRC) for the purposes of redrawing the state's congressional and legislative districting maps based on newly released census data. The MCRC was comprised of nine Maryland registered voter citizens, three Republicans, three Democrats, and three registered with neither party. Governor Hogan's Executive Order directed the MCRC to prepare maps that, among other things: respect natural boundaries and the geographic integrity and continuity of any municipal corporation, county, or other political subdivision to the extent practicable; and be geographically compact and include nearby areas of population to the extent practicable. A true and accurate copy of the January 12, 2021 Executive Order is attached heretoas Exhibit XI.

35. Over the course of the following months, the MCRC held over 30 public meetingswith a total of more than 4,000 attendees from around the State. The Commission

provided a public online application portal for citizens to prepare and submit maps, and it received a total of 86 maps for consideration.

36. After receiving public input and deliberating, on November 5, 2021, the MCRC recommended a congressional redistricting map to Governor Hogan.

37. On November 5, 2021, Governor Hogan accepted the MCRC's proposed final map and issued an order transmitting the maps to the Maryland General Assembly for adoption at a special session on December 6, 2021.

38. In July 2021, following the 2020 decennial census, Bill Ferguson, President of the Maryland Senate, and Adrienne A. Jones, Speaker of the Maryland House of Delegates, formed the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC"). The LRAC was charged with redrawing Maryland's congressional and state legislative maps.

39. The LRAC included Senator Ferguson, Delegate Jones, Senator Melony Griffith, and Delegate Eric G. Luedtke, all of whom are Democratic members of Maryland's General Assembly. Two Republicans, Senator Bryan W. Simonaire and Delegate Jason C. Buckel, also, were appointed to the LRAC by Senator Ferguson and Delegate Jones. Karl S. Aro, who is not a member of Maryland's General Assembly, was appointed as Chair of the LRAC by Senator Ferguson and Delegate Jones. Mr. Aro previously served as Executive Director of the non-partisan Department of Legislative Services for 18 years until his retirement in 2015, and was appointed by the Court of Appeals to assist in preparing a remedial redistricting plan that complied with state and federal law in 2002.

40. The LRAC held 16 public hearings across Maryland. At the hearings, the LRAC received testimony and comments from numerous citizens.

41. One of the themes that emerged from the public testimony and comments was that Maryland's citizens wanted congressional maps that were not gerrymandered. Other citizens indicated in these comments or public testimony that they did not want to be moved from their current districts. Still others advocated for the creation of majority-Democratic districts in every district of the State. And others requested that districts be drawn so as to eliminate the likelihood that a current incumbent might be reelected.

42. At the conclusion of the public hearings, the Department of Legislative Services ("DLS") was directed to produce maps for the LRAC's consideration.

43. On November 9, 2021, the LRAC issued four maps for public review and comment.

44. In a cover message releasing the maps, Chair Aro wrote: "These Congressional map concepts below reflect much of the specific testimony we've heard, and to the extent practicable, keep Marylanders in their existing districts. Portions of these districts have remained intact for at least 30 years and reflect a commitment to following the Voting Rights Act, protecting existing communities of interest, and utilizing existing natural and political boundaries. It is our sincere intention to dramatically improve upon our current map while keeping many of the bonds that have been forged over 30 years or more of shared representation and coordination."

45. On November 23, 2021, the LRAC chose a final map to submit to the General Assembly for approval (the "2021 Plan"). Neither Republican member of the LRAC supported the 2021 Plan.

46. On November 23, 2021, by a strict party-line vote, the LRAC chose a final map to submit to the General Assembly for approval, referred to as the 2021 Plan. Neither Republican

member of the LRAC supported the 2021 Plan. Senator Simonaire uttered the statement during the LRAC hearing on November 23, 2021, "[o]nce again, I've seen politics overshadow the will of the people."

47. A true and accurate copy of the 2021 Plan is attached as Exhibit I.

48. On December 7, 2021, the Maryland House of Delegates voted to reject an amendment that would have substituted the MCRC's map for the 2021 Plan. Two Democrats joined all of the Republicans in voting to substitute the MCRC's map for the Plan. No Republican member voted against the amendment.

49. On December 8, 2021, the General Assembly enacted the 2021 Plan. One Democratic member voted against the 2021 Plan. No Republican member voted to approve the 2021 Plan.

50. On December 8, 2021, the General Assembly enacted the 2021 Plan on a strict party-line vote. Not a single Republican member of the General Assembly voted to approve the 2021 Plan.

51. According to the Princeton Gerrymandering Project, Democrats now have an estimated vote-share advantage in every single Maryland congressional district.

52. On December 9, 2021, Governor Hogan vetoed the 2021 Plan.

53. On December 9, 2021, the General Assembly overrode Governor Hogan's veto, thus adopting the 2021 Plan into law. One Democratic member of the General Assembly voted against overriding Governor Hogan's veto, while no Republican member of the General Assembly voted in favor of override.

54. After passage of the 2021 Plan, Senator Ferguson and Delegate Jones issued a joint statement emphasizing that the 2021 Plan "keep[s] a significant portion of Marylanders in their current districts, ensuring continuity of representation."

55. Under Maryland's 2021 adopted congressional plan, portions of Anne Arundel County are in Districts 1, 2, and 4, and that District 1 includes population residing on the Eastern Shore and in Anne Arundel County.

56. Under Maryland's 2021 adopted congressional plan, portions of Baltimore City are in Districts 2, 3, and 7.

57. Under Maryland's 2021 adopted congressional plan, portions of Baltimore County are in Districts 2, 3, and 7.

58. Under Maryland's 2021 adopted congressional plan, portions of Montgomery County are in Districts 3, 4, 6, and 8.

59. Under Maryland's 2021 adopted congressional plan, nine counties have population assigned to more than one congressional district.

60. Congressmen Andy Harris, who currently represents the First Congressional District under the Enacted Plan and represented the First Congressional District under the 2011 Plan, was in the Seventh Congressional District, which is the District represented by Kweisi Mfume. Since that time, according to the Board of Elections' registration records, in early February 2022, Congressmen Harris registered to vote at a residence in Cambridge, Maryland, in the First Congressional District, which is on the Eastern Shore at a residence or place where Congressmen Harris has owned since 2009.

61. Exhibit II reports the adjusted population of Maryland's eight congressional districts following the 2010 census under Maryland's 2002 redistricting map. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit II are a true and accurate representation of data derived from government sources.

62. Exhibit III reports the adjusted population of Maryland's eight congressional districts following the 2020 census under the 2011 Plan and under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit III are a true and accurate representation of data derived from government sources.

63. Exhibit IV reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2010. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit IV are a true and accurate representation of data derived from government sources.

64. Exhibit V reports the number of eligible active voters and the respective political-party affiliations of those eligible active voters in each of Maryland's eight congressional districts on October 21, 2012. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit V are a true and accurate representation of data derived from government sources.

65. Exhibit VI reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2020. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VI are a true and accurate representation of data derived from government sources.

66. Exhibit VII reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VII are a true and accurate representation of data derived from government sources.

67. Exhibit VIII depicts Maryland's eight congressional districts under the 2011 Plan. The parties stipulate that the matters of fact asserted, stated or depicted in Exhibit VIII are a true and accurate representation of data derived from government sources.

Findings Derived by the Trial Judge from Testimony and Other Evidence Adduced at Trial

Mr. Sean Trende

68. Mr. Sean Trende testified and was qualified as an expert witness in political science, including elections, redistricting, including congressional redistricting, drawing redistricting maps, and analyzing redistricting.

69. Mr. Trende was asked to analyze the Congressional districts adopted by the Maryland Legislature in the recent rounds of redistricting and opine as to whether traditional redistricting criteria was [subordinated] for partisan considerations.[31]

70. Mr. Trende's opinions and conclusions were rendered to a reasonable degree of scientific certainty typical to his field.

71. In deriving his opinions, Mr. Trende conducted a three-part analysis; the first part analyzed traditional redistricting criteria in Maryland, with specific reference to the compactness

[31] The transcript stated, "whether traditional redistricting criteria was coordinated for partisan considerations," however, the trial judge recalls the correct verbiage was "whether traditional redistricting criteria was *subordinated* for partisan considerations." March 15, 2022, A.M. Tr. 45: 2–7.

of the maps with a comparison to other maps that had been drawn both in Maryland and across the country; he then examined the number of county splits, "the number of times the counties were split up by the maps" and finally, he then conducted a "qualitative assessment" to see how precincts were divided.

72. In the first part, Mr. Trende conducted a simulation analysis. In doing so, he "used the same techniques that were used in Ohio and in North Carolina" and "similar to that which has been used in Pennsylvania." The purpose of Mr. Trende's analysis was to analyze "partisan bias of the Maryland 2021 congressional districts."

73. Mr. Trende's methodology relied on "shape files."

74. In analyzing the shape files, he used "widely used statistical programming software called R."

75. Mr. Trende also conducted an analysis of the county splits for Maryland utilizing the "R" software.

76. Based upon his analysis of the county splits, referring to Exhibit 2-A, Mr. Trende found that the 1972 Congressional map included 8 splits.

77. In 1982, there were 10 county splits in the Congressional map.

78. In 1992, there were 13 county splits in the Congressional map.

79. In 2002, there were 21 county splits in the Congressional map.

80. In 2012, there were 21 county splits in the Congressional map.

81. In the 2021 Plan, there are 17 county splits.

82. The 2021 Plan has a historically high number of county splits compared to other Congressional plans, except the 2011 Map.

83. Mr. Trende testified that "you really only need 7 county splits in a map with 8 districts."

84. With respect to "compactness" of the 2021 Plan, Mr. Trende used four of the "most common compactness metrics": the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score; the lower the score the less compact a Congressional plan is.

85. The four scores were presented to strengthen his presentation as well as to present a different "aspect" of compactness.

86. Exhibits 4-A, 4-B, 4-C, and 4-D reflect the bases for Mr. Trende's compactness analyses, which included scores for all of Maryland's congressional districts dating back to 1788.

87. Exhibit 5 reflects the analysis of the four scores using a scale of 0 to 1, where "1 is a perfectly compact district, and 0 is a perfectly non-compact score."

88. There is no "magic number" that reflects whether a district is not compact. Comparisons to historical data supported Mr. Trende's conclusion that the 2021 Plan is "an outlier."

89. Based upon Mr. Trende's testimony, the Court finds that for "much of Maryland's history, including for a large portion of the post-*Baker v. Carr* history, Maryland had reasonably compact districts that showed a similar degree of compactness from cycle to cycle."

90. The Court also finds, based upon Mr. Trende's analysis that by Maryland's historic standards, the 2021 Congressional lines are "quite non-compact" regardless of which of the four metrics is used or analyzed.

91. Mr. Trende also analyzed the 2021 Plan with reference to every district in the United States going back to 1972, which is represented by Exhibits 6-A, 6-B, 6-C, and 6-D.

92. Mr. Trende testified that there are a limited number of maps for other states that have lower Reock scores than the 2021 Plan (*see* Exhibit 6-A).

93. Mr. Trende also testified with reference to Exhibit 6-B that there are only "six maps that have ever been drawn in the last 50 years with worse average Polsby-Popper scores than the current Maryland maps."

94. Mr. Trende further testified with reference to Exhibit 6-C that the 2021 Plan reflects one of the "worst Inverse Schwartzberg score[] in the last 50 years in the United States."

95. With reference to Exhibit 6-D, Mr. Trende testified that it scored, under the Convex Hull analysis, "very poorly relative to anything that's been drawn in the United States in the last 50 years."

96. Mr. Trende testified relative to compactness in the 2002 and 2012 Congressional plans in comparison to the 2021 Plan and concluded that the 2021 Plan is not compact.

97. Mr. Trende testified that relative to Exhibits 7-A, 7-B, 7-C, and 7-D, that the first Congressional district under the 2021 Plan "lower[ed] the Republican vote share in the First" and "[left] the democratic districts or precincts on the bay." He concluded that the "Democrats have an increased chance of winning this district in a normal or good democratic year."

98. As to Exhibits 8-A, 8-B, 8-C, and 8-D, he concluded that "almost all of the Republican precincts were placed into District 3 or District 7," while "[a]lmost all of the democratic precincts were placed into District 1."

99. Mr. Trende then presented a simulation approach to redistricting utilizing "R" software. The simulation package was dependent on the work of Dr. Imai using an approach that samples maps drawn without respect to politics. In each of Mr. Trende's simulations he used 250,000 maps all suppressing politics and utilizing two minority/majority districts mandated by the Voting Rights Act; he discarded duplicative maps and arrived at between 30,000 to 90,000 maps to be sampled for each simulation.

100. He then fed various "political data" into the program to measure partisanship.

101. Mr. Trende's simulations relied upon the correlations between vote shares and Presidential data, because he testified that Presidential data is the most predictive in analyzing election outcomes. Mr. Trende further testified that he used other elections at the Presidential, senatorial, and gubernatorial levels to check his simulation results.

102. In the first set of 250,000 maps, Mr. Trende depended upon population parity or equality and contiguity as well as a "very, very light compactness parameter." Other traditional redistricting criteria was not considered.

103. The second set of 250,000 maps depended on a "modest compactness criteria," "drawing without any political information."

104. The third set of 250,000 maps added respect for county subdivisions.

105. The three analyses are represented in Exhibits 9-A, 9-B, and 9-C.

106. In every one of the maps from which Mr. Trende drew his opinions, there are at least "two majority/minority districts to comport with the Voting Rights Act."

107. With respect to the first set of maps drawn with very little regard to compactness but regard given to contiguity and equal population, 14,000 of the maps have seven districts that

were won by President Joseph Biden and only 4.4% have eight districts won by President Joseph Biden. Mr. Trende concluded that "it is exceedingly unlikely that if you were drawing by chance, you would end up with a map where President Joe Biden carried all eight districts."

108. With respect to the application of compactness and contiguity as well as equal population, he concluded that the 2021 Plan would result in eight districts won by President Biden, which he concluded was "an extremely improbable outcome if you really were drawing – just caring about traditional redistricting criteria and weren't subordinating those considerations for partisanship."

109. With respect to Exhibit 9-C, which reflects maps drawn with consideration of population equality, contiguity, compactness, and respect for county lines, Mr. Trende testified that "you almost never produce eight districts that Joe Biden carries." Specifically, Mr. Trende found that of the 95,000 maps that survived the initial sort, 134 of them, or .14%, produced eight districts that President Biden won.

110. Mr. Trende then presented data dependent on box plots, which are reflected in Exhibits 10-A, 10-B, 10-C, 10-D, and 10-E. On the basis of his box plot analysis, Mr. Trende concluded that, "[p]olitics almost certainly played a role" in the 2021 Plan. He also concluded that, "there is a pattern that appears again and again and again, which is heavily democratic districts are made more Republican but still safely democratic. And that, in turn, allows otherwise Republican competitive districts to be drawn out of that Republican competitive range into an area where Democrats are almost guaranteed to have seven districts, have a great shot at winning that eighth District [that being, the First Congressional District]."

111. With respect to his final analysis, he utilized a "Gerrymandering Index," which is "a number that summarizes, on average, how far the deviations are from what . . . would [be] expect[ed] for a map drawn without respect to politics."

112. Mr. Trende relied Dr. Imai's work in his paper on the Sequential Monte Carlo methods.[32]

113. Exhibits 11-A, 11-B, and 11-C, illustrate Mr. Trende's conclusions with respect to the Gerrymandering Index. Lower scores are indicative of greater gerrymandering.

114. Mr. Trende concludes that the 2021 Plan is an outlier with respect to the Gerrymandering Index. In fact, he concludes with respect to Exhibit 11-A, which included considerations regarding contiguity and equal population, that "it's exceedingly unlikely" that a map would result that would have a larger Gerrymandering Index, because there were only 97 maps of the 31, 316 maps that were consulted that would have a larger gerrymandering index.

115. With respect to Exhibit 11-B in which compact districts are drawn, Mr. Trende concluded that there were only 102 maps with larger gerrymandering indexes than the 2021 Plan: "[i]t's exceedingly unlikely if you were really drawing without respect to partisanship, just trying to draw compact maps that are contiguous and equipopulous, its exceedingly unlikely you would get something like this."

116. The final Gerrymandering Index Exhibit, 11-C, reflects compact plans that are contiguous and of equal population and respect county lines (with due consideration to the Voting Rights Act: two majority/minority districts).

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[32] Kosuke Imai & Cory McCartan, *Sequential Monte Carlo for Sampling Balanced and Compact Redistricting Plans*, HARV. UNIV. 6–17 (Aug. 10, 2021), available at: https://perma.cc/Z2DT-A2RW.

117. On the basis of Exhibit 11-C, Mr. Trende concludes that the 2021 Plan is a "gross outlier," such that of the 95,000 maps under considerations, only one map had a Gerrymandering Index larger than the 2021 Plan.

118. Utilizing the Gerrymandering Index, Mr. Trende concluded that "it's just extraordinarily unlikely you would get a map that looks like the enacted plan."

119. Mr. Trende ultimately concluded that "the far more likely thing that we would accept in social science is given all this data is that partisan considerations predominated in the drawing of this map and that as was the case in Pennsylvania, North Carolina, and Ohio and other states where this type of analysis was conducted, traditional redistricting criteria were subordinated to these partisan considerations."

120. Mr. Trende also concluded that the 2021 Plan has a very high Gerrymandering Index and the same pattern of districts being drawn up in heavily Republican areas made more Democratic, as well as districts drawn down into the Democratic areas made more Republican, even when three majority/minority districts under the Voting Rights Act are conceded in the 2021 Plan.

121. Ultimately, Mr. Trende concludes that the 2021 Plan was drawn with partisanship as a predominant intent, to the exclusion of traditional redistricting criteria.

122. Mr. Trende had no opinion with respect to the Maryland Citizens Redistricting Commission ("MCRC") Plan.

123. Mr. Trende's simulations did not account for communities of interest and "double bunking of incumbents" into a single district.

124. Mr. Trende did not consider in his simulations the effect of Governor Hogan's victories in 2014 and 2018.

125. Mr. Trende did not account for unusually strong Congressional candidates running in an election using the 2021 Plan.

126. Mr. Trende used voting patterns rather than registration patterns in his analyses of the 2021 Plan.

127. Mr. Trende testified that the absolute minimum number of county splits in a map with eight congressional districts is seven splits.

128. Mr. Trende, when asked to defined an "outlier," explained that it "means a map that would have a less than 5% chance of being drawn without respect to politics" and that with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier."

129. Mr. Trende testified within his expertise to a reasonable degree of scientific, professional certainty, that under any definition of extreme gerrymandering, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know, with compactness and respect for county lines, .00001 percent. That's extreme."

130. Mr. Trende further opined that the 2021 Plan reflects "the surgical carving out of Republican and Democratic precincts" and that "there are a lot of individual things that tell an extreme-gerrymandering story," and "when you put them all together, it's just really hard to deny it."

131. Mr. Trende further stated that the 2021 Plan was drawn "with an intent to hurt the Republican party's chances of letting anyone in Congress."

132. Mr. Trende testified that the 2021 Plan "dilutes and diminishes the ability of Republicans to elect candidates of choice."

133. Mr. Trende also testified that among the implications of an extreme partisan gerrymandering, that it "becomes harder for political parties to recruit candidates to run for office, because who wants to raise all that money and then be guaranteed to lose in your district."

134. Mr. Trende did not conduct an efficiency gap analysis in this case.

Dr. Thomas L. Brunell

135. Dr. Brunell testified and was qualified as an expert in political science, including partisan gerrymandering, identifying partisan gerrymandering, and redistricting.

136. Dr. Brunell was asked to examine two Congressional districting maps for the State of Maryland: the 2021 Plan and the MCRC Plan and compare them using metrics for partisan gerrymandering.

137. In his comparison, he looked at city and county splits and compared the outcomes to proportionality regarding the relationship between the statewide vote for each party and the total number of seats in Congress for each party. He also looked at compactness and calculated the efficiency gap regarding statewide elections during the last ten years for both the 2021 Plan and the MCRC Plan.

138. Dr. Brunell testified that the MCRC Map is more compact on average than the eight districts for the 2021 Plan. He testified that the average compactness score using the Polsby-Popper index was lower for the 2021 Plan than the MCRC Plan. Dr. Brunnell also

concluded that in comparison to 29 states, the 2021 Plan had a Reock score that was higher than only two other states, Illinois and Idaho. He also concluded that only Illinois and Oregon had a lower Polsby-Popper score than Maryland with respect to the 2021 Plan.

139. Dr. Brunell utilized the actual number of voters in his analysis rather than voter registration.

140. Dr. Brunell testified that with respect to the 2016 Presidential election, similar to the 2012 Presidential election, the Democratic candidate received 64% of the statewide vote in Maryland and the Democrats carried seven of the eight Congressional districts in Maryland under the 2021 Plan. Using the 2020 Presidential data in evaluating the 2021 Plan, Democrats would carry all eight of the Congressional districts under the 2021 Plan. Using the 2012 Senate candidate data in evaluating the 2021 Plan, the Democrats would carry all eight Congressional districts. Using the 2016 Senate elections in evaluating the 2021 Plan, he testified that the Democrats would carry seven of the eight districts. Using the 2018 Senate elections data, the Democrats under the 2021 Plan would carry all eight districts. Using the 2014 and 2018 gubernatorial elections, he concluded that the Democrats would carry three of the eight seats in the Congressional elections under the 2021 Plan.

141. Dr. Brunell conducted an efficiency test to determine wasted votes, *i.e.*, those cast for the losing party and those cast for the winning party above the number of votes necessary to win.

142. In order to determine the efficiency gap, he added all the wasted votes for both parties in the same district to get a measure of who is wasting more votes at a higher rate.

143. A lower number of votes wasted reflects less likelihood of partisan gerrymandering.

144. Dr. Brunell testified that just considering the efficiency gap would not be enough to find that a map is gerrymandered. Dr. Brunell testified that one would need to look at "the totality of the circumstances, use different measures, different metrics, to see if they're telling you the same thing [or] different things."

145. Dr. Brunell testified that by using an efficiency gap measure, there was a bias in favor of the Republicans in the MCRC Plan, although that bias was not significant.

146. Dr. Brunell testified that there were many more county segments and county splits in the 2021 Plan than in the MCRC Plan.

147. Dr. Brunell testified that redrawing electoral districts "is a complex process with dozens of competing factors that need to be taken into account, . . . like compactness, contiguity, where incumbents live, national boundaries, municipal boundaries, county boundaries, and preserving the core confirmed districts."

148. Dr. Brunell only considered compactness of the districts in his analysis of the 2021 Plan.

149. Dr. Brunell did not take into consideration in his analysis the Voting Rights Act or incumbency bias. He testified he did assume population equality and contiguity having been met in the 2021 Plan.

Mr. John T. Willis

150. Mr. Willis testified and was qualified as an expert in Maryland political and election history and Maryland redistricting, including Congressional redistricting.

151. Mr. Willis was asked to evaluate the 2021 Plan and determine if it was consistent with redistricting in the course of Maryland history and to give his opinion as to its validity and whether it was based on reasonable factors.

152. Mr. Willis opined that Maryland's population over time has changed with an east-to-west migration, "in significant numbers."

153. Mr. Willis referred to a series of Maryland maps reflecting population migration every 50 years from 1800 to 2000, admitted into evidence as Exhibit H.

154. Exhibit H had been prepared by Mr. Willis in anticipation of the 2001 redistricting process.

155. Exhibit H shows population migration to the west in Maryland and towards the suburbs of the District of Columbia.

156. Mr. Willis testified regarding Defendants' Exhibit I, admitted into evidence, which reflects concentrations of population during the Fall of 2010.

157. He testified almost 70% of the Maryland population is "in a central core, which is roughly I-95 and the Beltway."

158. Mr. Willis also testified that geography impacts the redistricting process as well as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, and migration patterns.

159. With respect to Defendants' Exhibit J, Mr. Willis testified regarding the population changes from 2010 to 2020.

160. Mr. Willis further testified that each district in the 2021 Plan had to have a target population of 771,925.

161. Mr. Willis further testified that in Congressional redistricting the General Assembly starts with the map in existence to avoid disturbing existing governmental relationships.

162. Exhibit K includes all of the Congressional redistricting maps from 1789 to the present 2021 Plan, which includes a set of 17 maps. The last map—map 17—Mr. Willis testified that the district lines in the First District appeared to be based on reasonable factors and are consistent with the historical district lines enacted in Maryland. As the basis for his opinion, Mr. Willis explained that there has always been a population deficit in the First District which requires the boundary to cross over the Chesapeake Bay or to cross north over the Susquehanna River in Harford County and that there have been more crossings over the Chesapeake Bay historically than into Harford County.

163. Mr. Willis further testified regarding regional and county-based population changes over the decades in Maryland since 1790, on a decade basis, reflected in Exhibit L. He testified that the district lines in the Second Congressional District appear to be based upon reasonable factors and are consistent with historical district lines enacted in Maryland and reflects migration patterns relative to Baltimore City.

164. Mr. Willis further testified about the district lines for the Third Congressional District, which he opined were based on reasonable factors and consistent with historical district lines enacted in Maryland.

165. With respect to the liens of the Fourth Congressional District, Mr. Willis testified that the district lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. He testified that the Fourth District is also what is known as a "Voting Rights Act District."

166. With respect to the district lines of the Fifth Congressional District, he opined that the lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. The district lines are also based on major employment centers and major public institutions.

167. With respect to the district lines of the Sixth Congressional District, following the Potomac River, Mr. Willis testified that the lines reflect commercial and family connections tying the area together since the State was founded. On that basis, he testified that the lines of the Sixth District appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

168. Mr. Willis testified that the Seventh Congressional District is another "Voting Rights Act district."

169. Mr. Willis then testified about the Eighth Congressional District, the lines of which appear to be based on reasonable factors and consistent with historical district lines enacted in Maryland. Mr. Willis attributes the lines to traffic patterns along what is basically State Route 97.

170. He finally testified that the all the district lines as they are drawn in the 2021 Plan appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

171. Mr. Willis testified that for every election prior to 2002 in Congressional District 2, a Republican candidate won the Congressional seat. A Republican candidate also won every election in Congress in District 8 from 1992 to 2000, that being Congresswoman Constance Morella. Thereafter, from 2002 to 2010, no Republican candidate won a Congressional election in District 8. He then testified that in District 2, a Democratic candidate has won the Congressional election every single year since the 2002 map was drawn, *i.e.*, Congressman C.A. Dutch Ruppersberger.

172. Mr. Willis further testified with respect to the First Congressional District that as a result of a Federal Court decision, District 1 included all of the Eastern Shore and Cecil County as well as St. Mary's County, Calvert County, and part of Anne Arundel County.

173. As a result of the redistricting plan from 2002 to 2010, District 1 was drawn a different way, which included all of the Eastern Shore counties and an area across the Bay Bridge into Anne Arundel County, as well as parts of Harford and Baltimore County.

174. Mr. Willis characterized the Congressional map from 2002 to 2010 as "fraught with politics to favor some candidates over another."

175. He testified that since the Federal Court ordered the drawing of the Congressional districts in Maryland, the First Congressional District has crossed the Chesapeake Bay in southern Maryland, has crossed the Chesapeake Bay in northern Maryland, as well as crossed parts of Cecil, Harford, Baltimore, and Carroll County.

176. Mr. Willis testified that from the 1842 until the 2012 Congressional maps, Frederick County was linked in its entirety with the westernmost counties of Maryland, as well as in the Federal District Court redistricting map.

177. During the Court's questioning, Mr. Willis testified that the biggest "driver" in the redistricting process is populations shifts with gains in population in places like Prince George's County for example, and loss of population, for example, in Baltimore City.

178. He also testified about other factors affecting the redistricting process such as "transportation patterns," preservation of land, federal installations, state institutions, major employment centers, prior history, election history, as well as ballot questions that "show voter attitude." He further testified that incumbency protection might be a factor as well as political considerations.

Dr. Allan J. Lichtman

179. Dr. Allan J. Lichtman testified and was qualified as an expert in statistical historical methodology, American political history, American politics, voting rights, and partisan redistricting.

180. Dr. Lichtman testified that "politics inevitably comes into play" in the redistricting process and that the balance in democratic government is "between political values and other considerations" to include "public policy, preserving the cores of existing districts, avoiding the pairing of incumbents, looking at communities of interest, shapes of the districts, and a balance between political considerations."

181. Dr. Lichtman testified that, "[w]hen you're involved with legislative bodies, it's inevitably a process of negotiation, log rolling, compromise."

182. Dr. Lichtman denied as unrealistic comparing the 2021 Plan with "ensembles of plans with zero – the politics totally taken out."

183. Dr. Lichtman's test of the 2021 Plan, according to his testimony, evaluates whether the 2021 Plan was "a partisan gerrymander based on the balance of party power in the state." His conclusions were that the likely partisan alignment of the 2021 Plan was "status quo, 7 likely Democratic wins, 1 likely Republican win"; that there could be Democratic districts in jeopardy in 2022 because "2022 is a midterm with a Democratic President." In doing his analysis, he looked at other states which were "actually mostly Republican states, where the lead party got 60% or more of the Presidential vote," which he termed are "unbalanced political states." According to Dr. Lichtman, he looked at "gerrymandering" in multiple ways, "all based on real-world considerations, not the formation of abstract models."

184. Using an "S-curve" representation in Exhibit N, he determined that a party with 60% of the vote-share would win all of the Congressional districts. He continued in his testimony to discuss how he determined that the Democratic advantage under the 2021 Plan was likely a 7-to-1 advantage based upon the Cook's Partisan Voter Index ("PVI"), referring to Exhibit R.

185. Dr. Lichtman posited through Exhibit T that traditionally there are many midterm losses by the party of the President.

186. Dr. Lichtman testified that the Democrats could have drawn a stronger First Congressional District for themselves in the 2021 Map than they did to ensure a Republican defeat.

187. Dr. Lichtman testified pursuant to Exhibit U that the Democratic advantage in Maryland in federal elections is in the mid to upper 60% range so that the Democratic seat-share in a "fair" plan would exceed 80% of the seats.

188. With reference to Exhibit V, Dr. Lichtman presented a "trend line" from which he concluded that Maryland's enacted plan was not a partisan gerrymander because a 7-to-1 seat share was not commensurate with the Presidential vote for the Democratic party in 2020. He concluded that based on the trend line, "you would expect Maryland to be close to 100% of the [Congressional] seats."

189. Utilizing Exhibit W, he testified regarding "unbalanced states" in which the lead party secured more than 64.2% of the vote in the 2020 Presidential election. He included that the Democrats were performing below expectation in terms of its share of Congressional seats.

190. Dr. Lichtman testified that, in his opinion, "empirically, Maryland's Congressional seat allocation under the 2021 Plan is exactly what you would expect, assuming a 7-to-1 seat share."

191. He also testified that the Governor's plan, otherwise referred to as the MCRC Plan, is indicative of a gerrymander by "packing Democrats." He also concluded it was a gerrymander because it paired two or more incumbents of the opposition party, which he believed to be indicative of a gerrymander as reflected by Exhibit Z.

192. He testified that when you pair incumbents, "you are forcing them to rescramble and figure out how to rearrange their next election."

193. He also testified that the MCRC Plan also "dismantled the core of the existing districts and disrupted incumbency advantage again and the balance between representatives and the represented," referring to Exhibit AA.

194. Referring to Exhibit AB, he concluded that the MCRC Plan unduly packed Democrats, because in the MCRC Plan, there would be six Democratic districts over 70% and four Democratic districts close to or over 80%.

195. He testified further that the MCRC Plan is a "packed gerrymander." He testified that the Governor's Commission developing the plan was "extraordinarily under representative of Democrats" and that the Commission was appointed by a partisan elected official. He also testified that the Governor's instructions in developing the plan helps explain "why it turns out to be a Republican-packed gerrymander and a paired gerrymander"; "no attention was given to incumbency whatsoever." Instructions included considerations to include compactness and political subdivisions which he concludes "automatically" plays into, what he calls, partisan clustering. He also testified that the Governor's Secretary of Planning, Edward Johnson, sat in on deliberations while "there was no comparable Democratic representative sitting in."

196. Dr. Lichtman was critical of every one of Mr. Trende's simulation analyses because each one presumed "zero politics." Dr. Lichtman opined that "when state legislative body creates a plan, political considerations are one element to be balanced with a whole host of other elements and the process of negotiation, bartering, and trading that goes on in the legislative process and a demonstration that politics is not zero, is by not any stretch equivalent to a demonstration that the plan is a partisan gerrymander." He continued in his criticism of Mr. Trende's analysis that Mr. Trende did not provide "an absolute standard" and no comparative state-to-state standard. He testified in criticism of Mr. Trende's simulations not only based on "zero politics," but also because Mr. Trende's simulations did not consider "where to place historic landmarks, historic buildings, deciding how to deal with parks or airports or large open

spaces of water." He concluded that Mr. Trende's analysis was deficient because "you can't measure gerrymandering relative to zero politics, you can't measure gerrymandering without a standard, and you can't measure gerrymandering when comparing it to unrealistic simulated plans that don't consider much of the factors that routinely go into redistricting."

197. Dr. Lichtman attributed the problems of Republicans across the Congressional districts "not [to] the plan," but rather "the problem is that they are simply not getting enough votes, an absolutely critical distinction in assessing a gerrymander," based upon his review of Governor Hogan's two victories in 2014 and 2018 and the Republican vote-share in the 2014 Attorney General's race.

198. Dr. Lichtman concluded, in criticism of Mr. Trende's simulation analyses, that, "[a] supposed neutral plan based upon zero politics and supposedly neutral principles when applied in the real world into a place like Maryland, in fact, as demonstrated by this chart, produces extreme packing to the detriment of Democratic voters in the State of Maryland. Votes are extremely wasted for Democrats in at least half and maybe even more than half of the districts."

199. Dr. Lichtman, with respect to the 2021 Plan, does not dispute Mr. Trende's use of the four scores beginning with the Reock score, but opines that the scores of compactness reflect an improvement in compactness from the 2012 plan to the 2021 Plan. He then explains that the county splits decreased from the 2012 plan to the 2021 Plan, specifically, from 21 to 17 splits in the latter.

200. Dr. Lichtman further concluded, using the PVI, that the 2021 Plan "may not even be 7–1 in the real world." It may be "6–2, or even 5–3."

201. Dr. Lichtman later concludes that the very structure of the 2021 Plan "pretty much assures that Republicans are going to win two districts and that Democrats have wasted huge numbers of votes in the other districts."

202. In criticizing Dr. Brunell's analysis, he concludes that the 2021 Plan is not a gerrymander "just like [the] 2002 and 2012 plans were not gerrymanders."

203. Ultimately, Dr. Lichtman testified that "through multiple analyses -- affirmative analyses in [his] own report and scrutiny of the analyses of experts for the plaintiffs, it's clear that the Democrats did not operate to create a partisan gerrymander in their favor," and that "[t]he Governor's Commission plan is a partisan gerrymander that favors Republicans."

204. On cross-examination, Dr. Lichtman testified that non-compactness of Congressional districts could be, and it could not be, an indicator of partisan gerrymandering and concluded that "certainly nothing about compactness or municipal splits or county splits proves that a plan is not fair on a partisan basis, but they can be indicators."

205. On cross-examination, Dr. Lichtman acknowledged that for the past ten years, even when a midterm election occurred during the Democratic presidency of Barack Obama, the Maryland Delegation has been 7–1 Democratic/Republican, so that the Democrats did not lose any seats in any midterm elections, and prior to that, for a number of years, the outcome of Maryland's Congressional elections had been 6–2 Democratic/Republican, year after year.

206. Dr. Lichtman, during cross-examination, further stated that he had "checked the addresses of the incumbents to make sure there was not an unfair double bunking, which [Mr. Trende] meant the pairing of incumbents in the same districts" and indicated that he did not see any pairings in the 2021 Plan.

207. Dr. Lichtman, during cross-examination, concluded that if the General Assembly was "intent upon destroying a Republican district, they could have done so and didn't," which he concludes was a deliberate decision by Democratic leaders, including the Senate President, Bill Ferguson." He further concluded that the General Assembly "created a district that Andy Harris is overwhelmingly likely to win in the crucial first election under the redistricting plan."

208. Finally, Dr. Lichtman stated that he had not seen evidence that the General Assembly bumped "Andy Harris into the Seventh District with Kweisi Mfume."

209. On cross-examination, Dr. Lichtman reiterated that Mr. Trende's simulations "do not account for all traditional redistricting ideas. A whole host of them – and we've gone over that numerous times – are left out," and that Mr. Trende's simulation resulted in an "extraordinarily high degree of packing, which wastes large numbers of Democratic votes to the detriment of Democrats in Maryland."

210. In response to questioning from the Court, based on his opinion to a reasonable degree of professional certainty as to whether the 2021 Plan comports with Article III, Section 4, of the Maryland Constitution, Dr. Lichtman testified that the 2021 Plan comported with Article III, Section 4 because the drafters "actually made the districts substantially more compact than they had been in 2012 and equally compact as they had been in 2002." In providing that opinion relative to compactness, Dr. Lichtman testified that "instead of distorting compactness and violating Section 4, they made their district substantially more compact and in line with what compactness had been over long periods of time." Dr. Lichtman acknowledged that historical compactness is not necessarily the measure of Article III, Section 4 compactness and reiterated that there is no objective standard by which to judge any of the measures utilized by Mr. Trende.

He reiterated that he was "not aware of any study which establishes, on an objective scientific basis, a line you can draw in one or more compactness measures, which would distinguish between compact and noncompact."

211. In response to the question of whether in his opinion, to a reasonable degree of professional, scientific certainty that the standards of due regard shall be given to the natural boundaries and the boundaries of political subdivisions was met, he acknowledged that he had not done any of his own individual research. He opined, however, that "there has not been the presentation of proof by plaintiffs' experts that it doesn't comply." He reiterated "Plaintiffs did not prove that the 2021 Plan violates the Constitution."

212. Dr. Lichtman opined that Article 7 of the Declaration of Rights, dealing with free and frequent elections, Article 24 of the Declaration of Rights, entitled Due Process, as well Article 40, the free speech clause, would not apply to districting because "none of them mentioned districting or anything like that." He further opined that the free and frequent elections clause "clearly was designed for legislative elections" and that based upon his delineation of its history, that the free speech clause did not apply at all.

213. Dr. Lichtman further opined that he did not think that Article III, Section 4 or any of the provisions in the Maryland Constitution or Declaration of Rights applied to Congressional gerrymandering, nevertheless, even assuming were the standards to apply, partisan considerations would not predominate.

Application of the Law to the Findings of Fact

Applying the law to the findings of fact adduced during a trial with a "battle of the experts" initially requires a trial judge to transparently reflect what weight was given to a particular opinion or sets of opinions and why. Each expert in the instant case was qualified as an expert in particular areas. The qualification of each witness, however, was only the beginning of the analysis.

Whether the expert's testimony was reliable and helpful to the trier of fact and law, the trial judge herein, informs the weight to be afforded to each of the opinions. Obviously, the newly adopted *Daubert* standard, under *Rochkind v. Stevenson*, 471 Md. 1 (2020), was a point of discussion with respect to the opinions of Mr. Willis and Dr. Lichtman, but that challenge was withdrawn in the end by the Plaintiffs, and the State did not mount a *Daubert* challenge at all. Beyond *Daubert*, then, the weight given to an expert's opinion depends on many factors including, as well as irrespective, of their qualifications, but based upon a consideration of all of the other evidence in the case, under Maryland Rule 5–702.

In the present case, the trial judge gave great weight to the testimony and evidence presented by and discussed by Sean Trende. His conclusions regarding extreme partisan gerrymandering in the 2021 Plan were undergirded with empirical data that could be reliably tested and validly replicated. He used multifaceted analyses in his studies of compactness and splits of counties and acknowledged the data that he did not consider, such as voter registration patterns, might have yielded additional data, although the reliance on such data had not been studied. He readily acknowledged that he was not yet a PhD, although that title was soon to come, and that he was being paid for his work by the Plaintiffs.

Importantly, although he testified that he was on the Republican side of a number of redistricting cases in which Republican plans had been challenged—*Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658 (N.C. Super. July 08, 2013); *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d 681 (S.D. Ohio 2018), *vacated sub nom. Ohio A. Philip Randolph Inst. v. Obhof*, 802 F. App'x 185 (6th Cir. 2020); *Whitford v. Nichol*, 151 F. Supp. 3d 918 (W.D. Wis. 2015); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); and *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, --- N.E.3d ---, 2022-Ohio-789 (2022)—he apparently learned what would be helpful to a court in evaluating a Congressional redistricting plan, because he clearly relied on methodologies that were persuasive in North Carolina, *Harper v. Hall*, 2022-NCSC-17, 868 S.E.2d 499 (2022), and Pennsylvania, *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576 (2018).

The impeachment of Mr. Trende's presentation undertaken by Dr. Lichtman was unavailing, in large part, because of the bias that Dr. Lichtman portrayed against simulated maps utilizing "zero politics" and county splits that "happened" to be less in number than what had occurred in a map that had been the subject of criticism in 2012 at the Federal District Court level but not addressed in *Rucho* in 2019. Mr. Trende's presentation was an example of a deliberate, multifaceted, and reliable presentation that this fact finder found and determined to be very powerful.

Dr. Brunell's testimony and evidence in support was much less valuable and helpful to the trial judge, because to evaluate compactness, the efficiency gap, as presented, did not have the power that was portrayed in other cases. *See e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio) (finding that around 75% of historical efficiency

gaps around the country were between -10% and 10%, and only around 4% had an efficiency gap greater than 20% in either direction, and therefore, noting that several of Ohio's prior elections had efficiency gaps indicative of a plan that was a "historical outlier," including an efficiency gap of -22.4% in its 2012 election and an efficiency gap of -20% in its 2018 election, compared to efficiency gaps in 2014 and 2016 that were -9% and -8.7%, respectively). Dr. Brunell's presentation was murky and lacking in sufficient detail. He made no attempt to establish the interaction of an efficiency gap analysis with other types of testing for compactness and certainly, no basis to believe that allocating Republicans two of eight Congressional seats is appropriate, let alone reliable or valid.

The opinions of Mr. Willis, while of interest, to gain a perspective as to what legislators considered in 2002, 2012, and possibly may have considered in 2021 to draw the various Congressional boundaries, such as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, major employment centers, preservation of land, political considerations, and migration patterns, may in fact be "reasonable," but not, in any way, helpful in the determination of whether "constitutional guideposts" have been honored in the 2021 Plan. As Chief Judge Robert M. Bell from the Maryland Court of Appeals, in 2002 in *In re Legislative Districting of State*, eloquently stated in opinion regarding the influence of such criteria on Constitutional redistricting standards:

> Instead, however, the Legislature chose to mandate only that legislative districts consist of adjoining territory, be compact in form, and be of substantially equal population, and that due regard be given to natural boundaries and the boundaries of political subdivisions. That was a fundamental and deliberate political decision that, upon ratification by the People, became part of the organic

> law of the State. Along with the applicable federal requirements, adherence to those standards is the essential prerequisite of any redistricting plan.
>
> That is not to say that, in preparing the redistricting plans, the political branches, the Governor and General Assembly, may consider only the stated constitutional factors. On the contrary, because, in their hands, the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives. Thus, so long as the plan does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives, will not affect its validity.
>
> On the other hand, notwithstanding that there is necessary flexibility in how the constitutional criteria are applied – the districts need not be exactly equal in population or perfectly compact and they are not absolutely prohibited from crossing natural or political subdivision boundaries, since they must do so if necessary for population parity – those non-constitutional criteria cannot override the constitutional ones.

370 Md. at 321–22.

Finally, this trial judge gave little weight to the testimony of Dr. Allan J. Lichtman. Dr. Lichtman's presentation was dismissive of empirical studies presented by Mr. Trende because of their "zero politics" and disavowed their use because of their lack of absolute standards or comparative standards to guide what an outlier is. Juxtaposed against Mr. Trende's use of reliable valid measures that have been accepted in other state courts, such as simulations in North Carolina and Pennsylvania, Dr. Lichtman's own data urged the "realities" of Maryland politics, as he used a "predictive" model to address alleged Democratic concerns about losing not only one, but two or three seats in the midterm election in 2022, because of having a Democratic President in power; in fact the realities of Maryland politics, in the last ten years, under Republican as well as Democratic Presidents, as well as a Republican Governor, have been that the Congressional delegation has stayed essentially the same—7 Democrats to 1 Republican.

Dr. Lichtman's denial of the fact that the 2021 Plan, as enacted, actually "pitted" Congressman Andy Harris against Congressman Kweisi Mfume in the Seventh Congressional District when the 2021 Plan did so, reflects a lack of thoughtfulness and deliberativeness that a trial judge would expect of experts. The fact that only a short period of time was afforded for the development of Dr. Lichtman's report does not excuse that it would have taken a review of the 2021 Plan as enacted in December of 2021, rather than in February of 2022, to know that Congressman Harris had to move to Cambridge to reside in the First Congressional District to avoid being "paired" in the 2021 Plan with a Democratic Congressional incumbent in the Seventh Congressional District.

Finally, although a cold record does not always reflect the nuances of a witness's demeanor, it is apparent from the words Dr. Lichtman used that he was dismissive of the use of a normative or legal framework to evaluate the "structure," as he called it, of redistricting. He began his discussion by referring to legal "machinations" in referring to his testimony discussing a challenge by the plaintiffs in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004) against the redistricting plan of Pennsylvania for Congress, and ended with what amounted to a refrain of an "apologist" of the work of politicians.

There is no question that map-making is an extremely difficult task, but like most of the complexities of the modern world, justifications of map-making must be evaluated by the application of principles—here, the organic law of our State, its Constitution and Declaration of Rights.

Analysis and Conclusion

Application of the legal tenets that survived the Motion to Dismiss, as articulated heretofore, to the Joint Stipulations, Judicial Admissions and the stipulation orally presented by the State at the end of the trial, with consideration of the weight afforded to the evidence presented by the experts yields the conclusion that the 2021 Congressional Plan in Maryland is an "outlier," an extreme gerrymander that subordinates constitutional criteria to political considerations. In concluding that the 2021 Congressional Plan is unconstitutional under Article III, Section 4, either on its face or through a nexus to the Free Elections Clause, MD. CONST. DECL. OF RTS. art. 7, the trial judge recognized that the 2021 Plan embodies population equality as well as contiguity, as Dr. Brunell acknowledged. The substantial deviation from "compactness" as well as the failure to give "due regard" to "the boundaries of political subdivisions" as required by Article III, Section 4, are the bases for the constitutional failings of the 2021 Plan, which has been challenged in its entirety.

In evaluating the criteria of compactness required under Article III, Section 4, it is axiomatic that it and contiguity, but particularly compactness, "are intended to prevent political gerrymandering." *1984 Legislative Districting*, 299 Md. at 675 (citing *Schrage v. State Bd. of Elections*, 88 Ill.2d 87 (1981); *Preisler v. Doherty*, 365 Mo. 460 (1955); *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Opinion to the Governor*, 101 R.I. 203 (1966)). With respect to compactness, while it is true that our cases do not "insist that the most geometrically compact district be drawn," *In re Legislative Districting of State*, 370 Md. at 361, we recognized that compactness must be evaluated by a court in light of all of the constitutional requirements to

determine if all of them "have been fairly considered and applied in view of all relevant considerations." *Id.* at 416.

The task of evaluating whether "compactness" and other constitutional requirements have been fairly considered by the Legislature is informed by the various analyses performed by Mr. Trende. Initially, by application of each of the four "most common compactness metrics," *i.e.*, the Reock score; the Polsby-Poppper score; the Inverse Schwartzberg score; and the Convex Hull score, the districts included in the 2021 Plan are "quite non-compact" compared to prior Maryland Congressional maps and to other Congressional maps in other states based upon a comparison of the scores achieved with reference to the four metrics. It is notable that the 2021 Plan reflects compact scores that range from a "limited" number of state maps worse than Maryland, to only six other maps with worse scores, to the worst Inverse Schwartzberg score in the last fifty years in the United States, to "very poorly relative to anything drawn in the last fifty years in the United States."

The simulations conducted by Mr. Trende, of the type already accepted in North Carolina and Pennsylvania, when infused with the same constitutional criteria as embodied in Article III, Section 4 and allowing for two Voter Rights districts, result in only .14% or 134 maps of the 95,000 reflected produce a victory for President Biden in all eight Congressional districts in Maryland, based upon predictive Presidential votes, as acknowledged by the experts. Importantly, Exhibit 11-C, the Gerrymandering Index exhibit, which embodies all of the constitutional mandates and two Voting Rights districts, reflects that the 2021 Congressional Plan is a "gross outlier", as Mr. Trende opined, "such that of the 95,000 maps under consideration, only one map had a Gerrymandering Index larger than the 2021 Plan. It is

extraordinarily unlikely that a map that looks like the 2021 Plan could be produced without extreme partisan gerrymandering." As a result, the notion that the 2021 Plan is compact is empirically extraordinarily unlikely, a conclusion that utilizes comparative metrics and data throughout the various states. The notion that a plan must pass an absolute standard, as Dr. Lichtman suggested, is without merit, for the test is whether the constitutional conditions, especially compactness, are met.

With respect to county splits, it is clear that the number of crossings over county lines are 17 in the 2021 Plan, which is a historically "high number" of splits since 1972, only less than the 21 splits in 2002 and 2012. The importance of the due regard to political subdivisions language is a reflection of the importance of counties in Maryland, as recognized in *Md. Comm. for Fair Representation v. Tawes*, 229 Md. 406 (1962):

> The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire . . . Indeed, Kent County had been established by Claiborne before the landing of the Marylanders . . . We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. . . . While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

Id. at 411–12. In dissent in *Legislative Redistricting Cases*, 331 Md. 574 (1993), Judge Eldridge reiterated the pivotal governing function of counties:

> Unlike many other states, Maryland has a small number of basic political subdivisions: twenty-three counties and Baltimore City. Thus, "[t]he counties in Maryland occupy a far more important position than do similar political divisions in many other states of the union."
>
> The Maryland Constitution itself recognizes the critical importance of counties in the very structure of our government. See, e.g., Art. I, § 5; Art. III, §§ 45, 54; Art. IV, §§ 14, 19, 20, 21, 25, 26, 40, 41, 41B, 44, 45; Art. V, §§ 7, 11, 12; Art. VII, § 1; Art. XI; Art. XI–A; Art. XI–B; Art. XI–C; Art. XI–D; Art. XI–F; Art. XIV, § 2; Art. XV, § 2; Art. XVI, §§ 3, 4, 5; Art. XVII, §§ 1, 2, 3, 5, 6. After the State as a whole, the counties are the basic governing units in our political system. Maryland government is organized on a county-by-county basis. Numerous services and responsibilities are now, and historically have been, organized at the county level.
>
> The boundaries of political subdivisions are a significant concern in legislative redistricting for another reason: in Maryland, as in other States, many of the laws enacted by the General Assembly each year are public local laws, applicable to particular counties. *See Reynolds v. Sims*, 377 U.S. 533, 580–[]81, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506, 538 (1964) ("In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions").

Id. at 620–21.

Due regard for political subdivision lines is a mandatory consideration in evaluating compliance with constitutional redistricting, as Chief Judge Bell noted in the 2002 Legislative districting case, *In re Legislative Districting of State*, 370 Md. at 356, such that fracturing counties to the extent accomplished in the 2021 Plan does not even give lip service to the historical and constitutional significance of their role in the way Maryland is governed. To say that the 2021 Plan is four splits better than the 2002 and 2012 Plans (which have never been examined in a State court, let alone sanctioned), and so must be lawful, is a fictitious narrative, because it is inherently invalid; in 2002, Chief Judge Bell, writing on behalf of the Court, rejected similar justifications offered by the experts on behalf of the Defendants in this case. "There is simply an excessive number of political subdivision crossings in this redistricting plan .

. . ." The State has failed to meet its burden to rebut the proof adduced that the constitutional mandate that due regard to political subdivision lines was violated in the 2021 Plan.

To the extent that Dr. Lichtman and Mr. Willis discussed and prioritized a myriad of considerations that Dr. Lichtman called "political" and Mr. Willis called "reasonable factors," would require that this Court accept their implicit bias that constitutional mandates can be subordinated to politics and/or "reasonable factors." Again, Chief Judge Bell, more eloquently and precedentially than this judge could, addressed the same justifications offered by the State, then and now, when in 2002, he said,

> [b]ut neither discretion nor political considerations and judgments may be utilized in violation of constitutional standards. In other words, if in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained. That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution "trumps" political considerations. Politics or non-constitutional considerations never "trump" constitutional requirements.

Id. at 370.

Mr. Trende's analysis of the 2021 Plan with respect to its extreme nature and its status as an "outlier" reflects the realities of the 2021 Plan: an "outlier means a map that would have a less than five percent chance . . . of being drawn without respect to politics" and with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier," therefore, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know,

with compactness and respect for county lines, .00001 percent. That's extreme." This trial judge agrees; the 2021 Plan is an outlier and a product of extreme partisan gerrymandering.

With regard to the violations of the of the Articles of the Maryland Declaration of Rights, the 2021 Plan fails constitutional muster under each Article.

With regard to Article 7 of the Maryland Declaration of Rights, the 2021 Congressional Plan, the Plaintiffs, based upon the evidence adduced at trial, proved that the 2021 Plan was drawn with "partisanship as a predominant intent, to the exclusion of traditional redistricting criteria," *Findings of Fact*, *supra*, ¶ 121, accomplished by the party in power, to suppress the voice of Republican voters. The right for all votes of political participation in Congressional elections, as protected by Article 7, was violated by the 2021 Plan in its own right and as a nexus to the standards of Article III, Section 4.

Alternatively, Article 24, the Maryland Equal Protection Clause, applicable in redistricting cases, was violated under the 2021 Plan. The application of the Equal Protection Clause requires this Court to strictly scrutinize the 2021 Plan and balance what the State presented under a "compelling interest" standard. It is clear from Mr. Trende's testimony that Republican voters and candidates are substantially adversely impacted by the 2021 Plan. The State has not provided a "compelling state interest" to rationalize the adverse effect.

Alternatively, the same rationale holds true for the violation of Article 40 of the Maryland Declaration of Rights, the Free Speech Article, which requires a "strict scrutiny" analysis because a fundamental right is implicated, a citizen's right to vote. In many respects, all of the testimony in this case supports the notions that the voice of Republican voters was diluted

and their right to vote and be heard with the efficacy of a Democratic voter was diminished. No compelling reason for the dilution and diminution was ever adduced by the State.

Finally, with respect to the evaluation of the 2021 Plan through the lens of the Constitution and Declaration of Rights, it is axiomatic that popular sovereignty is the paramount consideration in a republican, democratic government. The limitation of the undue extension of power by any branch of government must be exercised to ensure that the will of the people is heard, no matter under which political placard those governing reside. The 2021 Congressional Plan is unconstitutional, and subverts that will of those governed.

As a result, this Court will enter declaratory judgment in favor of the Plaintiffs, declaring the 2021 Plan unconstitutional, and permanently enjoining its operation, and giving the General Assembly an opportunity to develop a new Congressional Plan that is constitutional. A separate declaratory judgment will be entered as of today's date.

3/25/2022
Date

LYNNE A. BATTAGLIA
Senior Judge

Expert Report of Dr. Daryl DeFord on Behalf of Intervenors-Petitioners Citizen Mathematicians and Scientists

IN THE SUPREME COURT OF WISCONSIN

No. 2021AP001450 OA

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS and RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, and SOMESH JHA,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR. in his official capacity as a member of the Wisconsin Elections Commission and MARK THOMSEN in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, and JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

EXPERT REPORT OF DR. DARYL DEFORD ON BEHALF OF INTERVENORS-PETITIONERS CITIZEN MATHEMATICIANS AND SCIENTISTS

Expert Report of Daryl R. DeFord on behalf of the Citizen Mathematicians and Scientists

December 30, 2021

I Qualifications

I am an Assistant Professor of Data Analytics in the Department of Mathematics and Statistics at Washington State University. I earned A.M. and Ph.D. degrees in Mathematics at Dartmouth College and also hold a B.S. in Theoretical Mathematics from Washington State University. From 2018-2020 I was a postdoctoral associate in the Geometric Data Processing Group in the Computer Science and Artificial Intelligence Laboratory at the Massachusetts Institute of Technology and affiliated with the Metric Geometry and Gerrymandering Group in the Jonathan M. Tisch College of Civic Life at Tufts University with a full-time focus on computational redistricting research.

My mathematical work focuses on applications of combinatorial and algebraic techniques to the analysis of social data and particularly includes the study of statistical sampling techniques for political redistricting problems. This work includes both theoretical design and analysis of algorithms as well as empirical projects modeling the interactions between districting criteria. My redistricting work has been published in the *Harvard Data Science Review*, *Political Analysis*, *Statistics and Public Policy*, *Journal of Computational Social Science*, *Mathematical Association of America's Math Horizons*, *Physical Review E*, and *Society of Industrial and Applied Mathematics Journal on Applied Algebra and Geometry*. I have given dozens of presentations on computational redistricting and designed an IAP course at MIT on the topic. As a postdoc, I helped supervise the Voting Rights Data Institute summer program in 2018 and 2019 and in Summer 2021 I supervised a team of research fellows through the University of Washington's Data Science for Social Good program applying computational redistricting to initial stages of the map-making process.

During the current redistricting cycle, Dr. Jeanne Clelland, Dr. Beth Malmskog, Dr. Flavia Sancier-Barbosa, and I provided reports and analysis for the 2021 Colorado Independent Legislative Redistricting Commission. Our work was cited by the commission in their final report supporting their maps and the Colorado State Supreme Court cited our work as evidence that the commission complied with the legislative requirement to optimize for the number of competitive districts. In 2019, I performed computational work and served as a collaborator on an Amicus brief to the United States Supreme Court for *Rucho v. Common Cause*. I have not previously testified as an expert witness or been deposed in any legal proceeding.

A full copy of my CV is included in Appendix A which contains a list of my publications in the last 10 years. For my work on this matter, I am being compensated at a rate of $300 per hour. This compensation does not depend in any way on the results of my analysis, the conclusions that I draw, or the eventual outcome of the litigation.

II Executive Summary

Counsel for the Citizen Mathematicians and Scientists requested that I review and analyze congressional and state legislative maps and accompanying expert materials submitted in this proceeding. This work involved evaluation of several redistricting criteria identified by counsel, including (but not limited to) population deviation, compliance with metrics related to the Voting Rights Act, respect for counties, towns, and wards, district compactness, and contiguity. It also required evaluating how proposed maps perform on metrics of "least change," including whether proposed maps are consistent with an approach of minimizing changes made to conform malapportioned districts to constitutional and statutory requirements. In connection with the work, I assessed how proposed least-change maps that comply with constitutional and statutory requirements perform on traditional neutral redistricting criteria.

To facilitate analysis, I identified appropriate and reliable quantitative metrics, which are laid out in Part IV of this report. Because most of the metrics are not binary, but rather measured on a spectrum ("continuous-valued"), it is possible to evaluate the relative performance of the proposed maps. Additionally, where appropriate, quantitative thresholds can be applied to disqualify maps that do not perform adequately on a continuous-valued metric. For example, although population deviation is continuous-valued, one can apply a quantitative threshold to evaluate whether proposed congressional maps comply with legal requirements regarding population equality.

II.A Congressional Maps

I reviewed Congressional plans submitted by the Congressman, Governor, and Hunter Plaintiffs, in addition to the 2011 enacted plan and the plan proposed by the Citizen Mathematicians and Scientists (the "CMS plan"). In doing so, I applied my understanding of the law applicable to congressional redistricting in Wisconsin, including: (i) the requirement that plans contain equally populated districts except where practically impossible to create them; (ii) the requirement that plans comply with the Voting Rights Act of 1965; (iii) the direction that proposed maps adopt a least-change approach to bringing malapportioned maps into compliance; and (iv) the importance of traditional neutral districting criteria in distinguishing between plans that satisfy legal requirements and implement a least-change approach. My complete analysis of the Congressional plans with respect to these metrics is described in Section V.B and here I summarize my conclusions.

Among the alternatives to the CMS congressional map that I was instructed to analyze, and applying my understanding of the law applicable to Wisconsin congressional redistricting, I conclude that the Legislature's map performs better than other alternatives to the CMS plan on federal requirements, that the Governor's map performs better than other alternatives to the CMS plan on metrics of least change, and that each party performs better than other alternatives to the CMS plan on at least one criterion that is considered traditional and neutral when evaluating congressional maps. However, I further conclude that the CMS plan performs just as well as the Legislature's map on federal requirements, outperforms or equals the Governor on some metrics of least change, and performs best on each of the traditional neutral criteria considered in this report. Accordingly, after reviewing and analyzing alternatives to the CMS plan, I am not able to identify any that performs as effectively under the applicable framework.

II.B State Legislative Maps

I reviewed the Bewley, BLOC, Governor, Hunter, and Legislature state legislative plans, as well as the 2011 enacted plans and the CMS state legislative plans. In doing so, I applied my understanding of the law applicable to state legislative redistricting in Wisconsin, including: (i) the requirement that districts approximate population equality across districts as closely as possible; (ii) the requirement that plans comply with the Voting Rights Act of 1965; (iii) the requirement that plans respect county, town, and ward lines when reapportioning districts; (iv) the requirement that plans create legislative districts "in as compact form as practicable"; (v) the requirement that districts be contiguous; (vi) the direction that plans adopt a least-change approach to bringing malapportioned maps into compliance with constitutional and statutory

requirements; and (vii) the importance of traditional neutral districting criteria in distinguishing between plans that satisfy legal requirements and implement a least-change approach. My complete analysis of the state legislative plans is described in Section V.C-D and here I summarize my conclusions.

With respect to Senate districts, and among alternatives to the CMS plan, there is significant variance in performance across metrics related to constitutional and statutory requirements, and on metrics of least change. Having analyzed the performance of each Senate plan across metrics related to constitutional and statutory requirements, I conclude that the plans fall short of the CMS Senate map, which makes necessary modifications to district boundaries to achieve lower population deviation, fewer county splits, and better mean Reock scores than any other Senate proposal, while also performing as well as other plans on metrics related to VRA compliance and the preservation of wards, and performing better than nearly all maps on several important measures of compactness, including mean Polsby-Popper, mean Convex Hull, and cut edges.

With respect to Assembly districts, my conclusions are similar, a logical result given that the Senate districts are composed of nested Assembly districts. In the context of Assembly districts, and among alternatives to the CMS plan (and only among those alternatives), I again find considerable variance in performance across metrics related to constitutional and statutory requirements, and on metrics of least change. Based on my analysis of each Assembly plan across metrics related to those constitutional and statutory requirements, I conclude that the plans again fall short of the CMS map, which makes necessary modifications to district boundaries to achieve the lowest population deviation, the fewest county splits, and the second best score on critical measures of compactness, including mean Reock, mean Polsby-Popper, mean Convex Hull, and cut edges. The CMS plan accomplishes all of that without splitting a single ward, and while performing effectively on metrics related to VRA compliance.

III Assignment

Counsel for a group of Wisconsin voters ("Citizen Mathematicians and Scientists" or "CMS") asked me to evaluate proposed maps and supporting expert reports submitted to the Wisconsin Supreme Court (the "Court") on December 15, 2021.

More specifically, counsel asked that I evaluate congressional maps submitted by three parties, including Congressmen Glen Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (together, the "Congressmen"),[1] Governor Tony Evers (the "Governor"), and individual plaintiffs Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (together, "Hunter" or "Hunter plaintiffs").

Counsel also asked that I evaluate state legislative maps submitted by five parties: the Wisconsin Legislature (the "Legislature"), the Governor, Senate Minority Leader Janet Bewley ("Bewley"), Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, and Rebecca Alwin (together, "BLOC" or "BLOC plaintiffs"), and the Hunter plaintiffs.

I also compared these maps with the congressional and state legislative maps submitted by the Citizen Mathematicians and Scientists. As several of the reports and briefs make comparisons with the 2011 enacted plan, I also provide summary metrics for those maps.

For each of the proposed maps, I was asked to evaluate the following:

- How the proposed maps perform on redistricting criteria that are mandated by law, such as equal population, compliance with the Voting Rights Act, and—in the case of state legislative plans—respect for counties, towns, and wards, district compactness, and district contiguity.

[1] The Congressmen propose that the Court adopt a congressional map passed by the Legislature.

- How the proposed maps perform on various metrics of "least change" and effectuate the Court's direction that parties minimize changes made to conform the currently malapportioned maps to constitutional and statutory requirements.
- How proposed least-change maps that comply with constitutional and statutory requirements perform on various traditional neutral redistricting criteria.

To carry out this task, I measured the properties of each redistricting proposal, and the existing malapportioned maps, according to several different metrics. My conclusions are summarized in Part II of this report. The measures, metrics, methodologies, and data that I use are defined in Part IV of this report. My more granular analysis of the parties' congressional plans is set out in Part V.B of this report. And my analysis of the parties' state legislative plans is set out in Part V.C-D of this report.

In addition to measuring the properties of each redistricting proposal, I also evaluate the claims made in expert reports or affidavits submitted with the proposals. These include the expert reports or affidavits submitted by Dr. Loren Collingwood, Dr. David T. Canon, Dr. Kenneth R. Mayer, Tom Schreibel, Dr. Jeanne Clelland, Dr. Stephen Ansolabehere, Dr. Brian Amos, Dr. James G. Gimpel, Dr John Alford, and Thomas M. Bryan.

In measuring the properties of each redistricting proposal and evaluating claims made in expert reports or affidavits accompanying them, I relied on the briefs, maps, and reports submitted to the Court on December 15, 2021. I also relied on additional materials that the litigants produced to each other after making their December 15, 2021 submissions. Finally, I relied on data obtained from the Wisconsin Legislative Technology Services Bureau (LTSB) and the U.S. Census Bureau. Further description of this data, and a complete list of all materials that I considered in connection with the preparation of this Report, is provided in Appendix B, attached to this report.

IV Redistricting Criteria and Metrics

In order to evaluate the proposed Congressional and state legislative maps submitted in this proceeding, I analyzed performance on several redistricting criteria identified by counsel, including (but not limited to) population deviation, compliance with metrics related to the Voting Rights Act, respect for counties, towns, and wards, district compactness, and contiguity. In this section, I set out the quantitative metrics, used to conduct my analysis.

In reviewing the metrics, it is important to remember that the relationship between them can be complex, and attempting to improve performance on one of those criterion often involves diminishing performance on another. Throughout this report, I highlight instances where criteria are in tension and how that affects my analysis of the proposed plans.

IV.A Population Deviation

The Court's November 30, 2021 order ("Order") reflects the importance of population deviation. See also Bryan Report ¶ 25. It instructs that congressional districts should be zero-balanced, Order ¶ 25, and that for legislative district populations "there should be as close an approximation to exactness as possible." Order ¶28. To assess compliance with these population deviation requirements, I employ an optimization perspective where plans with smaller top-to-bottom deviations are regarded more favorably. This value, obtained by subtracting the smallest district population from the largest is known as the 'maximum deviation' and is a common measure of the overall population balance of a map.

The guiding legislative and judicial text governing population deviation is usually formulated as an optimization constraint where plans with smaller top-to-bottom deviations are regarded more favorably. This value, obtained by subtracting the smallest district population from the largest is known as the 'maximum deviation' and is a common measure of the overall population balance of a map. For Congressional districts the requirement to minimize this value is frequently referred to as 'zero-balancing', in that there should be a maximum of one person deviation between the largest and smallest district populations. This is different than deviation in either direction from the ideal value by one person, which is a distinction which matters for two of the proposed maps discussed in Section V.B.1 below.

For state legislative districts there is not a tradition of strict zero–balancing between the districts but previous maps implemented in Wisconsin have had deviations of less than 2%. Several of the reports appeal to nationally applied 10% or 2% standards for Assembly and Senate districts but as the evaluated proposals demonstrate, it is possible to do significantly better than these bounds, without compromising other legal or traditional principles.

IV.B Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) imposes an additional federal requirement on redistricting plans, requiring in Section 2 that lines cannot be drawn to deny racial, ethnic, or language minority voters the opportunity to "to participate in the political process and to elect representatives of their choice." Discussion around this constraint frequently focuses on the construction and existence of 'opportunity districts' that allow groups the ability to elect candidates of their choice. Compliance with the Supreme Court precedent also requires that lines not be drawn with race as the predominant factor but analysis of opportunity districts does not require evidence of intent, only of impact. This means that districts that were previously well-tuned to satisfy VRA concerns could fail to perform effectively in the next redistricting cycle due to shifts in population or voting preferences between groups.

Litigation over VRA violations centers on three Gingles factors, originally derived from the Supreme Court's 1986 ruling in Thornburg v. Gingles and further extended through a significant body of case law. These factors require a demonstration that:

1. it is possible to create a compact majority-minority district of voters belonging to a racial, ethnic, or language minority within the state,
2. members of the identified community tend to vote as a block for the same type of candidates,
3. and that the remainder of the community tends to vote as a block for a different type of candidates.

The combined existence of the conditions described in the final two criteria is known as racially polarized voting and requires the application of statistical inference to determine likely voting behaviors by group. The collection of techniques that are commonly used for this analysis are known as ecological regression and inference, which attempt to estimate the voting propensities for minority groups by analyzing precinct or ward level returns, together with demographic information about the units.

While the Gingles factors are used in court to analyze whether Section 2 of the VRA has been violated by an enacted map, VRA analysis at the line drawing stage does not necessarily require the construction of districts that meet certain thresholds of minority population as in Gingles 1. Instead, there is a focus on whether specific districts are likely to offer an effective opportunity for minority groups to elect their preferred candidates, using historical election data and the same types of statistical methods for evaluating vote polarization between groups. This is becoming increasingly relevant when considering 'coalition districts' or districts drawn that would not have a majority of a single minority group but that might allow multiple groups to band together to elect similarly preferred candidates.

In Wisconsin over the previous decade there is significant evidence of polarized voting between Black and non-Black voters, as computed as a proportion of the voting age population, as well as evidence to a lesser degree of polarization with respect to Hispanic voters. As both of these groups vote predominantly for Democratic candidates in general statewide elections, it is helpful to look at Democratic primary elections to determine voting block behavior and the likelihood of success of preferred candidates for these groups. Specifically, the 2018 Democratic primaries for Governor and Lieutenant Governor, and votes for the candidates Mahlon Mitchell who lost and Mandela Barnes who won.

Based on this analysis, and similar analysis described by Professor Moon Duchin, *See* Duchin Report at 8, I consider a district as effective for Black voters if it satisfies the following conditions:

- A significant proportion of the citizen voting age population is Black,
- with respect to historical voting data the district would have favored the Black candidate of choice in general elections, and
- Mahlon Mitchell winning the district and Mandela Barnes receiving a strong (80%+) majority with respect to the 2018 Democratic primary election data.

Note that with respect to the first criteria there is not a requirement that districts be drawn with a majority of minority voters in order for a district to be considered effective for that group. The Legislature's expert makes this point clearly in paragraphs 24-26 and footnote 9 discussing Cooper v. Harris. Approaches that only seek to maximize percentages of demographic groups beyond specific thresholds are not necessarily directly responsive to the VRA but in the maps analyzed here, each claimed district also passes the effectiveness test described above.

IV.C Boundary Preservation

Although it is "secondary" to population deviation, Order ¶ 34, I am informed that the Wisconsin Constitution requires that parties engaged in state legislative redistricting maximize protection for county, town, and ward lines. I am also informed that Wisconsin courts look at whether parties have minimized the degree to which district lines "split" county, town, and ward lines when evaluating congressional maps. To evaluate how the proposed plans perform on this criteria, I analyze the frequency with which the proposed maps traverse county, municipality, and ward lines.[2]

I begin with counties because these primary units of Wisconsin political geography. See Citizen Mathematicians and Scientists' Dec. 15 Brief at 19-22. In evaluating how proposed maps perform on this criterion, it is important to remember that parties cannot construct population balanced districts that preserve all county boundaries. Moreover, there are several measures that provide valuable information about party performance on this criterion. First, it is possible to measure the number of counties that are split by district lines, demonstrating at a fundamental level the number of counties that are divided. Second, it is possible to measure the number of times that counties are divided by district lines, which ensures that parties are evaluated not only on the number of counties that they split, but also on the number of county pieces that they create.

Finally, particularly for state legislative districts, some counties must be split multiple times because the population of the county is larger than the ideal population size of a district. Counting these splits against proposals can overestimate the count of splits that were due to the discretion of the line drawer, or created as a tradeoff required to satisfy other priorities, rather than those forced to exist in all population balanced maps. Thus, I will also report results for the number of splits and pieces above those necessary to comply with population equality, a measure I call Pop Split [Unit]. To obtain this value I compute the ratio of the county population to the ideal district population and then round up to the next integer.

[2]Towns are one component of municipalities, which also include cities and villages. Although the Wisconsin constitution does not appear to address cities and villages, I report them because they are indistinguishably grouped together in the LTSB data product.

This evaluation of the number of times a county must be split to adhere to population balance requirements also demonstrates a potential source of rigidity in balancing the redistricting constraints. Consider an example of a county like Outagamie whose population was equal to 2.97 Assembly districts in 2010 but has grown to represent 3.2 Assembly districts in 2020. While it would have been possible to have three districts completely contained in Outagamie in the 2011 map, it must be split into at least four parts in a population balanced 2020 map, regardless of least change considerations. A similar scenario is true in La Crosse county, which goes from needing to touch two districts, which is realized in the enacted plan, to having a population slightly larger than two Assembly districts, particularly given the small amount of population deviation that exists in the proposed plans.

Next, I report results for splits of municipalities. Here, I again report (i) the total number of splits, (ii) the total number of pieces, (iii) the total number of splits not necessitated by the requirement of population equality, and (iv) the total number of pieces greater than those necessitated by the requirement of population equality. Finally, I report on preservation of ward boundaries. Here, I confine my analysis to splits, pieces, and the number of wards that are subdivided multiple times. This approach is appropriate because wards as significantly smaller units than counties and municipalities and are all significantly smaller than congressional, senate, and assembly districts.

IV.D Compactness

I am instructed that the Wisconsin Constitution requires that plans create legislative districts "in as compact form as practicable," Wisc. Const. art. IV, § 4, and that Wisconsin courts have historically treated compactness as a traditional redistricting principle when considering Congressional boundaries. Compactness is a measure of geographic or geometric regularity of a district or districting plan, although it is rarely specifically specified in legislation governing redistricting. In this report, I apply several measures of compactness, computed using Python libraries in the epsg:32616 projection [geocompactness, gerrychain]. Three of them—Polsby-Popper,[3] Reock, and cut edges—are elaborated in the report submitted by Professor Moon Duchin. See Duchin Report at 9-10. The fourth, called the convex hull ratio, measures what proportion of the area of the smallest convex shape containing the district is filled by the district.

In evaluating how the proposed plans perform on compactness, I attempt to account for constraints on the ability to improve compactness. For example, measures that depend on the perimeter are determined by the properties of the discrete units, so a map built out of larger structures, like wards instead of blocks, has less flexibility to tune the districts to be compact under these measures. Moreover, since these measures are defined for individual districts, they have to be combined or averaged in some fashion to obtain a score for the whole plan. Consistent with the expert reports filed in this case, I will report mean values for these metrics across all districts in each plan.

There are also measures that apply to the plan as a whole. All continuous measures suffer from some potential distortions due to map projections and other geographic issues [Bar-Natan–Najt–Schutzmann 2020, Solomon and Barnes 2021], so recently some mathematicians have proposed using discrete measures to support compactness claims [Duchin and Tenner 2018]. A common choice for this is the number of cut edges, which represents the count of the number of adjacent units like wards or blocks that are not placed in the same district, which can be viewed as a discrete version of perimeter.

IV.E Contiguity

Contiguity is the principle that states that districts should be connected, usually in the sense that they could be traversed from point to point without needing to leave the district. To evaluate the proposed plans in this proceeding, I apply the definition of contiguity set out in the Duchin Report and my understanding of how Wisconsin courts have previously interpreted contiguity. *See* Duchin Report at 9. Based on that

[3]The Legislature's report also measures the Schwartzberg score, which can be derived as the reciprocal of the squareroot of the Polsby-Popper score and hence does not provide any additional ranking information [Duchin and Tenner 2018].

measure, all plans contain contiguous districts. As a result, I do not report on this metric in my analysis below.

IV.F Nesting

Wisconsin also has a requirement that each Senate district be formed by merging the units associated to three contiguous Assembly districts, as "no assembly district shall be divided in the formation of a senate district." Wis. Const. art. IV, § 5; Order ¶ 37. Each of the proposed plans satisfies this requirement. As a result, I do not report on this metric in my analysis below.

IV.G Least Change

As the Duchin Report notes, the Court's November 30 order specifies that parties should "make only necessary modifications to accord with the legal requirements" and avoid "treading further than necessary to remedy [the existing maps'] currently legal deficiencies." To evaluate how the proposed plans perform on this least change principle, I apply metrics elaborated in the Duchin Report, including measures of core people retention, core area retention, buffer distance, county overlap, and district overlap. See Duchin Report at 10. I also apply another discrete approach to measuring least change, considering whether adjacent census blocks are placed in the same or different districts in the enacted plan and whether that configuration is preserved in the proposed plan. This is similar to the cut edges measure defined for compactness above. I calculated this on the block-level dual graph for all plans, so the baselines are given by the number of edges of each type reported for the enacted plan.

IV.H Traditional Districting Criteria

In the November 30 Order, the concurring opinion specifically mentions the preservation of communities of interest and minimizing the number of individuals who must wait six years between voting for a state senator as examples of 'traditional districting criteria' that might be considered to distinguish between otherwise lawful maps determined to have been drawn with a least-change approach.[4]

IV.H.1 Communities of Interest

The preservation of communities of interest is a traditional districting principle. In reviewing the Bewley, BLOC, Congressman, Governor, Hunter, Legislature, and Johnson plans, briefs, and expert reports submitted on December 15, I did not identify any significant quantitative analysis of efforts to preserve communities of interest. The parties do offer some examples of communities of interest they assert have been preserved in their plans. *See*, e.g., Congressman's Br. at 12-18; Hunter Br. at 16-17. While I offer no analysis of these examples, some parties also draw on the reduction of county, municipal, and/or ward splits as evidence that their plans protect communities of interest. *See*, e.g., Hunter Br. at 16-17. As discussed below, in Parts V.B.4, V.C.3, and V.D.2, the CMS plans perform very well on these measures.

IV.H.2 Delayed Voting in Senate Elections

While statewide elections occur in Wisconsin in each even year, only half of the State Senate districts hold elections at a time, as the Senate terms are for four years. The cycle of each district is determined by whether it is odd or even. Thus, any individuals that are moved from an odd-numbered district to an even-numbered district as a result of redistricting face a six-year gap between being able to vote for a State Senator. Minimizing the number of people placed into this situation has been used to evaluate Senate districts in past cycles. In evaluating how plans perform on this metric, I offer two computations. First, I measure what proportion of the population is currently in an odd-numbered district but would be moved to an even-numbered district under each proposal. Second, I measure the absolute number of people moved from an odd-numbered district to an even-numbered district under each proposal.

[4] As mentioned above, criteria like compactness and political boundary preservation that are required for constructing Assembly districts are also frequently referred to as traditional districting criteria when analyzing Congressional maps.

V Analysis and Methodology

This section describes the results of the analysis that was used to inform the executive summary above.

V.A Data

V.A.1 Methodology

The data used in this report is described in Appendix B. The starting point for my quantitative analysis was the LTSB block-level shapefile, which contained population values and subcategories derived from the census data release. Block equivalence files were used to associate each party's plan with the census block units, with one exception. Because the Bewley maps had some values labelled with sub-block assignments, I used the MAUP package to assign the district boundary level shapefiles to the blocks. This accounts for some small deviations in measurements obtained, as compared to those in the Bewley intervenors' expert report, particularly with respect to ward splits. In the tables below I include the values from their report parenthetically where there are significant discrepancies, particularly with respect to ward splits. In the discussion of the maps I use the most beneficial values to the Bewley plan for each metric.

For the vote total computations necessary to evaluate district performance for VRA analysis I used the ward level geographic data provided by the LTSB, and supplemented it with additional data provided by counsel for the Citizen Mathematicians and Scientists. To analyze plans not drawn on wards, I associated votes with blocks by using the MAUP package to prorate vote totals from the ward level (using the voting age populations). As there are several wards with no population, but some votes recorded, this leads to some small discrepancies in vote totals. However, aggregated back to the district level, this appears to have minimal impact on the final results.

V.A.2 Changes in Wisconsin Demography

In evaluating how the proposed maps perform on various metrics, it is important to remember why the existing map must be adjusted. During the past decade, the population of Wisconsin has grown by 3.6%. However, that population growth is not equally distributed across the state. For example, Dane County grew by over 15%, but nearly 30% (21/72) of counties have lost population since 2010. The last decade has also seen other shifts in demography and in the boundaries of political subdivisions. Changes in the relative density of minority groups throughout the state have not been uniform and several town and city boundaries have been modified since the 2011 maps were enacted. *See* Citizen Mathematicians and Scientists Brief at 5. These shifts can affect the line-drawing process and performance on various redistricting requirements and criteria.

V.B Congressional Maps

In this section I analyze the three proposed alternatives to the CMS congressional map, based on the metrics and principles described above. In all tables, I italicize those metrics for which a lower score is better, and leave unitalicized those metrics for which a higher score is better.

V.B.1 Population Deviation

As discussed above, Congressional district populations should be zero-balanced. Thus, in an optimal plan, I expect the difference between the largest district population and the smallest district population to be exactly one person.

In Table 1,[5] I report population deviation for the proposed plans and the plan enacted in 2011. The Table demonstrates three important points. First, the enacted plan is significantly malapportioned. This underscores the magnitude of reapportionment required. Second, the Legislature and CMS reduce the range

[5]Here and throughout, if a criterion must be considered under applicable law (as I understand it) then I highlight the best performing map on metrics evaluating that criterion in green.

of population deviation to 1. Third, the Governor and Hunter plans do not achieve that range of population deviation, because neither reduces the difference between the most and least populous districts to a single person. In this respect, the table demonstrates that it is important to compare the size of proposed districts when calculating the range of population deviation, rather than comparing districts to the rounded ideal population, *see* Governor's Brief at 12, or evaluating population based on a plus or minus calculation, *see* Hunter Brief at 15. Ultimately the key takeaway is that the Legislature and CMS plans achieve the mathematically optimal population deviation, and the Governor and Hunter plans do not.

Plan Name	CMS	GOV	HUNTER	SB622	WI-ENACTED
Maximum Deviation	0	1	1	0	52,681
Minimum Deviation	-1	-1	-1	-1	-41,320
Min to Max	1	2	2	1	94,001

Table 1: Population deviations for proposed Congressional maps.

V.B.2 Voting Rights Act

The parties broadly agree on the impact of the VRA on the Congressional map, with each plan supporting a single minority opportunity district that is majority non-White as shown in Table 2.

Plan Name	CMS	GOV	HUNTER	SB622	WI-ENACTED
Minority Opportunity	1	1	1	1	1

Table 2: VRA summary of proposed Congressional districts

V.B.3 Least Change

In Table 3, I report several metrics of least change. First, core population and population percent (together "core population retention") reflect the number of people that are moved to a new district in the proposed plan. Second, core area moved and area percent (together "core area retention") reflect the amount of area that is moved to a new district in the proposed plan. Third, county and district overlap reflect whether at least one county and populated unit (respectively) are preserved between identically numbered districts in the enacted and proposed map. Fourth, preserved internal edges reflects the number of adjacent census blocks that are preserved between identically numbered districts. Fifth, buffer distance reflects the amount of buffering that must be done in order to contain all of an enacted district in the new map. These metrics represent just a few of the metrics that can be used to evaluate whether a map comports with the least change approach established in the Court's November 30 Order.

Core population retention and core area retention are familiar metrics that provide a rough proxy for the magnitude of changes made to the enacted map. As Professor Duchin explained in her initial report, the county and district overlap figures are grounded in the Court's November 30 opinion and, more specifically, the concurring opinion. Preserved internal edges is a more discrete computation of change. The preserved internal edges calculation accounts for the number of census block adjacencies (i.e. a discrete unit of area) that are preserved in the new plan, reflecting a local measurement of the nearest pairs of residents that can be separated in a districting plan.

Given the magnitude of malapportionment that must be remedied, I expect that all parties will need to make material adjustments to the enacted map. I am not aware of any quantitative threshold that should be applied in evaluating how parties perform on these continuous-valued metrics of least change. Table 3 illustrates that all parties perform well on at least some metrics, and that there is variance in how well most parties perform. For example, the Legislature moves the second-least number of people, but the most area. The Governor performs best on both core people retention and core area retention, but does not perform

best on preserved internal edges, on which the Hunter map performs best. This illustrates that various approaches to making minimal changes to the starting plan may lead measurably different outcomes. All parties score perfectly on both county and district overlap. I do not claim that these metrics exhaust the mechanisms for evaluating whether a map comports with the least change approach.

Plan Name	CMS	GOV	HUNTER	SB622
Core Population Moved	500785	324415	411777	384456
Population Percent Moved	8.5	5.5	7.0	6.5
Area Percent Moved	3.0	1.5	3.4	9.1
Average Buffer Distance	5.1	4.8	9.6	11.5
County Overlap	8	8	8	8
District Overlap	8	8	8	8
Preserved Internal Edges	487096	487087	487245	486746

Table 3: Least change metrics for proposed Congressional maps

V.B.4 Political Boundaries

In Table 4, I report metrics that demonstrate the degree to which parties preserve political boundaries, including counties, municipalities,[6] and wards. The measurement of municipality splits presented here agrees with the approach taken by Professor Duchin in her report. I understand these metrics to be appropriate considerations in selecting between plans that comply with federal legal requirements and comport with the least change approach.

Given the size of Congressional districts, and the challenges of zero-balancing, I expect that all plans will split some number of wards and counties. Specifically based on my experience analyzing Congressional redistricting maps, I would expect that in a strong map the number of county splits would be approximately on the order of the number of districts or smaller. And I expect the number of municipal splits to be larger than the number of county splits, because municipal boundaries do not align directly with county boundaries, because municipalities are more numerous than counties, and because I understand that prioritizing the preservation of county lines is consistent with the Wisconsin constitution and historical practice.

I am not aware of any quantitative threshold that should be applied in evaluating how parties perform on continuous-valued metrics of boundary preservation. Among alternatives to the CMS plan, the Hunter plaintiffs perform best on wards and municipalities, while performing nearly as well as the Legislature on county splits and just as well on county pieces. However, Table 4 illustrates that the CMS maps are comfortably best on all metrics, splitting many fewer wards, fewer counties, and fewer municipalities than the second best map, while also creating the fewest pieces.

Each plan splits at least one county that is not split in the others. For example, the CMS map is the only proposal that splits Iowa county. The counties not split by the CMS map but divided by the other proposals are Jackson, Juneau, Monroe, Sauk, Walworth, and Winnebago for the Governor's map; Monroe, Sauk, Shawano, Winnebago, and Winnebago for the Hunter map; and Columbia, Dunn, Portage, Sauk, Walworth, and Waukesha for the Legislature's map.

Similarly, with respect to municpalities, the five largest split by each plan that is not split in the CMS plan are West Allis, Tomah, East Troy, Lomira, and Eagle Point in the Governor's plan; Wauwatosa,

[6] My measure of municipalities includes both unincorporated towns and incorporated cities and villages. In the state legislative context, I understand that respect for certain municipalities (incorporated cities and villages) is not required under the Wisconsin Constitution. However, I also understand that Wisconsin courts have (historically) evaluated the number of cities and villages, as well as the number of towns, that are split. As a result, I included cities and villages in my analysis of the congressional and legislative maps.

Waupun, Tomah, East Troy, and Columbus in the Hunter Plan; and Waukesha, Eau Claire, Wauwatosa, New Berlin, and Menomonee Falls in the Legislature's plan.

Plan Name	CMS	GOV	HUNTER	SB622	WI-ENACTED
Split Wards	8	32	18	48	0
Split Counties	7	12	11	10	12
County Pieces	15	25	22	22	27
Pop Split Counties	7	12	10	10	12
Pop Split County Pieces	7	12	10	11	14
Split Munis	13	30	20	24	35
Muni Pieces	27	60	40	48	70
Pop Split Munis	13	30	20	24	35
Pop Split Muni Pieces	14	30	20	24	35

Table 4: Political boundary preservation in proposed Congressional maps.

V.B.5 Compactness

In Table 5, I report metrics that demonstrate the degree to which parties achieve compactness in their Congressional districts. As with respect to political boundaries, I understand these metrics to be appropriate considerations in selecting between plans that comply with federal legal requirements and comport with the least change approach.

As with several prior metrics, I am not aware of any quantitative threshold that should be applied in evaluating how parties perform on these continuous-valued metrics. However, I understand that in the state legislative context, compactness should be maximized to the extent practicable, and that for Congressional districts this is often viewed as a traditional districting criterion.

Among alternatives to the CMS plan, the Legislature's plan appears to perform better than the Governor or Hunter plans, achieving a higher mean Polsby-Popper Score, a higher mean convex hull score, and a better cut edges score.[7]

However, on metrics of compactness, the Legislature's plan does not outperform the CMS plan. As Table 5 illustrates, the CMS plan performs best in all mean categories except for convex hull, where it performs just .003 points behind the Legislature. In my view, it is particularly noteworthy that the CMS plan performs best on the cut edges metric, as that metric controls for natural features, like the Wisconsin coastline

Plan Name	CMS	GOV	HUNTER	SB622	WI-ENACTED
Min Polsby-Popper	0.126	0.127	0.125	0.125	0.118
Mean Polsby-Popper	0.305	0.243	0.272	0.280	0.209
Min Reock	0.360	0.334	0.286	0.334	0.302
Mean Reock	0.464	0.458	0.425	0.456	0.440
Min Convex Hull Ratio	0.638	0.592	0.590	0.679	0.588
Mean Convex Hull Ratio	0.776	0.758	0.733	0.779	0.741
Cut Edges	3228	3774	3661	3410	4293

Table 5: Compactness performance of Congressional district proposals

[7]Unlike other metrics of compactness, cut edges is a plan-wide rather than district-specific score. With respect to cut edges, a lower figure demonstrates greater compactness.

V.B.6 Congressional Summary

Among the alternatives to the CMS congressional map that I was instructed to analyze, and applying my understanding of the law applicable to Wisconsin congressional redistricting, I conclude that the Legislature's map performs better than other alternatives to the CMS plan on federal requirements, that the Governor's map performs better than other alternatives to the CMS plan on metrics of least change, and that each party performs better than other alternatives to the CMS plan on at least one criterion that is considered traditional and neutral when evaluating congressional maps. However, I further conclude that the CMS performs just as well as the Legislature's map on federal requirements, outperforms or equals the Governor on some metrics of least change, and performs best on each of the traditional neutral criteria considered in this report. Accordingly, after reviewing and analyzing alternatives to the CMS plan, I am not able to identify any that performs as effectively under the applicable framework.

V.C State Senate

Next, I turn to analyzing the five proposed alternatives to the CMS Senate map, based on the metrics and principles described in Part IV of my report.

V.C.1 Population Deviation

The Court's November 30 order instructs that, for legislative district populations, "there should be as close an approximation to exactness as possible." Order ¶ 33. Although the Court did not identify a specific quantitative threshold, I expect that in preparing proposed plans parties will seek to minimize top to bottom deviations from the ideal district size.

In Table 6 I report the population deviation values for the proposed and current plans. The Table illustrates three important points. First, as with Congressional districts, the malapportionment of the current plan is easy to observe and underscores the magnitude of reapportionment required. Second, it is possible to drive population deviation down well below the top-to-bottom deviations in the Bewley, BLOC, Governor's, and Hunter plans. Third, the CMS plan performs better than all alternative plans on each measure of deviation. In this respect, the CMS proposal stands out. While the Legislature's population deviation figures may be "remarkable" [Legislature's Br. at 8] and "exceptionally good" *see* Bryan Report ¶ ¶ 45, 49, the CMS plan performs better on this critical criterion.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
Maximum Deviation	1281	802	428	1112	845	520	22874
Maximum Deviation (%)	0.718	0.449	0.24	0.623	0.473	0.291	12.808
Minimum Deviation	–1590	-917	-467	-1026	-853	-506	-16529
Minimum Deviation (%)	–0.89	-0.513	-0.261	-0.574	-0.477	-0.283	-9.255
Min to Max	2871	1719	895	2138	1698	1026	39403
Min to Max (%)	1.608	0.962	0.501	1.197	0.951	0.574	22.062

Table 6: Population deviations for proposed Senate maps

V.C.2 Voting Rights Act

As with the Congressional plans, there is broad agreement between the briefs, reports, and proposals on the feasibility and desirability of having two minority opportunity districts at the State Senate level. There is a small amount of variance between the plans in terms of whether they construct Black voting-age population ("BVAP")-majority districts or are content with effective districts and analyzing non-White or majority-minority districts as described in the Governor and Hunter briefs respectively.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
BVAP Opportunity	2	2	2	2	2	2	2

Table 7: VRA performance of proposed Senate maps

V.C.3 Political Boundaries

While minimizing population deviation is the first and most critical concern in redistricting, I am instructed that the Wisconsin Constitution requires respect for counties, towns, and wards when reapportioning legislative districts. See Wis. Const. art. IV, §4.[8] As a result, I consider this criterion before evaluating how the plans perform on metrics of least change.

In evaluating whether plans effectively protect political boundaries, I am cognizant of the tension between preserving counties, on the one hand, and equalizing population, on the other. That tension is exacerbated in the legislative context, because Senate and Assembly districts are smaller than congressional districts and therefore less suited to the preservation of county units with considerable population. As a result of these issues, I expect that parties able to drive population deviation closer to exactness will perform worse on metrics that concern respect for counties.[9] Because wards are a smaller unit, with less population, I anticipate diminished need to split wards in pursuit of population balance.

In Table 8, I report metrics that demonstrate the degree to which parties preserve political boundaries, including counties, municipalities, and wards. I am not aware of any quantitative threshold that should be applied in evaluating how parties perform on continuous-valued metrics of preservation. However, consistent with the requirement that plans respect counties, towns, and wards, I conclude that parties perform better on metrics of preservation when they minimize the number of splits. And Table 8 illustrates a very important point: that it is possible to navigate the tension between population balancing and respect for political boundaries.

In this respect, this analysis upends my expectation that parties performing best on population deviation will perform worse on metrics of preservation. Among alternatives to the CMS plan, the Legislature's map performed better on population deviation and performs better on metrics of preservation, preserving at least as many counties and wards, and more municipalities than other alternatives to the CMS map. As Table 8 makes clear, the BLOC, Governor, and Hunter plans split a considerable number of wards, while the Legislature's and Bewley plans split none. In addition to splitting a significant number of wards, the BLOC, Governor, and Hunter plans also split wards into a significant number of pieces. A similar dynamic plays out with respect to municipalities, where the Legislature's plan beats the other plans by a significant margin.

Although the Legislature's plan outperforms the Bewley, BLOC, Governor, and Hunter plans, it does **not** outperform the CMS plan. Although the CMS plan performs best on each metric of population deviation, and one might expect performance on preservation to suffer by consequence, the CMS plan is comfortably best on the preservation of counties, splitting 14 fewer units into 29 fewer pieces than the Legislature's plan. The CMS plan also performs just as well as the Legislature on preserving wards, splitting none. And the CMS map performs nearly as well as the Legislature on preservation of municipalities, a metric that I give less weight because I am informed that preservation of city and village lines is desirable but not mandatory under applicable law. Ultimately, based on my review and analysis of these preservation metrics, and my understanding of applicable law, I conclude that the CMS performs best on the preservation criterion.

The five largest counties split by each plan that are not split in the CMS plan are Winnebago, Kenosha, La Crosse, Dodge, and Portage for Bewley; Winnebago, Kenosha, St. Croix, Dodge, and Chippewa for

[8] Although this provision applies to Assembly districts, those Assembly districts must be nested into Senate districts, which has the practical effect of extending the requirement from Assembly to Senate districts.

[9] For the same reason, I expect that parties able to drive population deviation closer to exactness will perform worse on metrics that concern respect for municipalities. I address the inclusion of municipalities below.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
Split Wards	161 (0)	65	0	179	132	0	0
Ward Pieces	326 (0)	130	0	362	271	0	0
Pop Split Wards	165 (0)	65	0	183	139	0	0
Split Counties	48	42	28	45	42	42	46
County Pieces	138	128	86	136	116	115	130
Pop Split Counties	48	42	27	45	42	42	46
Pop Split County Pieces	77	73	45	78	61	60	71
Split Muni	67 (52)	73	31	117	109	28	84
Muni Pieces	146	157	69	252	234	62	180
Pop Split Munis	67	73	31	117	109	28	84
Pop Split Muni Pieces	75	80	34	131	121	30	92

Table 8: Political boundary preservation in proposed Senate maps.

BLOC; Winnebago, Kenosha, St. Croix, Dodge, and Portage for the Governor; Winnebago, Kenosha, La Crosse, Dodge, and Portage for Hunter; and Winnebago, Kenosha, La Crosse, St. Croix, and Dodge for the Legislature.

The five largest municipalities split by each plan that are not split in the CMS proposal are Racine, West Allis, Beloit, Menomonee Falls, and Middleton for the Bewley proposal; Kenosha, Racine, Oshkosh, Wesst Allis, and Sheboygan for the BLOC proposal; Kenosha, Racine, West Allis, Beloit, and Menomonee Falls for the Governor's proposal; Kenosha, Racine, West Allis, Menononee Falls, and Manitowoc for the Hunter proposal; and Racine, West Allis, Beloit, Waterford, and Tomah for the Legislature's proposal.

V.C.4 Compactness

Although it bears repeating that minimizing population deviation is the first and most critical concern in redistricting, I am instructed that the Wisconsin Constitution requires that plans create legislatively districts "in as compact form as practicable." Wis. Const. art. IV, § 4. As a result, and as with respect for political boundaries, I consider this criterion before evaluating how the parties' plans also perform on metrics of least change. The results of my analysis are reported in Table 9. Although I am not aware of any quantitative threshold that should be applied in evaluating how parties perform on these continuous-valued metrics, the requirement to make districts in "as compact form as practicable" suggests parties should attempt to maximize the compactness of districts, subject to the constraints created by other redistricting requirements.

In evaluating alternatives to the CMS plan, I determine that the Hunter plan performs better than other plans on metrics of compactness, as it is the only plan to increase the prevailing mean Polsby-Popper and convex hull ratio scores, and also performs best on cut edges. However, as Table 9 illustrates, the CMS map performs very competitively on measures of compactness, achieving the best mean Reock score and placing second to the Hunter plan on mean Polsby-Popper, mean Convex-Hull, and cut edges. Significantly, the CMS achieves this performance while splitting significantly fewer political boundaries than the Hunter plan. I say this is significant because superior compliance with the requirement to respect county, town, and ward boundaries necessarily constrains the ability to improve compactness. Despite the constraints imposed by its superior compliance on another redistricting requirement, the CMS plan manages to achieve districts that are nearly as or as compact as those in the Hunter plan.[10]

[10]Of course, the CMS plan also performs better on mean metrics of compactness than every alternative to the Hunter plan, including the only other plan that is competitive on metrics of preservation: the Legislature's.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
Min Polsby-Popper	0.078	0.067	0.071	0.053	0.085	0.048	0.053
Mean Polsby-Popper	0.213	0.197	0.260	0.217	0.268	0.224	0.230
Min Reock	0.137	0.127	0.140	0.135	0.141	0.133	0.128
Mean Reock	0.401	0.395	0.402	0.392	0.397	0.395	0.402
Min Convex Hull Ratio	0.492	0.486	0.508	0.480	0.470	0.466	0.483
Mean Convex Hull Ratio	0.717	0.695	0.735	0.710	0.739	0.710	0.723
Cut Edges	10688	11776	9754	11147	9565	10785	10928

Table 9: Compactness in proposed Senate maps.

V.C.5 Least Change

Legislative plans must comply with federal and state constitutional requirements, including requirements concerning population deviation, compliance with the VRA, respect for county, town, and ward lines, and maximizing compactness (to the extent practicable). My analysis of metrics relevant to each requirement—including metrics that illustrate whether plans approximate population balance as closely as possible, contain a sufficient number of districts that can elect minority candidates of choice, respect counties and wards, and maximize compactness to the extent practicable—demonstrates that the alternatives to the CMS plan fall short. Nevertheless, I have been asked to evaluate how the parties' plans perform on metrics of least change. The results of that evaluation are reported in Table 10.

In evaluating performance on these measures of least change, it is important to remember the magnitude of reapportionment required to approximate population balance as closely as possible, and to consider the effect that compliance with requirements concerning the integrity of counties, towns, and wards, as well as compactness, have on the ability to minimize change. Because of the requirements applicable to legislative redistricting in Wisconsin, I expect that parties will need to tolerate more change in order to "conform the existing districts to constitutional and statutory requirements." Order ¶8. Moreover, the smaller size of Senate districts make them more sensitive to local population shifts, including those made to preserve political boundaries.

Among alternatives to the CMS map, the Legislature's plan prevails on core population retention, with the Governor's plan prevailing on core area retention, buffer distance, and preserved internal edges. While the CMS plan does not perform as well as others on the core retention metrics or buffer distance, it performs well on metrics of county and district overlap and preserved internal edges. Moreover, the CMS plan's performance on least change is not surprising, given that it performs best on the requirement to balance population, best on the requirement to preserve county, town, and ward boundaries, and nearly best on the requirement to maximize compactness to the extent practicable. In this respect, the metrics of least change reflect the trade-offs necessarily made in pursuit of constitutional and statutory requirements.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621
Core Population Moved	576321	610568	1513824	461228	1128878	459061
Percent Population Moved	9.8 (9.5)	10.4	25.7	7.8	19.2	7.8
Percent Area Moved	9.8	6.1	29.1	5.0	14.0	7.1
Average Buffer Distance	6.7	6.2	17.0	5.4	8.5	6.5
County Overlap	33	33	33	33	33	33
District Overlap	33	33	33	33	33	33
Preserved Internal Edges	476575	476621	477230	477745	476482	477558

Table 10: Least change metrics of proposed Senate maps

V.C.6 Delayed Voting in Senate Elections

Counsel also asked that I evaluate the extent to which proposed maps result in delayed voting for senators. The result of my analysis is reported below, in Table 11.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621
Odd to Even Population	137084	177698	422492	139677	240593	138753
Percent	2.3	3	7.2	2.4	4.1	2.4

Table 11: Count of individuals with a six-year delay in Senate votes.

V.C.7 State Senate Summary

Among alternatives to the CMS plan, there is significant variance in performance across metrics related to constitutional and statutory requirements, and on metrics of least change. Having analyzed the performance of each plan across metrics related to constitutional and statutory requirements, I conclude that the plans fall short of the CMS plan, which necessarily makes modifications to district boundaries to achieve lower population deviation, fewer county splits, and better mean Reock scores than any other plan, while also performing as well as other plans on metrics related to VRA compliance and the preservation of wards, and performing better than nearly all maps on several important measures of compactness, including mean Polsby-Popper, mean Convex Hull, and cut edges.

V.D State Assembly

I conclude by analyzing the five alternatives to the CMS Assembly map, again based on the metrics and principles set out in Part IV of my report.

V.D.1 Population Deviation

As with respect to Senate districts, and consistent with the requirements that plans approximate exactness as closely as possible, I expect that parties will aim to minimize top-to-bottom population deviation from the ideal district size. In Table 12, I report the population deviation values for the proposed and current plan. The results are similar to those obtained for Senate districts and support three conclusions. First, the malapportionment of the current plan is significant and illustrates the magnitude of reapportionment required. Second, population deviation can be driven down well below levels achieved by the Bewley, BLOC, Governor, and Hunter plans. Finally, the Legislature and CMS plans again achieve the tightest balance, with the CMS plan obtaining even more "remarkable" proximity to exactness.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
Maximum Deviation	547	392	220	584	530	231	12183
Maximum Deviation (%)	0.92	0.659	0.37	0.982	0.891	0.389	20.465
Minimum Deviation	-557	-392	-218	-537	-553	-221	-6905
Minimum Deviation (%)	-0.935	-0.658	-0.365	-0.901	-0.928	-0.37	-11.598
Min to Max	1104	784	438	1121	1083	452	19088
Min to Max (%)	1.854	1.317	0.736	1.883	1.819	0.759	32.063

Table 12: Population deviations for proposed Assembly maps

V.D.2 Voting Rights Act

There is a little more of interest with respect to the VRA at the level of Assembly districts. Several of the proposals are able to construct an additional effective opportunity district compared to the 2011 plan, although as with the Senate districts there is some variance between the formulations. In particular, the

BLOC plaintiffs construct 7 majority BVAP districts, while the CMS map contains 7 effective districts at a wider range of BVAP percentages. With respect to HVAP the proposals are consistent, providing two majority HVAP districts.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
BVAP Opportunity	6	7	7	7	7	6	6
HVAP Opportunity	2	2	2	2	2	2	2

Table 13: VRA performance for proposed Assembly maps

V.D.3 Political Boundaries

As with respect to Senate districts, and consistent with the requirement that plans respect counties, towns, and wards when reapportioning legislative districts, I view plans favorably if they minimize the number of splits. And as with respect to Senate districts, the proposals demonstrate that it is possible to navigate the tension between minimizing population deviation and respect for political boundaries.

Table 14 demonstrates that, among alternatives to the CMS plan, there is no clear winner on preservation of political boundaries. However, I conclude that the CMS plan outperforms each alternative plan. Like the Legislature and Bewley plans, the CMS plan preserves every single ward. And, importantly, the CMS plan splits the fewest number of counties into the fewest pieces Although the CMS map splits more municipalities into more pieces than does the Legislature, I weight those splits less than county splits, because I am informed that preservation of city and village lines is desirable but not mandatory under applicable law.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
Split Wards	285 (0)	94	0	258	257	0	0
Ward Pieces	583 (0)	190	0	529	527	0	0
Pop Split Ward Pieces	298 (0)	96	0	271	270	0	0
Split Counties	55	53	40	53	50	53	58
County Pieces	229	226	175	229	194	212	229
Pop Split Counties	54	52	33	52	48	51	57
Pop Split County Pieces	109	108	70	111	79	94	106
Split Munis	99 (79)	104	70	175	181	48	126
Muni Pieces	250	254	176	415	421	125	296
Pop Split Munis	97	101	66	174	180	45	125
Pop Split Muni Pieces	129	128	84	218	218	55	148

Table 14: Political boundary preservation in proposed Assembly maps

V.D.4 Compactness

As with respect to Senate districts, and consistent with the Wisconsin constitutional requirement that parties create Assembly districts "in as compact form as practicable," I expect that plans will attempt to maximize the compactness of districts, subject to the constraints created by other districting requirements. Among alternatives to the CMS plan, the Hunter plan performs best on all mean measures of performance and cut edges. The CMS plan performs competitively on these measures, placing second to the Hunter plan on each one, and accomplishing this notwithstanding materially greater respect for counties, municipalities, and wards. Particularly given that the required pursuit of compactness is subject to a practicability requirement, and that respect for political subdivisions necessarily trades off against the flexibility need to maximize compactness, I conclude that the CMS plans perform very well on this measure.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621	WI-ENACTED
Min Polsby-Popper	0.065	0.043	0.062	0.056	0.086	0.050	0.048
Mean Polsby-Popper	0.253	0.227	0.282	0.251	0.340	0.243	0.260
Min Reock	0.148	0.136	0.148	0.147	0.136	0.148	0.147
Mean Reock	0.405	0.374	0.406	0.397	0.442	0.379	0.390
Min Convex Hull Ratio	0.473	0.351	0.473	0.475	0.449	0.291	0.418
Mean Convex Hull Ratio	0.734	0.698	0.736	0.720	0.783	0.717	0.732
Cut Edges	18420	20096	17781	18441	15353	19196	18994

Table 15: Compactness metrics for proposed Assembly maps

V.D.5 Least Change

As with respect to Senate districts, it bears repeating that Assembly districts must comply with federal and state constitutional requirements, including requirements concerning population deviation, compliance with the VRA, respect for counties, towns, and wards, and maximizing compactness (to the extent practicable). My analysis of metrics relevant to each requirement demonstrates that the alterna-tives to the CMS plan fall short. Nevertheless, I have been asked to evaluate how the parties' plans perform on metrics of least change.

The results of that evaluation are reported in Table 16, and I again note that in evaluating performance on these measures of least change, it is important to remember the magnitude of the reapportionment required to approximate population balance as closely as possible, and to consider the effect of compliance with other constitutional and statutory requirements. Under the circumstances, and given that Assembly districts are particularly sensitive to local population shifts, it is not surprising that the CMS plan does not perform as well as others on the reported metrics. The results provide further evidence that metrics of least change reflect trade-offs necessarily made in pursuing constitutional and statutory requirements.

Plan Name	BEWLEY	BLOC	CMS	GOV	HUNTER	SB621
Core Population Moved	984336	939513	2299625	837659	1586059	933604
Population Percent Moved	16.7 (16.2)	15.9	39.0	14.2	26.9	15.8
Area Percent Moved	16.8	9.6	38.5	11.3	18.2	16.5
Average Buffer Distance	5.4	4.9	13.0	4.8	6.0	6.0
County Overlap	99	99	93	99	99	99
District Overlap	98	99	85	99	99	99
Preserved Internal Edges	465157	466205	465050	467562	466597	466249

Table 16: Least change analysis for proposed Assembly maps

V.D.6 Assembly Summary

Among alternatives to the CMS plan, I again find considerable variance in performance across metrics related to constitutional and statutory requirements, and on metrics of least change. Based on my analysis of each plan across metrics related to those constitutional and statutory requirements, I conclude that the plans again fall short of the CMS plan, which necessarily makes modifications to district boundaries to achieve the lowest population deviation, the fewest county splits, and the second best score on critical measures of compactness, including mean Reock, mean Polsby-Popper, mean Convex Hull, and cut edges. The CMS plan accomplishes all of that without splitting a single ward, and while performing effectively on metrics related to VRA compliance.

VI References

[Bar-Natan–Najt–Schutzmann 2020] Assaf Bar-Natan, Elle Najt, and Zachary Schutzmann, The gerrymandering jumble: Map projections permute districts' compactness scores. Cartography and Geographic Information Science, Volume 47, Issue 4, 2020, 321–335.

[Solomon and Barnes 2021] Richard Barnes and Justin Solomon, Gerrymandering and Compactness: Implementation Flexibility and Abuse. Political Analysis, Volume 29, Issue 4, 2021, 448–466.

[Duchin and Tenner 2018] Moon Duchin and Bridget Tenner, Discrete geometry for electoral geography. ArXiv: 1808.05860, 2018, 1-18.

I declare under penalty of perjury of the United States that the foregoing is true and correct to the best of my knowledge and understanding.

Dated: December 30, 2021

Daryl R. Deford

Appendix A

DARYL R. DEFORD

Curriculum Vitae

328 Neill Hall WSU Pullman, WA ⋄ (509) 205–7347
daryl.deford@wsu.edu ⋄ daryldeford.com

ACADEMIC APPOINTMENTS

Washington State University, Pullman, WA *August 2020 – Present*
Assistant Professor of Data Analytics – Department of Mathematics and Statistics

Massachusetts Institute of Technology, Cambridge, MA *June 2018 – July 2020*
Postdoctoral Associate – CSAIL Geometric Data Processing Group
Advisor: Justin Solomon

Tufts University, Medford, MA *June 2018 – July 2020*
Visiting Scholar – Jonathan M. Tisch College of Civic Life
Advisor: Moon Duchin

EDUCATION

Dartmouth College, Hanover, NH *September 2013 – June 2018*
Ph.D. Mathematics *Awarded June 2018*
Advisor: Dan Rockmore
Dissertation: Matched Products and Dynamical Models for Multiplex Networks
A.M. Mathematics *Awarded November 2014*

Washington State University, Pullman, WA *August 2010 – May 2013*
B.S. in Theoretical Mathematics *Awarded May 2013*
Summa Cum Laude

RESEARCH PUBLICATIONS

Accepted Papers

A24: *Random Walks and the Universe of Districting Plans* (with M. Duchin), Book Chapter in *Political Geography*, Birkhäuser, to appear 2022.

A23: *Implementing Partisan Symmetry: Problems and Paradoxes* (with N. Dhamankar, M. Duchin, V. Gupta, M. McPike, G. Schoenbach, K. W. Sim), Political Analysis, arxiv: 2008.06930, to appear 2022.

A22: *Empirical Sampling of Connected Graph Partitions for Redistricting* (with L. Najt and J. Solomon), Physical Review E, 104(6), 064130, 2021.

A21: *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering* (with N. Eubank and J. Rodden), Political Analysis, 1-23, doi:10.1017/pan.2021.13, 2021.

A20: *Colorado in Context: Congressional Redistricting and Competing Fairness Criteria in Colorado* (with J. Clelland, H. Colgate, B. Malmskog, and F. Sancier-Barbosa), Journal of Computational Social Science, doi:10.1007/s42001-021-00119-7, 2021.

A19: *ReCombination: A family of Markov chains for redistricting* (with M. Duchin and J. Solomon), Harvard Data Science Review, 3(1), 2021.

A18: *Medial Axis Isoperimetric Profiles* (with J. Solomon and P. Zhang), Computer Graphics Forum, 39(5), 1-13, 2020.

A17: *On the Spectrum of Finite, Rooted Homogeneous Trees* (with D. Rockmore), Linear Algebra and its Applications, 598, 165-185, 2020.

A16: *Competitiveness Measures for Evaluating Districting Plans* (with M. Duchin and J. Solomon), Statistics and Public Policy, 7(1), 69-86, 2020.

A15: *Mathematics of Nested Districts: The Case of Alaska* (with S. Caldera, M. Duchin, S. Gutenkust, and C. Nix), Statistics and Public Policy, 7(1), 39-51, 2020.

A14: *Aftermath: The ensemble approach to political redistricting* (with J. Clelland and M. Duchin), MAA Math Horizons, 28(1), 34-35, 2020.

A13: *Total Variation Isoperimetric Profiles* (with H. Lavenant, Z. Schutzman, and J. Solomon), SIAM J. Appl. Algebra Geometry, 3(4), 585-613, 2019.

A12: *Spectral Clustering Methods for Multiplex Networks* (with S. Pauls) Physica A: Statistical Mechanics and its Applications, 533, 121949, 2019.

A11: *Redistricting Reform in Virginia: Districting Criteria in Context* (with M. Duchin), Virginia Policy Review, 12(2), 120-146, 2019.

A10: *A New Framework for Dynamical Models on Multiplex Networks* (with S. Pauls), Journal of Complex Networks, 6(3), 353-381, 2018.

A9: *Cyclic Groups with the same Hodge Series*, (with P. Doyle), Revista de la Uniòn Matemática Argentina, 59(2), 241–254, 2018.

A8: *Multiplex Dynamics on the World Trade Web*, Proc. 6th International Conference on Complex Networks and Applications, Studies in Computational Intelligence, Springer, 1111–1123, 2018.

A7: *Random Walk Null Models for Time Series Data*, (with K. Moore), Entropy, 19(11), 615, 2017.

A6: *Enumerating Tilings of Rectangles By Squares*, Journal of Combinatorics, 6(3), 339-351, 2015.

A5: *Enumerating Distinct Chessboard Tilings*, Fibonacci Quarterly, 52(5), 102-116, 2014.

A4: *Pulsated Fibonacci Sequences* (with K. Atanassov and A. Shannon), Fibonacci Quarterly, 52(5), 22-27, 2014.

A3: *Seating Rearrangements on Arbitrary Graphs*, Involve: A Journal of Mathematics, 7(6), 787-805, 2014.

A2: *Empirical Analysis of Space-Filling Curves for Scientific Computing Applications* (With A. Kalyanaraman), Proc. 42nd International Conference on Parallel Processing, 170-179, 2013.

A1: *Counting Rearrangements on Generalized Wheel Graphs*, Fibonacci Quarterly, 51(3), 259-273, 2013.

Preprints

P4: *Bayesian Inference of Random Dot Product Graphs via Conic Programming* (with D. Wu and D. Palmer), arXiv:2101.02180.

P3: *Complexity and Geometry of Sampling Connected Graph Partitions* (with L. Najt and J. Solomon), arXiv: 1908.08881.

P2: *Fourier Transforms on $SL_2(\mathbb{Z}/p^n\mathbb{Z})$ and Related Numerical Experiments* (with B. Breen, J. Linehan, and D. Rockmore), arXiv:1710.02687.

P1: *A Random Dot Product Model for Weighted Networks* (with D. Rockmore) arXiv: 1611.02530.

Technical Reports

T6: *Ensemble Analysis for 2021 Legislative Redistricting in Colorado, First and Second Staff Plans* (with J. Clelland, B. Malmskog, and F. Sancier-Barbosa), Colorado in Context Report, 2021.

T5: *Ensemble Analysis for 2021 Congressional Redistricting in Colorado* (with J. Clelland, B. Malmskog, and F. Sancier-Barbosa), Colorado in Context Report, 2021.

T4: *Comparison of Districting Plans for the Virginia House of Delegates* (with M. Duchin and J. Solomon), MGGG Technical Report, 2019.

T3: *Amicus Brief of Mathematicians, Law Professors, and Students* (with M. Duchin and G. Charles et al.), Rucho v. Common Cause, Supreme Court, 2019.

T2: *Study of Reform Proposals for Chicago City Council* (with M. Duchin et al.), MGGG Technical Report, 2019.

T1: *An Application of the Permanent–Determinant Method: Computing the Z-Index of Arbitrary Trees*, WSU Department of Mathematics Technical Report Series 2013 #2, 2013.

TEACHING EXPERIENCE

Washington State University Pullman, WA
Instructor *Fall 2020 - Present*

· Designed syllabi and daily lectures. Wrote and graded homework, quizzes, and exams. Fully responsible for course content and material.

Math 448/548 - Numerical Analysis *Spring 2022*
Fundamental course on numerical computation, including: finding zeroes of functions, approximation and interpolation, numerical integration, numerical solution of ordinary differential equations, and numerical linear algebra.

STAT 419 - Introduction to Multivariate Statistics *Fall 2021*
Introductory course covering multidimensional data, multivariate normal distribution, principal components, factor analysis, clustering, and discriminant analysis.

Data 115 - Introduction to Data Analytics *Fall 2020, 2021 Spring 2021*
Basic techniques and methodology of data science, with an emphasis on data processing and software tools. This course provides a foundation for beginning data analytics majors as well as students from across the university who are looking to develop data and quantitative literacy.

Math 581 - Topics in Math (Computational Methods in Complex Networks) *Fall 2020*
Introduction to computational methods and software for analyzing complex systems as well as applications of partition sampling to political redistricting.

Metric Geometry and Gerrymandering Group Cambridge, MA
VRDI Instructor *Summer 2018, 2019*

· Organized and led student research groups during an eight week summer program on political redistricting for 80+ graduate and undergraduate students. Met with students daily and both generated and supervised a wide variety of research projects in computational, mathematical, and political topics.

Tufts University Medford, MA
Co-Instructor *Spring 2019*

· Co–taught STS 10: Reading Lab on Mathematical Models in Social Context. This is a reading and discussion based course focused on providing an STS perspective to students who are taking technically-focused modeling classes.

Massachusetts Institute of Technology Cambridge, MA
IAP Instructor *January 2019*

· Developed a four-week course on computational methods for political redistricting. The course incorporated cutting edge mathematical and computational techniques for analyzing gerrymandering.

Dartmouth College Hanover, NH
Instructor *September 2015 - May 2018*

· Designed syllabi and daily lectures. Wrote and graded homework, quizzes, and exams. Fully responsible for course content and material.

Math 36/QSS 36 - Mathematical Modeling in the Social Sciences *Fall 2017*
Data driven course exploring mathematical models and analysis techniques

UNSG 100 - Graduate Ethics Seminar *Fall 2017, 2016, 2015*
Seminar on ethical and professional issues in science and mathematics

Math 8 - Calculus of Functions of one and Several Variables *Winter 2017*
Second term calculus course covering infinite series, vector functions, and partial derivatives

Math 1 - Calculus with Algebra *Fall 2015*
Introductory calculus course with an emphasis on limits and differentiation

Teaching Assistant *September 2013 - June 2015*

· Held tutorial sessions three times per week. Graded quizzes and exams. Designed computing assignments and tutorials for linear algebra.

Math 23 - Differential Equations *Spring 2015*
Math 22 - Linear Algebra with Applications *Fall 2014*
Math 3 - Calculus *Winter 2014*
Math 12 - Calculus Plus *Fall 2013*

Washington State University Pullman, WA
Undergraduate Teaching Assistant *August 2012 - May 2013*

· Held tutorial sessions and graded homework and exams. Supervised a mathematical computing lab.

Math 320 - Modern Algebra *Spring 2013*
Math 330 - Secondary Teaching *Spring 2013*
Math 315 - Differential Equations *Fall 2012*

EDUCATIONAL OUTREACH

UW Data Science for Social Good Seattle, WA
Project Lead *Summer 2021*

· Designed and supervised a research project for four data science fellows on applications of ensemble methods to initial districting plan evaluation. The fellows gave a public presentation of their work and developed a user guide "Applying GerryChain: A Users Guide for Redistricting Problems" with accompanying website, case studies, and code examples to demonstrate good modeling practives and support other researchers working on these problems.

New Hampshire State Math Team Manchester, NH
Math Team Coach *Fall 2018–2020*

· Designed practice problems and preparatory exercises for the AMC exams, ARML, MMATH, and HMMT. Led monthly problem solving sessions and group activities.

LaTeX Workshops Hanover, NH
Organizer *Fall 2016–May 2018*

· Designed and presented a series of eleven one hour–long and two three hour–long workshops on mathematical typesetting in LaTeX with D. Freund and K. Harding. Resources and lesson plans

Crossroads Academy Math Team Lyme, NH
Math Team Coach *September 2015 – May 2018*

· Designed practice problems and preparatory exercises for the AMC exams, MathCounts, and MathLeague. Led weekly problem solving sessions and group activities. During 2015–17, the Crossroads team twice won the Chapter and State MathCounts and MathLeague competitions and placed first in Northern New England on the AMC-8.

New Hampshire State MathCounts Team Lyme, NH
Math Team Coach *March 2017 – May 2017*

· Designed practice problems and preparatory exercises for the national MathCounts exam. Led biweekly problem solving sessions and group activities. Students competed in the national competition in Orlando, Florida.

Johns Hopkins Center for Talented Youth Science and Technology Series Hanover, NH
Workshop Leader

· Developed and presented hour–long workshops for high school students.

Modern Cryptography (with D. Freund)	*October 2014*
Forensic Accounting	*April 2016*
Binary and Barcodes (with D. Freund)	*April 2017*

Dartmouth College Exploring Mathematics Camp Hanover, NH
Co-Instructor

· Organized and presented week long math camps for high school students.

Mathematics of Games	*August 2015*
Cryptography	*July 2015*

RESEARCH PRESENTATIONS

Talks

1. Analysis Seminar, Pullman, WA *December 2021*
   Introduction to Graphons I and II
2. PPPA Research Colloquium, Pullman, WA *November 2021*
   Computational Methods for Evaluating Districting Plans
3. INFORMS Annual Meeting, Zoom *October 2021*
   Algorithms And Analysis For Centered Redistricting Plans
4. WSU Math Club, Pullman, WA *October 2021*
   Graphs, Geometry, and Gerrymandering
5. Civic Hackathon, Madison, WI *September 2021*
   Introduction to Computational Redistricting
6. Harvard Redistricting Algorithms, Law, and Policy Cambridge, MA *September 2021*
   Technical State of the Art for Computational Redistricting
7. ASA Joint Statistical Meeting, Zoom *August 2021*
   Computational Methods for Assessing Political Redistricting Reforms
8. New Mexico Redistricting Commission, Santa Fe, NM *July 2021*
   Markov chain ensemble metrics for evaluation of redistricting plans
9. Colorado College Summer Program, Colorado Springs, CO *June 2021*
   Computational Redistricting Analysis
10. WSU Seminar in Statistics, Pullman, WA *April 2021*
    Ensemble Analysis for the 2020 Redistricting Cycle
11. Princeton Gerrymandering Project, Princeton, NJ *March 2021*
    Computational Redistricting in 2021
12. Combinatorics, Linear Algebra, and Number Theory, WSU, Pullman, WA *March 2021*
    Gerry-Matchings and Pair-y-Mandering
13. JMM 2021, Washington DC *January 2021*
    Short Course: Mathematical and Computational Methods for Complex Social Systems
14. INFORMS Special Session on Fairness in Operations Research, Baltimore, MD *November 2020*
    Computational Methods For Assessing Districting Plans
15. WSU Seminar in Statistics, Pullman, WA *November 2020*
    Statistical and Computational Methods for Assessing Political Redistricting
16. Pi MU Epsilon Lecture, St. Michael's College, Colchester, VT *October 2020*
    Graphs, Geometry, and Gerrymandering
17. ADSA Annual Meeting, Zoom *October 2020*
    Geospatial Data for Political Redistricting Analysis

18. Common Experience Lecture, Texas State University, San Marcos, TX *October 2020*
Graphs, Geometry, and Gerrymandering
19. Combinatorics, Linear Algebra, and Number Theory, WSU, Pullman, WA *September 2020*
Representations of $SL_2(\mathbb{Z}/p^n\mathbb{Z})$ and spectral properties of Bethe trees
20. CGAD-GTOpt Seminar, Washington State University, Pullman, WA, *July 2020*
Geometric and Optimization Problems Motivated by Political Redistricting
21. Redistricting Conference 2020, Duke University, Durham, NC, *March 2020*
Multiresolution Redistricting Algorithms
22. Math Department Colloquium, College of Charleston, Charleston, SC. *February 2020*
Geospatial Data, Markov Chains, and Political Redistricting
23. Math Department Colloquium, Washington State University, Pullman, WA. *January 2020*
Geospatial Data, Markov Chains, and Political Redistricting
24. JMM 2020, Denver, CO. *January 2020*
Markov chains for sampling connected graph partitions
25. Math Department Colloquium, Pacific University, Forest Grove, OR. *January 2020*
The Mathematics of Nested Legislative Districts
26. MIT Graphics Annual Retreat, North Falmouth, MA. *October 2019*
Connected Graph Partitions and Political Districting
27. Topology, Geometry and Data Seminar, Ohio State University, Columbus, OH. *September 2019*
Hardness results for sampling connected graph partitions with applications to redistricting
28. Math Department Colloquium, Denison University, Granville, OH. *September 2019*
Graphs, Geometry, and Gerrymandering
29. Math Department Colloquium, Oberlin College, Oberlin, OH. *September 2019*
Graphs, Geometry, and Gerrymandering
30. Math Department Colloquium, College of Wooster, Wooster, OH. *September 2019*
Graphs, Geometry, and Gerrymandering
31. Math Monday Colloquium, Kenyon College, Gambier, OH. *September 2019*
Graphs, Geometry, and Gerrymandering
32. Applied Math Seminar, University of Massachusetts Lowell, Lowell, MA. *September 2019*
Hardness results for sampling connected graph partitions with applications to redistricting
33. Math Department Colloquium, Yale University, New Haven, CT. *August 2019*
Mathematical Challenges in Neutral Redistricting
34. Voting Rights Data Institute Seminar, Cambridge, MA. *June 2019*
A Friendly Introduction to Discrete MCMC
35. Voting Rights Data Institute Seminar, Cambridge, MA. *June 2019*
Graphs and Networks: Discrete Approaches to Redistricting
36. Math Department Colloquium, Dartmouth College, Hanover, NH. *April 2019*
Total Variation Isoperimetric Profiles and Political Redistricting
37. ACM Seminar, Dartmouth College, Hanover, NH. *April 2019*
Hardness results for sampling connected graph partitions with applications to redistricting
38. Unrig Summit Masterclass, Nashville, TN. *March 2019*
Legal and Math Deep Dive: Gerrymandering and Redistricting
39. MIT Graphics Seminar, Cambridge, MA. *March 2019*
Computational Challenges in Neutral Redistricting
40. JMM 2019, Baltimore, MD. *January 2019*
Matched Products and Stirling Numbers of Graphs
41. Societal Concerns in Algorithsm and Data Analysis, Weizmann Institute of Science, Rehovot, Israel. *December 2018*
Computational Problems in Neutral Redistricting
42. Math and Law of Redistricting, Radcliffe Institute, Cambridge, MA. *December 2018*
GerryChain and MCMC tutorials
43. Math Colloquium, Tufts University, Medford, MA. *November 2018*
Matched Products and Stirling Numbers of Graphs

44. MIT Graphics Annual Retreat, Dedham, MA. *October 2018*
Mathematical Challenges in Neutral Redistricting
45. SAMSI Workshop on Quantitative Redistricting, Duke University, Durham, NC. *October 2018*
Compactness Profiles and Reversible Sampling Methods for Plane and Graph Partitions
46. Election Teach–in, SMFA, Boston, MA. *October 2018*
Computational Challenges in Political Redistricting
47. STS Seminar, Tufts University, Cambridge, MA. *September 2018*
Mathematical Modeling of Social Connections
48. Voting Rights Data Institute Seminar, Cambridge, MA. *June 2018*
Introduction to Monte Carlo Methods
49. Mathematics Colloquium, University of Central Florida, Orlando, FL. *February 2018*
Dynamical Models for Multiplex Data
50. Mathematics Colloquium GVSU, Grand Valley, MI. *February 2018*
Random Walk Null Models for Time Series
51. Omidyar Fellowship Presentation, Santa Fe, NM. *January 2018*
Mathematical Embeddings of Complex Systems
52. Mathematics Colloquium at University of San Fransisco, San Fransisco, CA. *January 2018*
Dynamical Models for Multiplex Data
53. Mathematics Colloquium at Providence College, Providence, RI. *January 2018*
Dynamical Models for Multiplex Data
54. JMM, San Diego, CA. *January 2018*
Dynamical Modeling for Multiplex Networks
55. International Complex Networks Conference Lyon, France. *December 2017*
Multiplex Dynamics on the World Trade Web
56. Physics Colloquium at Washington University, St. Louis, MO. *October 2017*
Spectral Clustering on Multiplex Data
57. SIAM Annual Meeting, Pittsburgh, PA. *July 2017*
Permutation Complexity Measures for Time Series
58. Applied and Computational Mathematics Seminar, Hanover NH. *November 2016*
Random Dot Product Models for Weighted Networks
59. Inference on Networks: Algorithms, Phase Transitions, New Models and New Data, Santa Fe, NM. *December 2015*
Dynamically Motivated Models for Multiplex Networks
60. Applied Math Days, Troy, NY. *April 2015*
Multiplex Structure on the World Trade Web
61. Graduate Student Combinatorics Conference, Lexington, KY. *March 2015*
Total Dynamics on Multiplex Networks
62. Sixteenth International Fibonacci Conference, Rochester, NY. *July 2014*
Enumerating Distinct Chessboard Tilings
63. Dartmouth Graduate Student Seminar, Hanover, NH. *(Quarterly) 2013 - 2018*
Various Topics
64. Joint Mathematics Meeting, San Diego, CA. *January 2013*
Counting Combinatorial Rearrangements, Tilings with Squares and Symmetric Tilings
65. West Coast Number Theory Conference, Asilomar, CA. *December 2012*
Generalized Lucas Bases
66. Young Mathematician's Conference, Columbus, OH. *July 2012*
Combinatorial Rearrangements on Arbitrary Graphs
67. Northwest Undergraduate Mathematics Symposium, Portland, OR. *March 2012*
Combinatorial Rearrangements on Arbitrary Graphs
68. WSU Graduate Seminar on Combinatorial Geometry, Pullman, WA. *(Quarterly) 2012-2013*
Various Topics

Posters

1. SIAM Workshop on Network Science, Boston, MA. *July 2016*
   Generalized Random Dot Product Models For Multigraphs
2. Dartmouth Graduate Student Poster Session, Hanover, NH. *April 2016*
   Generalized Dot Product Models for Weighted Networks
3. Dartmouth Graduate Student Poster Session, Hanover, NH. *April 2015*
   Multiplex Structures in the World Trade Web
4. WSU SURCA, Pullman, WA. *March 2013*
   Empirical Analysis of Space Filling Curves for Scientific Computing Applications
5. WSU SURCA, Pullman, WA. *April 2012*
   Combinatorial Rearrangements, Restricted Permutations, and Matrix Permanents

HONORS AND AWARDS

- Dartmouth Hannah Croasdale Award *2018*
  College-wide award for the graduating Ph.D. student that best exemplifies the qualities of a scholar.
- Dartmouth Graduate Student Teaching Award *2017*
  College-wide award for the graduate student who best exemplifies the qualities of a college educator.
- Dartmouth Graduate Fellowship *2014–18*
- NSF Graduate Research Fellowship: Honorable Mention *2014, 2015*
- Dartmouth GAANN Fellowship *2013*
- WSU Morris Knebelman Outstanding Senior Award *2013*
- WSU Department of Mathematics Outstanding Senior *2013*
- WSU Emeritus Society Award in the Physical Sciences *2013*
- WSU J. Russell and Mildred H. Vatnsdal Memorial Scholarship *2013*
- WSU SURCA Crimson Award: Computer Science and Mathematics *2012, 2013*
- WSU Auvil Undergraduate Scholars Fellowship *2012*
- WSU Leonard B. Kirschner Scholarship *2012*
- WSU College of Sciences Undergraduate Research Grant *2012*
- Norma C. Fuentes and Gary M Kirk Award for Excellence in Undergraduate Research *2012*

PROFESSIONAL SERVICE

Peer Reviewer

- Election Law Journal
- Transactions on Signal and Information Processing over Networks
- Multiscale Modeling and Simulation: A SIAM Interdisciplinary Journal
- International Conference on Learning Representations (ICLR)
- International Conference on Artificial Intelligence and Statistics (AISTATS)
- AAAI Conference on Artificial Intelligence (AAAI)
- International Conference on Machine Learning (ICML)
- ACM-SIAM Symposium on Discrete Algorithms (SODA)
- Neural Information Processing Systems (NeurIPS)
- Transactions on Pattern Analysis and Machine Intelligence (TPAMI)
- Chaos: An Interdisciplinary Journal of Nonlinear Science
- Involve: A Journal of Mathematics
- Entropy
- MATCH Communications in Mathematical and in Computer Chemistry

Appendix B

Data and Materials

This appendix describes the data and materials that I relied on while performing this analysis and crafting this report.

B.i Data

The primary data sources and document repositories for the analysis in this report are publicly available, including the underlying geospatial data. I made use of data and documents from the following sources:

- Wisconsin-specific geospatial data and annotations (https://legis.wisconsin.gov/ltsb/gis/data/)
- Geospatial and population data from the US Census (https://www.census.gov/geographies/mapping-files/time-series/geo/tiger-line-file.html)
- Filings in this case (https://www.wicourts.gov/courts/supreme/origact/2021ap1450.htm)
  - Briefs, reports, maps, and expert materials submitted by the parties on December 15, 2021 including material produced by parties pursuant to agreement on discovery
  - Supreme Court's November 30 order
- Election and CVAP data prepared by counsel that I merged with the LTSB Ward data

B.ii Computational Libraries

The bulk of the computational work for this report was carried out using standard libraries of the Python programming language. I also used the following more specialized packages for specific computational tasks.

- [MAUP] github.com/mggg/maup
- [Gerrychain] github.com/mggg/gerrychain
- [Geocompactness] github.com/leehach/geocompactness