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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the  
2021 REDISTRICTING PLAN. )  
Case No. 3AN-21-08869CI )  
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**CONDITIONAL MOTION TO STRIKE PARAGRAPHS 34 AND 35 OF  
SUPPLEMENTAL AFFIDAVIT OF PETER TORKELSON**

At 3:00 p.m. on January 20, 2022 — the day before the East Anchorage Plaintiffs are scheduled to begin their trial in the above-captioned case — the Alaska Redistricting Board (the “Board”) filed a supplemental affidavit providing additional direct testimony from the Board’s executive director, Peter Torkelson. Mr. Torkelson’s supplemental affidavit “is meant to address[] the pre-filed expert testimony of Kimball Brace offered by the Valdez Plaintiffs and Skagway Plaintiffs ... and the pre-filed expert testimony of Chase Hensel offered by the East Anchorage Plaintiffs.”<sup>1</sup> The supplemental testimony offered

<sup>1</sup> Affidavit of Peter Torkelson (Supplemental Direct Testimony) at ¶ 1.

by the Board to address Dr. Hensel's testimony is set forth at paragraphs 34 and 35 of Mr. Torkelson's supplemental affidavit, and purports to establish mathematically with two unidentified screenshots of maps and data tables that minority voters in East Anchorage are not disadvantaged by the Board's senate pairings. Because Mr. Torkelson's supplemental testimony is untimely, prejudicial, lacks foundation, and is being improperly offered as expert testimony, it must be stricken.<sup>2</sup>

The Board's witness list described the scope of Mr. Torkelson's anticipated testimony as follows:

Mr. Torkelson was the Executive Director of the Board during the 2021 redistricting process and remains the Executive Director now. Mr. Torkelson will testify to the practices and procedures of the Board during the 2021 redistricting process, as well as the 2021 redistricting process itself.<sup>3</sup>

The Board did not notice Mr. Torkelson as an expert witness, and in fact indicated on multiple occasions, including on the record, that it would not be calling any expert witnesses, despite retaining Bruce Adelson, Dr. Jonathan Katz, and Dr. Douglas Johnson as VRA experts early in its 2021 redistricting process.

Mr. Torkelson's first direct testimony affidavit was submitted on January 12, 2022. The affidavit was 44 pages — 74 paragraphs — long (the longest affidavit filed by the Board), and detailed exhaustively Mr. Torkelson's personal experiences, observations, and impressions relating to the 2021 redistricting process consistent with the description contained in the Board's witness list. The affidavit did not attach any exhibits. With the

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<sup>2</sup> Notwithstanding this Motion to Strike, the East Anchorage Plaintiffs object to Paragraphs 34 and 35 of the Supplemental Affidavit of Peter Torkelson on grounds of relevance, lack of foundation, improper expert testimony, vagueness, and prejudice.

<sup>3</sup> Alaska Redistricting Board's Preliminary Witness List at 3.

benefit of this lay witness affidavit, all Plaintiffs were able to depose Mr. Torkelson on January 15, 2022 — well in advance of trial — both as to the contents of the affidavit and to any other ancillary matters that were appropriate. Yet, now — fewer than 18 hours before trial is set to begin — the Board files Mr. Torkelson’s supplemental affidavit setting out expert opinions far beyond the scope of those offered in his initial affidavit. None of this Court’s pretrial orders contemplated such eleventh-hour supplementation of direct testimony affidavits, nor should the East Anchorage Plaintiffs be forced to forego adequate trial preparation to respond to its contents. On that basis alone, in addition to those described below, the East Anchorage Plaintiffs are profoundly and irreparably prejudiced by the Board’s deleterious decision to file this last-minute supplemental affidavit.

Even if Mr. Torkelson’s supplemental affidavit were timely, it should still be stricken. Evidence Rule 702(a) provides that “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” The Alaska Supreme Court has clarified this rule, explaining that expert opinion evidence is *only* admissible at trial if the trial court determines that the following criteria are met:

1. the evidence is relevant (Rule 401);
2. the witness is qualified as an expert (Rule 702(a));
3. the trier of fact will be assisted (Rule 702(a));

4. the facts or data on which the opinion is based are of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject (Rule 703); and
5. the probative value of the evidence is not outweighed by its prejudicial effect (Rule 403).<sup>4</sup>

Paragraphs 34 and 35 of Mr. Torkelson's supplemental affidavit satisfy none of these criteria. First, Mr. Torkelson's statements regarding majority-minority senate districts are not relevant to the East Anchorage Plaintiffs' case, and are categorically not responsive to the positions articulated in Dr. Hensel's affidavit. Dr. Hensel provides an exhaustive anthropological analysis as to the community character and interests of East Anchorage and Eagle River and his expert opinion as to the impact of the Board's senate pairings on these communities' vote and voice; Mr. Torkelson's statements regarding majority-minority districts have no bearing on this analysis. The Court simply will not be assisted by Mr. Torkelson's testimony because it does not clarify or respond to any issue in this case. Nothing precludes the Board from fully and fairly cross-examining Dr. Hensel at trial; Mr. Torkelson's supplemental testimony provides no additional value to the Board.

Second, Mr. Torkelson lacks any qualification to provide the technical and broad expert opinion articulated in his supplemental affidavit. In his first affidavit, Mr. Torkelson testified that he has a bachelor's degree in criminal justice<sup>5</sup> and has worked as a web

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<sup>4</sup> *Cora G. v. Dep't of Health & Soc. Servs., Off. of Children's Servs.*, 461 P.3d 1265, 1277 (Alaska 2020) (citing *Barton v. N. Slope Borough Sch. Dist.*, 268 P.3d 346, 350-51 (Alaska 2012)).

<sup>5</sup> Affidavit of Peter Torkelson at ¶ 4

designer since 2000.<sup>6</sup> Since 2013 — prior to beginning work as the executive director of the Alaska Redistricting Board — Mr. Torkelson was employed as a “web designer, programmer, and professional assistant to the Senate President’s office.”<sup>7</sup> Mr. Torkelson is not a lawyer, is not a statistician, is not a mathematician, and does not appear to have ever served as an expert witness in any capacity. Yet, the Board now offers his testimony to support the proposition that the Board’s 2021 proclamation plan does not result in the dilution of the vote or community voice of East Anchorage residents. This is not permitted by Alaska law.

Third, even if Mr. Torkelson were qualified to offer the expert opinion expressed in paragraphs 34 and 35 of his supplemental affidavit, the Board has failed to comply with the discovery procedure mandated for such expert testimony by Civil Rule 26. As the Board is well aware — having received these materials and disclosures from all Plaintiffs — Civil Rule 26(a)(2) provides that expert witnesses must be disclosed in advance of trial, and must produce a report containing not only their opinions and the content of their anticipated trial testimony, but also, among other information, “the data or other information considered by the witness in forming the opinions [and] any exhibits to be used as a summary of or support for the opinions.”<sup>8</sup> Although Mr. Torkelson’s supplemental report purports to offer a statistical analysis which the Board apparently believes is sufficient to rebut Dr. Hensel’s expert opinion, it is accompanied by no explanation of Mr. Torkelson’s methodology, assumptions, process, or even the source

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<sup>6</sup> *Id.* at ¶ 6.

<sup>7</sup> *Id.* at ¶ 7.

<sup>8</sup> Alaska R. Civ. P. 26(a)(2)(B).

of his data. The graphics accompanying paragraphs 34 and 35 of the supplemental affidavit do not appear in the record, nor does the data purporting to be represented therein.<sup>9</sup> In the absence of any attempt at the routine expert disclosures contemplated by Rule 26, the East Anchorage Plaintiffs — and the Court — are left completely unable to determine whether “the facts or data on which [Mr. Torkelson’s] opinion is based are of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject.”<sup>10</sup>

Finally, the conclusions expressed by Mr. Torkelson in his supplemental affidavit are inconsistent with those previously expressed by the Board’s VRA experts. On November 1, 2021, Bruce Adelson and Dr. Katz provided a one-paragraph Supplemental Alaska Racially Polarized Voting Analysis<sup>11</sup> to the Board which purports to statistically analyze voting patterns of minority individuals in the Anchorage area. The experts wrote:

... we examined legislative districts 15, 16, 17, 18, 19, 20, 23, and 25. ***Unfortunately, this analysis is not possible and no reliable inferences can be made of voter behavior in this area. Ecological inference requires at least some almost homogeneous precincts in order to generate reliable estimates of a group’s voting behavior. In this area, there are no precincts that are anywhere close to homogeneous.*** For

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<sup>9</sup> The East Anchorage Plaintiffs note that these graphics have been listed as Exhibits 1013 and 1014 on the Board’s Amended Exhibit List. The East Anchorage Plaintiffs object to their admission at trial for the reasons contained in this Motion to Strike.

<sup>10</sup> Civil Rule 37(g) permits the Court to impose sanctions, including the payment of the other party’s attorney’s fees, where a party or a party’s attorney “engages in unreasonable, groundless, abusive, or obstructionist conduct during the course of discovery.” The Board’s last-minute submission of Mr. Torkelson’s supplemental affidavit and failure to provide any attempt at corresponding Rule 26 expert disclosures constitutes the latest installment in a pattern of bad faith and sharp discovery practice by the Board. In light of the expedited nature of this case, the East Anchorage Plaintiffs specifically reserve and do not waive their rights to pursue Rule 37(g) sanctions and other remedies to address the Board’s conduct.

<sup>11</sup> ARB000113, attached hereto as Exhibit A.

example, the largest fraction of non-Alaska Native minority population in any precinct is 77.4% and only 30.0% for Alaska Natives. This problem was confirmed by the failed diagnostics of the estimated models attempted on the data from this area.<sup>12</sup>

Contrary to this expert analysis, the screenshots contained in Mr. Torkelson's supplemental affidavit seem to be offered for the purpose of demonstrating that not only is such a statistical analysis of East Anchorage possible, but that it should be construed in the Board's favor. Should the Board desire to put on such statistical evidence at trial, the East Anchorage Plaintiffs would have no objection to the Board presenting testimony from Bruce Adelson, Dr. Katz, or Dr. Johnson, provided that the East Anchorage Plaintiffs were provided with the requisite expert disclosures and permitted to put on a qualified statistical witness of their own, if necessary. But in no circumstance should the Board's lay witnesses — even Mr. Torkelson — be permitted to rebut this earlier expert opinion based on screenshots.

For all of these reasons, the East Anchorage Plaintiffs respectfully request that this Court strike the untimely, unqualified, and prejudicial testimony offered by Peter Torkelson in paragraphs 34 and 35 of his January 20, 2022 supplemental affidavit. In the alternative, if the Court denies this Conditional Motion to Strike, the East Anchorage Plaintiffs respectfully request that the cross-examination of their expert witness, Dr. Chase Hensel, be deferred until Monday, January 24, 2022 — the second day allotted to the East Anchorage case — to permit Dr. Hensel to respond appropriately and meaningfully to the new and unanticipated information contained in Mr. Torkelson's supplemental affidavit. Although the Board deposed Dr. Hensel the day before filing

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<sup>12</sup> *Id.*, *emphasis added.*

Mr. Torkelson's supplemental affidavit, the subject matter contained therein was noticeably absent from the Board's questioning at deposition and could not have been anticipated by Dr. Hensel when preparing to undergo cross examination from the Board.

RESPECTFULLY SUBMITTED this 20th day of January, 2022.

BIRCH HORTON BITTNER & CHEROT  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of January, 2022, a true and correct copy of the foregoing document was served electronically on the following:

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By:     /s/ Martha K. Marshall      
Believed to be transmitted without error  
from tmarshall@bhb.com at approx. 10:15 p.m.

## Supplemental Alaska Racially Polarized Voting Analysis for 2021 Redistricting

Bruce Adelson, Esq. and Jonathan N. Katz, Ph.D.

November 1, 2021

After completing our racially polarized voting analysis of elections in Alaska presented in our earlier report, we were asked to further quantitatively examine voting patterns of Alaska Native, non-Alaska Native Minorities, and Other (non-Minority and non-Alaska Native) individuals in the Anchorage area. In particular, we examined legislative districts 15, 16, 17, 18, 19, 20, 23, and 25. Unfortunately, this analysis is not possible and no reliable inferences can be made of voter behavior in this area. Ecological inference requires at least some almost homogeneous precincts in order to generate reliable estimates of a group's voting behavior. In this area, there are no precincts that are anywhere close to homogeneous. For example, the largest fraction of non-Alaska Native minority population in any precinct is 77.4% and only 30.0% for Alaska Natives. This problem was confirmed by the failed diagnostics of the estimated models attempted on the data from this area.