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IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the 2021 Redistricting Cases	)	Supreme Court No.: **S-18332**

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

STATE'S RESPONSE TO PETITIONS FOR REVIEW

The State of Alaska is a party to this consolidated case because it was named as a defendant in complaints below, but it did not take a position on the redistricting maps in the trial court and does not do so here. Instead, the State simply asks the Court to render a decision promptly and craft its opinion in a manner that recognizes the uniqueness of the redistricting process and minimizes disruptions to other areas of law.

I. ARGUMENT

A. The trial court's legal standard for incorporating public comment in drawing district maps is specific to the redistricting context.

The trial court concluded that the redistricting board "must make a good-faith effort to consider and incorporate the clear weight of public comment, unless state or federal law requires otherwise," and reviewed the board's decisions for compliance with this rule. [FFCL[1] 143] Although agencies and boards should always consider public comments they receive, the trial court's standard of review appears more stringent than those that Alaska courts normally apply when examining administrative

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[1] The State cites only the trial court's Findings of Fact and Conclusions of Law (FFCL) from the record below, referring to it by page number in the decision.

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decisions.[2] The State takes no position on whether this is the correct legal standard to apply here, but emphasizes that it is specific to the redistricting context and does not extend to other bodies that conduct public hearings or receive public comment. This Court should make this distinction clear, to avoid unintended consequences for state agencies and boards that are meaningfully different from the redistricting board.

The trial court "adopt[ed] a blended approach" when considering the parties' procedural challenges, mixing concepts of constitutional due process and administrative law with the "public hearings" requirement of Article VI, Section 10. [FFCL 131] But the trial court's ultimate legal standard for the redistricting board should not be interpreted as a general rule of due process or administrative law, because it relies heavily on at least four considerations that are specific to redistricting:

First, the trial court observed that redistricting board members are not meant to be "appointed for their substantive knowledge." [FFCL 133] As the court put it, "redistricting is not a science and Board appointees are not experts." [FFCL 138] The court opined that "the whole purpose of the Board is to elicit and incorporate public comment into the final plan." [FFCL 138] This makes the redistricting board different from the many public entities that make scientific and technical judgments based on

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[2] *See Kennedy v. Anchorage Police & Fire Ret. Sys*., 485 P.3d 1030, 1034 n.10 (Alaska 2021) ("We use a four-part standard for appeals of administrative rulings: '(1) the "substantial evidence test" for questions of fact, (2) the "reasonable basis test" for questions of law involving agency expertise, (3) the "substitution of judgment test" for questions of law involving no agency expertise, and (4) the "reasonable and not arbitrary test" for review of administrative regulations.'") (quoting *Oels v. Anchorage Police Dep't Emp.'s Ass'n*, 279 P.3d 589, 595 (Alaska 2012)).

their expertise. Agency heads and members of other boards are often chosen for their knowledge and experience so that they can apply their own judgment—not simply serve as conduits for public opinion. The Court's decisions recognize that such decision-makers deserve substantial deference from the Court when acting on specialized matters.[3] They should not be required to bend to pressure from commenting members of the general public who lack their expert perspective.

Second, the trial court observed that the redistricting board is not politically accountable to voters in the way that an administrative agency is. [FFCL 140-41] After the most recent constitutional changes, the redistricting board is "no longer directly answerable to any elected official," so "there is nobody for the people to hold accountable for a skewed redistricting process." [FFCL 141] The same is not true of administrative agencies and boards that are politically accountable through appointees who are often chosen by (and removable by) the governor. As the trial court observed, in such other contexts the "ballot box" provides a remedy for unpopular decisions, but

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[3] *See, e.g., Alaska Police Standards Council v. Parcell*, 348 P.3d 882, 888 (Alaska 2015) (deferring to the Alaska Police Standards Council's interpretation and application of the regulations on police officer moral character); *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986) (deferring to the Department of Community and Regional Affairs' determination of municipal population for state revenue-sharing); *Powercorp Alaska, LLC v. State, Alaska Indus. Dev. & Exp. Auth., Alaska Energy Auth*., 171 P.3d 159, 164 (Alaska 2007) (deferring to the Alaska Energy Authority's bid specification for a switchgear system); *Fantasies on 5th Ave., LLC v. Alcoholic Beverage Control Bd*., 446 P.3d 360, 367 (Alaska 2019) (applying deferential standards of review to a decision of the Alcoholic Beverage Control Board not to renew a liquor license); *Native Vill. of Elim v. State*, 990 P.2d 1, 11 (Alaska 1999) (giving "considerable deference" to the Board of Fisheries' identification of fish stocks, noting that the issues were "clouded by scientific uncertainty").

"[t]hat remedy is unavailable here." [FFCL 141] Because the trial court concluded that the primary "check" on the redistricting board's power is the "'check of public opinion' in the form of mandatory 'public hearings,'" the court tried to enhance that "check." [FFCL 140-42] But no such enhanced check is warranted when an agency is politically accountable through normal channels. Nor would it be appropriate in that context, because it would elevate the role of public commenters and the judicial branch at the expense of politically accountable executive branch actors, undermining the "strong executive"[4] that the constitutional delegates intended.

Third, the trial court looked to historical redistricting cases for insight into what kind of public hearing process the drafters of Article VI, Section 10 envisioned. [FFCL 132-36] Based on that history, the court concluded that the drafters intended "that public testimony favoring one map over another be given greater weight in the redistricting process." [FFCL 136] But none of this redistricting history and drafting intent is relevant to the many other entities that take public comment in performing their different functions under different laws such as the Administrative Procedure Act (APA). The history of Article VI, Section 10 provides no insight into the requirements of the APA and other laws governing agency action.

Fourth, in crafting its legal standard, the trial court considered how best to advance the "policy goals of Article VI, Section 10" to reduce partisanship in

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[4] *Bradner v. Hammond*, 553 P.2d 1, 3 (Alaska 1976) ("There is no dispute that our constitution was designed with a strong executive in mind.").

redistricting. [FFCL 142-43] These policy goals—and the trial court's ideas about how best to advance them—are also specific to the redistricting context.

In addition to these four redistricting-specific considerations, the trial court also considered the "hard look" standard that this Court applies to natural resource decisions[5] and referenced in a prior redistricting decision,[6] which has its roots in federal administrative law.[7] [FFCL 136-38] But although taking some inspiration from these other areas of law may be appropriate when crafting redistricting law, the inspiration should not go both ways. In other words, the procedural standard for redistricting should not be viewed as an elaboration on the "hard look" or APA review standards, such that it would then apply in other contexts. Indeed, the trial court opined that even its interpretation of federal administrative law—one the State does not necessarily agree with—might not be stringent enough for the redistricting context. [FFCL 138 ("[F]ederal case law applying the 'hard look' standard of review to notice-and-comment agency rulemaking may not go far enough.")] This makes clear that the

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5 *See, e.g., Sagoonick v. State*, --- P.3d ----, 2022 WL 262268, at *7 (Alaska 2022) ("[W]e have used the 'hard look' standard when reviewing agency decisions on resource uses.").

6 *See In re 2001 Redistricting Cases*, 44 P.3d 141, 144 n.5 (Alaska 2002).

7 *See Hammond v. N. Slope Borough*, 645 P.2d 750, 759 (Alaska 1982) (quoting federal law for the proposition that a "court cannot substitute its judgment as to environmental consequences, but should only ensure that the agency has taken a 'hard look'"); *Se. Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983) (introducing the "hard look" standard in a quote from a law review article on federal environmental law).

trial court did not intend its ultimate legal standard to be a generally applicable rule of administrative law, but rather a rule specific to redistricting.

To avoid any confusion or unintended consequences, if the Court adopts a version of the trial court's standard of review for the board's decisions, the Court should make clear that this standard is crafted specifically for the redistricting process, informed by the special considerations discussed above.

B. Waiver of the attorney-client privilege is not an appropriate remedy for a violation of the Open Meetings Act.

Similarly, the State has an interest in how the Court interprets the interplay between the Open Meetings Act and the attorney-client privilege because the Act applies to many public entities beyond the redistricting board. If the Court touches on these issues, it should reaffirm that an entity subject to the Open Meetings Act can validly assert the attorney-client privilege, and it should reject the trial court's suggestion that waiver of the privilege would be "an appropriate remedy" for a violation of the Act. [FFCL 168-69]

To start with, the Open Meetings Act is about public access to *meetings*, not written documents.[8] The trial court at times blurred this distinction, but this Court should not. When the question is whether a meeting should be public, the Open Meetings Act provides the answer. But when the question is whether a *document* should be public or discoverable in litigation, the answer must be found in the Public Records Act or the court rules, not the Open Meetings Act. The confidentiality of a

[8] *See* AS 44.62.310-.19.

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document being discussed at a meeting can be a reason for the meeting not to be public under the Open Meetings Act.[9] But the Act's sole guidance about disclosure of documents is limited to ensuring that public access to meetings by teleconference is roughly equivalent to attendance in person.[10] The Open Meetings Act does not address claims of privilege or confidentiality regarding documents considered at meetings, much less the fate of documents not considered at meetings. Those are questions for the Public Records Act and the court rules.[11] This Court has recognized that the Open Meetings Act and the Public Records Act are distinct by declining to automatically incorporate standards under one act into decisions under the other.[12]

When it comes to meetings, the Court has held that the Open Meetings Act does not prevent an entity from meeting privately to receive confidential legal advice from its attorney. In *Cool Homes, Inc. v. Fairbanks North Star Borough*, the Court approved

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9 *See* AS 44.62.310(c)(4) (providing that "matters involving consideration of government records that by law are not subject to public disclosure" may be considered in an executive session).

10 AS 44.62.310(a) ("Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable.").

11 *See* AS 47.25.100-.295 (Public Records Act); AS 47.25.220(3) (definition of "public records"); AK R. Civ. P. 34 (production of documents in discovery) & 26(b)(5) (claims of privilege in discovery); *see also Windel v. Matanuska-Susitna Borough*, 496 P.3d 392, 401 (Alaska 2021) ("Documents covered by the [attorney-client] privilege are excepted from the Alaska Public Records Act.").

12 *See Griswold v. Homer City Council*, 428 P.3d 180, 188 n.35 (Alaska 2018) (declining to decide whether a decision about the Open Meetings Act applied to a dispute about the Public Records Act); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 590 (Alaska 1990) (concluding that whether a meeting could be closed under the Open Meetings Act did not dictate whether documents discussed at the meeting could be withheld from disclosure under the Public Records Act).

of this practice in appropriate circumstances.[13] Although there must be a "recognized purpose in keeping the meeting confidential"—not a mere "pretext for secret consultations whose revelation will not injure the public interest"—the Court noted several policy reasons for allowing public entities to meet privately with their attorneys: to avoid disadvantaging them in litigation or impairing their functioning, and to allow "candid discussion of the facts and litigation strategies."[14]

As this discussion in *Cool Homes* recognizes, the general policy behind the attorney-client privilege—which is "to promote the freedom of consultation of legal advisors by clients"[15]—applies to public clients as well as private clients. If a public entity cannot speak with its attorney outside the public view, it will not benefit from the same quality of clear and candid legal advice that a private client can obtain. As a decision quoted in *Cool Homes* put it, "[i]f client and counsel must confer in public view and hearing, both privilege and policy are stripped of value."[16] Not only would any client hesitate to raise serious questions or disclose worrisome facts to its attorney

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13 860 P.2d 1248, 1262 (Alaska 1993).

14 *Id*. at 1261-62.

15 *See Matter of Mendel*, 897 P.2d 68, 73 (Alaska 1995) (quoting *United Services Automobile Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974)); *see also Houston v. State*, 602 P.2d 784, 790 (Alaska 1979) ("The attorney-client privilege . . . rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously. . . ." (quoting United States ex rel. Edney v. Smith, 425 F.Supp. 1038, 1046 (E.D.N.Y. 1976))).

16 *Cool Homes*, 860 P.2d at 1261 n.22 (quoting *The Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal.App.2d 41, 53–54 (Cal. App. 1968) (superseded by statute)).

in public, but any attorney would hesitate to frankly detail the legal weaknesses in her client's ideas and positions if she knew her advice would be public and her own words could be turned against her client later.[17]

If public entities subject to the Open Meetings Act cannot meet with their attorneys in private, such entities will likely seek legal advice less frequently, depriving them of vital guidance they may need. Or, to obtain the benefits of confidential legal advice, an entity's members might contact the attorney individually to avoid convening a "meeting" that would be subject to the Act,[18] leading to less consistent and efficient legal services to the government but no greater transparency.

Cool Homes thus correctly recognizes that the Open Meetings Act and the attorney-client privilege "can coexist" such that an entity subject to the Act can meet privately with its attorney to receive confidential legal advice.[19] This is not an all-purpose workaround that an entity can use to avoid the Open Meetings Act just by having an attorney in the room when it meets. Instead, a closed meeting should be limited to the kind of legal consultation the attorney-client privilege is designed to protect, like "candid discussion of the facts and litigation strategies."[20]

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17 The attorney would also face ethical issues. *See, e.g.*, AK R. of Prof. Conduct 2.1 (mandating that an attorney "render candid advice").

18 *See* AS 44.62.310(h)(2) (defining "meeting" to require more than one member of the entity to be present).

19 *Cool Homes*, 860 P.2d at 1261.

20 *Id*. at 1262.

Cool Homes addressed only whether a *meeting* with an attorney should have been public, which is properly an Open Meetings Act question. The Court did not consider—because no such question was before it—whether any *documents* reflecting communications with the attorney were discoverable in litigation or subject to disclosure under the Public Records Act.

Nor did the Court in *Cool Homes* suggest that waiver of the attorney-client privilege—whether in the context of document production or questions to witnesses—would be an appropriate remedy for a meeting with an attorney that violated the Open Meetings Act. The Court in *Cool Homes* found no violation, so it had no occasion to consider remedies. The Court noted only, correctly, that "[t]he remedy provided by the [Open Meetings] Act is to void all action taken contrary to the Act."[21]

Indeed, voiding an action (thus requiring the entity to reconsider the matter after the proper public process) is the only remedy the Open Meetings Act provides for an improperly held meeting.[22] The Court's decisions on remedies focus on restoring—

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21 *Id*. at 1260.

22 AS 44.62.310(f).

to the extent possible—the status quo that existed before the improper meeting.[23] The goal is "that non-conforming procedures be righted as near to the point of derailment as possible, and that the governmental process be allowed to resume from there."[24] If this is not possible, simple declaratory relief can still make "the nature and circumstances of violations come to light."[25]

The legislature added more detail to the remedy section of the Open Meetings Act in 1994,[26] giving the courts a list of things to consider in determining whether voiding an action would cause more harm than good.[27] But the legislature has not added additional remedies to the statute. The *expressio unius* canon supports the

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23 *See Revelle v. Marston*, 898 P.2d 917, 924 (Alaska 1995) ("Ideally, the goal of the Open Meetings Act is to place [the plaintiff] in the position he would have been in had the violation never occurred."); *Alaska Cmty. Colleges' Fed'n of Teachers, Loc. No. 2404 v. Univ. of Alaska (ACCFT)*, 677 P.2d 886, 890-93 (Alaska 1984) (discussing how a new decision could be rendered after reconsideration, and opining that "approximation of the status quo at the time of the original decision is desirable"); *Brookwood Area Homeowners Ass'n, Inc. v. Municipality of Anchorage*, 702 P.2d 1317, 1324–25 (Alaska 1985) (outlining "the procedure that a trial court should follow to decide whether a subsequent public meeting validated a governmental decision made at a meeting held in violation of the [Open Meetings Act]").

24 *ACCFT*, 677 P.2d at 891.

25 *See Alaska Cmty. Colleges' Fed'n of Teachers*, 677 P.2d at 892.

26 *See* SLA 1994, ch. 69, § 7, 1994 Alaska Laws Ch. 69 (H.B. 254) (repealing and reenacting AS 44.62.310(f) in its current form).

27 AS 44.62.310(f) (providing that "[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," and listing factors to be considered).

conclusion that the legislature intended the remedy for an Open Meetings Act violation to be the one it listed in the statute—voiding the action—and not others.[28]

Thus, nothing in the text of the Open Meetings Act nor the Court's decisions suggests that a proper remedy for a violation is to try to retroactively "open" an improper executive session by exposing confidential attorney-client communications, whether by ordering responses to questions about the content of confidential discussions or by requiring production of confidential documents. The attorney-client privilege can only be overcome in special circumstances, such as where "the party seeking to discover communications between the attorney and the client 'present[s] prima facie evidence of the perpetration of a fraud or crime in the attorney-client relationship.'"[29] An Open Meetings Act violation does not rise to this level, nor does it constitute any other recognized exception[30] or circumstance where the privilege is

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28 *Basey v. Dep't of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations*, 462 P.3d 529, 536 (Alaska 2020) ("The *expressio unius est exclusio alterius* canon of statutory construction 'establishes the inference that, where certain things are designated in a statute, "all omissions should be understood as exclusions." The maxim . . . is essentially an application of common sense and logic.'") (quoting *Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 964 n.34 (Alaska 2018)) (alterations in original).

29 *Munn v. Bristol Bay Hous. Auth*., 777 P.2d 188, 195 (Alaska 1989) (quoting *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 32 (Alaska 1974)).

30 *See* AK R. Evidence 503(d) (listing exceptions to the attorney-client privilege).

waived.[31] And as the trial court correctly observed, to "throw open the doors" and expose communications that a client expected to remain confidential would be "extraordinary" and "the antithesis of the policy underlying the attorney-client privilege." [FFCL 168] Instead, to remedy Open Meetings Act violations, courts should simply employ the remedy provided in the Act.[32]

Even if the Court were to look beyond the Open Meetings Act for remedies—which it should not—entirely stripping a public entity of the attorney-client privilege would be a drastic and disproportionate response to a violation. Instead, any waiver of the privilege should be tailored to encompass only the subset of attorney-client discussions that should have been held in open session, not everything discussed in the closed session. For instance, if an attorney gave "general legal advice" in a closed session—advice *Cool Homes* suggests should be given in open session[33]—any waiver of the privilege should not extend beyond that general legal advice.

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31 *See, e.g., Gefre v. Davis Wright Tremaine, LLP*, 306 P.3d 1264, 1280 (Alaska 2013) (holding that a client waives the attorney-client privilege if "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.") (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581(E.D. Wash. 1975)); AK R. Evidence 510 (providing that a privilege can be waived by voluntary disclosure).

32 AS 44.62.310(f).

33 *Cool Homes*, 860 P.2d at 1262. Applying this vague, less protective attorney-client privilege standard in the context of the Open Meetings Act uniquely disadvantages the State in litigation and raises questions about the operation of subject-matter waiver. This will discourage state agencies from seeking legal advice, contrary to the purpose of the attorney-client privilege.

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In contemplating Open Meetings Act remedies, the trial court found persuasive a redistricting decision from Michigan, *Detroit News, Inc. v. Independent Citizens Redistricting Commission*. [FFCL 167-68] In that case, the Michigan Supreme Court ordered that state's redistricting board to disclose a recording of a closed-session meeting with its attorney that should have been public and some attorney memoranda that constituted "supporting material" for the redistricting plans.[34] But *Detroit News* was not about an open meetings statute—it was based on a "close analysis" of Michigan's constitutional provisions about redistricting.[35] Neither Alaska's Open Meetings Act nor its constitutional provisions on redistricting employ broad language like that of the Michigan Constitution, which says "[t]he commission shall conduct *all of its business* at open meetings"[36] and "shall publish . . . *any data and supporting materials* used to develop the [redistricting] plans."[37] And the court's reasoning was specific to that state's constitutional redistricting process, so even if this Court were to adopt it, it should be limited to that context. The Court should decline the trial court's suggestion to graft the Michigan court's reasoning into Alaska's Open Meetings Act such that it would apply to "other public entity litigation." [FFCL 169]

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34 2021 WL 6058031, at *14 (Mich. 2021).

35 *Id*. at *5.

36 Mich. Const. art. 4, § 6(10) (emphasis added).

37 Mich. Const. art. 4, § 6(9) (emphasis added).

II. CONCLUSION

The State does not take a position on the legality of the redistricting maps or the outcome of these petitions for review, but respectfully asks the Court to consider the above points in crafting its opinion. The State also emphasizes that the Division of Elections (and the candidates seeking election) need to know as soon as possible what redistricting maps will be used in the upcoming election.

Dated: March 10, 2022

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CERTIFICATE OF SERVICE AND TYPEFACE

I certify that on March 10, 2022, true and correct copies of the **States Response to Petitions for Review** and this **Certificate of Service** were served on the following via email:

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I further certify, pursuant to App. R. 513.5, that the aforementioned document was prepared in 13 point proportionately spaced Times New Roman typeface.

/s/ Jamie Dodd 03/10/2022
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