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CLERK APPELLATE COURT
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Attorneys for Appellee Alaskans for Better Elections

IN THE SUPREME COURT FOR THE STATE OF ALASKA

KEVIN MEYER, LIEUTENANT
GOVERNOR OF THE STATE OF
ALASKA and the STATE OF
ALASKA, DIVISION OF
ELECTIONS,

Appellants,

vs.

ALASKANS FOR BETTER
ELECTIONS,

Appellee.

Supreme Court No. S-17629

Superior Ct. No.: 3AN-19-09704 CI

*****EMERGENCY*****

**APPELLEE'S PARTIAL OPPOSITION TO APPELLANTS' MOTION TO
EXPEDITE APPEAL**

Appellee Alaskans for Better Elections ("ABE") partially opposes Appellants' Kevin Meyer, Lieutenant Governor of the State of Alaska, and the State of Alaska, Division of Elections ("Appellants") emergency motion to expedite appeal. Although

ABE joins Appellants' request to expedite the appeal generally, Appellants' specific request for an "extremely expedited" appeal is unnecessary, invites hasty briefing on an important constitutional issue, and represents a drastic change in Appellants' position from one week ago. ABE therefore respectfully requests that this Court grant a request for a conventionally-expedited appeal, but reject Appellants' request for an "extreme[]" schedule.

I. BACKGROUND

The superior court granted ABE's cross-motion for summary judgment on October 28, 2019, certifying the initiative and ordering Appellants to distribute the petition booklets immediately.¹ Appellants requested a stay pending appeal later that day; Appellants also proposed an expedited schedule for appeal similar to a recent initiative appeal—a schedule that would see the appeal briefed in the early months of 2020, allowing adequate time for this Court to rule before any ballots were printed.² ABE's counsel responded positively to that concept.³

After considering Appellants' motion for stay and ABE's opposition, the superior court denied Appellants request for a stay pending appeal on October 30,

¹ See Appendix A at 12 in Appellants' Motion to Expedite Appeal (Nov. 1, 2019).

² See Exhibit 1 to Affidavit of Scott M. Kendall (Nov. 4, 2019). Although parties always wish to have decisions as soon as possible, past practice demonstrates—and ABE believes—the ballot-printing deadline is the only relevant hard deadline related to this Court's decision.

³ Affidavit of Scott M. Kendall at ¶ 2.

2019.⁴ ABE obtained the certified petition booklets from the Division of Elections on October 31, 2019, and has already begun gathering signatures to meet the short deadline (over 28,000 signatures—including minimum of 7% of last year’s turnout in 30 of Alaska’s 40 state house districts—by January 20, 2020) to appear on the general election ballot in 2020. ABE learned of Appellants’ new position regarding expedited briefing very late in the afternoon on October 31.

II. ARGUMENT

A. ABE Joins Appellants’ Request For An Expedited Appeal.

ABE generally agrees with the proposition that an expedited appeal would be appropriate in this case. Because this appeal concerns the constitutionality of proposed language for a ballot initiative, ABE requests a decision from this Court before the deadline for printing election ballots.

Appellants’ proposal from October 28 would provide sufficient time for this appeal.⁵ There are three different timelines this appeal could operate on, depending on (1) whether and when ABE obtains and files the requisite signatures for 19AKBE and (2) when the legislature completes its 2020 session.⁶ This appeal may therefore necessitate a decision: (1) in early July; (2) in early September; or (3) on an ordinary,

⁴ See Appendix B in Appellants’ Motion to Expedite Appeal.

⁵ Exhibit 1.

⁶ *Id.*; see also AS 15.45.190.

non-expedited basis.⁷ ABE therefore requests an expedited appeal schedule similar to previous initiative appeals, which calls for initial briefing and oral argument in early 2020, with a decision by July 2020.

B. ABE Opposes Appellants' Request For An "Extremely Expedited" Appeal.

ABE learned late in the afternoon on October 31 that Appellants have a new request for an "extremely expedited" appeal. Instead of the rationally-expedited briefing schedule proposed by Appellants on October 28,⁸ Appellants now request full briefing *and* oral argument *in less than two weeks* after their expedited request. Appellants' surprising and "extreme[]" request is both unnecessary and invites suboptimal research and briefing on an important constitutional issue.

Appellants' request for an "extremely expedited" appeal is unnecessary for at least three reasons. First, Appellants' claim that this is the only way to minimize ABE's reliance on prior precedent is incorrect.⁹ ABE has already relied on this Court's clear, unwavering precedent while: (1) spending months drafting 19AKBE's initiative language; (2) litigating the single-subject rule on an already expedited basis; and (3) hiring staff and expending resources to gather signatures on an already short

⁷ See Exhibit 1 at 4-5.

⁸ See Exhibit 1 at 1.

⁹ See Appellants' Motion to Expedite Appeal at 4-5.

timeline.¹⁰ Second, ABE is already past the point of being able to give voters the opportunity to vote on 19AKBE's election reform initiative in the 2020 general election in either bifurcated or trifurcated petitions. Even a decision from this Court within two weeks simply would not give the Division of Elections enough time to review the measure, reprint multiple new initiative signature booklets, *and* give ABE enough time to meet the stringent signature requirements before January 20, 2020.¹¹ And ABE does not have the ability or resources to bear the doubling or tripling of costs to gather signatures for separate proposals.¹² Finally, if ABE does not submit the requisite number of signatures with its petition by January 20, 2020, there would no longer be a reason for this appeal to be expedited at all.¹³

Appellants' request for an "extremely expedited" appeal also invites hasty briefing on an important constitutional issue. Appellants acknowledge they are asking this Court to overturn over half a century of clear, uninterrupted precedent defining a provision in the Alaska Constitution by relying on hastily-drafted briefs.¹⁴ The superior court has not even entered a final judgment in this case.¹⁵ There will be almost

¹⁰ See Affidavit of Scott M. Kendall.

¹¹ See *id.* at ¶ 4.

¹² See *id.*

¹³ See Exhibit 1 at 5.

¹⁴ See Appellants' Motion to Expedite Appeal at 5.

¹⁵ See Appellants' Notice of Appeal (Nov. 1, 2019).

no time for a record and transcripts to be prepared.¹⁶ And Appellants' proposed "extreme[]" schedule would effectively prevent Amici briefs from being filed on a constitutional question that implicates legislation passed by the Legislature as well as initiatives.¹⁷

Finally, due to existing obligations, and having no meaningful notice of Appellants' dramatic change in position, counsel for ABE can candidly convey that they do not believe they can represent their client's interests to their best ability under these timelines.¹⁸ Counsel for ABE does not have the dozens of attorneys at their disposal that the Department of Law has, and we therefore believe that ABE's interests will be unfairly negatively impacted if Appellants' extreme request is granted.

Appellants' rapid change in position within days was indeed radical, as is their timeline, and it should accordingly be rejected by this Court.

III. Conclusion

Both ABE and Appellants agree that this Court should consider this appeal on an expedited basis. But ABE adamantly opposes Appellants' "extreme[]" request for

¹⁶ See Alaska Appellate Rule 210.

¹⁷ See Appendix A at 7 in Appellants' Motion to Expedite Appeal ("[T]he Alaska Supreme Court, relying on the explicit language in the Alaska Constitution that 'the law-making powers assigned to the legislature may be exercised by the people through the initiative,' has made clear that the same test applies to both legislation and initiatives." (quoting *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (quoting Alaska Const. art. XII, § 11))).

¹⁸ See Affidavit of Scott M. Kendall at ¶ 5.

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an unprecedented, *ultra*-expedited appeal. Appellants have shown no emergency to justify their request, and to the extent they claim that their request will “benefit the sponsors” by allowing them to focus on “multiple, separate” measures,¹⁹ that claim is false. ABE will have no opportunity or ability to qualify other versions of the measure for the 2020 ballot and its interests may actually be harmed if the request is granted, forcing inadequate and hasty briefing before this Court.

This Court should instead set an expedited appeal schedule commensurate with prior initiative litigation, setting a deadline for initial briefs and oral argument in early 2020.

DATED this 4th day of November 2019, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Appellee

By: 

Scott M. Kendall
Alaska Bar No. 0405019
Jahna Lindemuth
Alaska Bar No. 9711068
Samuel G. Gottstein
Alaska Bar No. 1511099

¹⁹ Motion to Expedite Appeal at 5.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail and email this 4th day of November 2019 on:

Laura Fox, Esq.
Attorney General's Office
1031 W. 4th Avenue, Ste. 200
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laura.fox@alaska.gov

Margaret Paton-Walsh, Esq.
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I further certify that the typeface used in the foregoing is 13 point Times New Roman, in accordance with Appellate Rule 513.5(c).



Mackenzie Milliken
Holmes Weddle & Barcott, P.C.

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

KEVIN MEYER, LIEUTENANT
 GOVERNOR OF THE STATE OF
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 ALASKA, DIVISION OF
 ELECTIONS,

Appellants,

vs.

ALASKANS FOR BETTER
 ELECTIONS,

Appellee.

Supreme Court No. S-17629

Superior Ct. No.: 3AN-19-09704 CI

AFFIDAVIT OF SCOTT M. KENDALL

STATE OF ALASKA)
) ss.
 THIRD JUDICIAL DISTRICT)

I, Scott M. Kendall, being first duly sworn and deposited, hereby states as follows:

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 TELEPHONE (907) 274-0666
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1) I am counsel representing Appellee, Alaskans for Better Elections (“ABE”), in Supreme Court No. S-17629.


2) The attached Exhibit 1 is a true and correct copy of an email and attachment that I received from counsel for Appellants on October 28, 2019. I responded at 9:05am on October 30 that “[s]omething equivalent seems totally reasonable in this case,” and that Appellants “can expect we will non-oppose such a motion when the time comes.”

3) ABE received petition signature booklets for 19AKBE on October 31, 2019. ABE has volunteers gathering signatures, but in addition has entered into an agreement with a firm to gather signatures. ABE has already paid a substantial down payment and the total contract represents a substantial expense.

4) Even if this Court grants Appellants’ request for an “extremely expedited” appeal, ABE would be unable to successfully “split” their ballot measure into two or three parts and gather signatures as Appellants suggests. First, after another possible 60-day review period by the Lieutenant Governor, ABE would be completely unable to gather signatures in time. The two-month delay imposed by the unlawful denial of certification already represents a significant challenge—any additional delay could make a successful signature drive impossible. Second, “splitting” the ballot measure as Appellants suggest would also double or triple the related costs of gathering the signatures and ABE currently lacks the funds to compensate for such an increase in costs.

5) Given other short-term demands on the time of the attorneys working on this matter, I believe the extreme schedule proposed by Appellants could materially negatively impact my ability to properly represent ABE's interests in this appeal. Appellants have attempted to present their extremely expedited briefing schedule as having a benefit to ABE. This is false. I believe expediting this appeal in the extreme manner proposed could significantly prejudice ABE's interests for the reasons described above.


FURTHER AFFIANT SAYETH NAUGHT.



Scott M. Kendall
Alaska Bar No. 0405019

SUBSCRIBED AND SWORN to before me this 4th day of November 2019.




Notary Public in and for ALASKA
My Commission Expires: 3-18-2021

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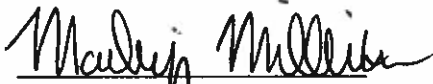
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November 2019, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

Laura Fox, Esq.
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I further certify that the typeface used in the foregoing is 13 point Times New Roman, in accordance with Appellate Rule 513.5(c).



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Samuel G. Gottstein

From: Mills, Cori M (LAW) <cori.mills@alaska.gov>
Sent: Monday, October 28, 2019 4:24 PM
To: Scott Kendall
Cc: Jahna Lindemuth; Paton-Walsh, Margaret A (LAW); Samuel G. Gottstein
Subject: RE: Alaskans for Better Elections (v. Meyer) (19AKBE):VKB / Defendant's Motion for Stay Pending Appeal, // 2019200705
Attachments: 11261685.pdf

Scott, just to confirm in writing, the 24 hours to file a reply is fine.

Attached is the unopposed motion for expedited consideration in the FSH2 appeal. This is what we were considering for the appeal in this case as well.

Cori Mills

From: Scott Kendall <SMKendall@hwb-law.com>
Sent: Monday, October 28, 2019 2:33 PM
To: Mills, Cori M (LAW) <cori.mills@alaska.gov>
Cc: Jahna Lindemuth <JLindemuth@hwb-law.com>; Paton-Walsh, Margaret A (LAW) <margaret.paton-walsh@alaska.gov>; Samuel G. Gottstein <SGottstein@hwb-law.com>
Subject: RE: Alaskans for Better Elections (v. Meyer) (19AKBE):VKB / Defendant's Motion for Stay Pending Appeal, // 2019200705

Thank you, Cori.

Also, understanding that you do not oppose our motion to expedite your motion to stay, do you intend or need to file a Reply brief?

If you do, we intend to allow 24 hours from our opposition.

Is this acceptable?

From: Mills, Cori M (LAW) [<mailto:cori.mills@alaska.gov>]
Sent: Monday, October 28, 2019 1:41 PM
To: Scott Kendall <SMKendall@hwb-law.com>
Cc: Jahna Lindemuth <JLindemuth@hwb-law.com>; Paton-Walsh, Margaret A (LAW) <margaret.paton-walsh@alaska.gov>
Subject: FW: Alaskans for Better Elections (v. Meyer) (19AKBE):VKB / Defendant's Motion for Stay Pending Appeal, // 2019200705

Scott, attached is a copy of the motion for stay that was just filed in superior court.

Cori Mills
Assistant Attorney General
Labor & State Affairs Section
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IN THE SUPREME COURT OF THE STATE OF ALASKA

Byron Mallott, Lieutenant Governor of)
the State of Alaska, and the Alaska)
Division of Elections,)

Appellants,)

v.)

Supreme Court No.: S-16862

Stand for Salmon,)

Appellee.)

Trial Court Case No.: 3AN-17-09183CI

UNOPPOSED MOTION TO EXPEDITE APPEAL

Appellants Byron Mallott and the Alaska Division of Elections ask the Court to decide this appeal on an expedited basis, if necessary. This case presents the issue of whether a proposed initiative contains a constitutionally prohibited subject that precludes its appearance on the ballot; thus, the Division requests an order by the deadline for printing election ballots. Appellees do not oppose this motion, and the parties have agreed to a schedule under which briefing will be complete in March 2018 and argument can be scheduled for the April 2018 calendar. Depending on future events, the Division requests a decision by either July 3, 2018 or September 5, 2018. Alternatively, under a third scenario, the appeal can proceed according to the Court's normal timeframe.

This case was filed by the sponsors of proposed initiative 17FSH2 after the Lieutenant Governor denied certification based on his determination that the initiative would make an appropriation. The sponsors challenged this conclusion in superior

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court, and the court granted summary judgment in their favor. The Division then printed booklets for the initiative, and the sponsors currently are obtaining the signatures required by AS 15.45.140 to have the initiative placed on the ballot. In the meantime, the Lieutenant Governor and the Division have filed this appeal.

Although it is not yet clear that the Division will need an expedited order, it asks the Court to grant this motion now in order to put the case on a schedule that will permit an expedited order if necessary.

The appeal could proceed according to three different timelines, depending on (1) whether and when the sponsors obtain the signatures needed to put the initiative on the ballot and file them with the Lieutenant Governor and (2) when the legislature completes its 2018 session. Under AS 15.45.190, the Lieutenant Governor will instruct the Division of Elections to place a ballot proposition on the ballot of the first statewide election that is held after (1) the initiative petition has been filed; (2) a legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of the legislative session. Based on this statute, the three timelines possible in this case are as follows:

1. **The Division will need guidance by July 3, 2018.** The next legislative session—the second regular session of the thirtieth legislature—is scheduled to convene on January 16, 2018. See <http://w3.legis.state.ak.us>. The 2018 primary election is scheduled for August 21, 2018. See Affidavit of Josephine Bahnke, ¶ 4. If the 17FSH2 sponsors file their petition with signatures that satisfy AS 15.45.140 before the legislative session convenes and the legislature adjourns by April 22, 2018, the measure

Byron Mallott, et al. v. Stand for Salmon
Unopposed Motion to Expedite Appeal

Supreme Court No. S-16862
Page 2 of 4

will appear on the August 21 primary ballot. Aff. of Josephine Bahnke, ¶ 5. If this occurs, the Division will need to know whether to include 17FSH2 on the ballot by the printing deadline for the primary election, which is July 3, 2018. Aff. of Josephine Bahnke, ¶ 6.

2. **The Division will need guidance by September 5, 2018.** If the 17FSH2 sponsors file their petition with sufficient signatures before the legislative session convenes and the legislature adjourns after April 22, 2018, the measure will appear on the general election ballot, scheduled for November 6, 2018. Aff. of Josephine Bahnke, ¶¶ 7, 8. If this occurs, the Division of Elections would need to know whether to put the measure on the general election ballot by the printing deadline, which is September 5, 2018. Aff. of Josephine Bahnke, ¶ 9.

3. **The case can proceed according to the Court's regular, non-expedited schedule.** If the 17FSH2 sponsors do not file their petition with sufficient signatures before the legislative session convenes, they have one year to do so, calculated from the time the Lieutenant Governor notified them that the booklets were ready for delivery, which is October 12, 2018. Aff. of Josephine Bahnke, ¶ 10; AS 15.45.140(a). If the sponsors file by that deadline, the measure will move to the 2020 election cycle and the appeal need not be expedited. If the sponsors do not file by that deadline, the petition is void. AS 15.45.140(b). The appeal would not be moot, based on the likely award of attorney's fees, but it could proceed on a non-expedited schedule.

Because an expedited consideration will probably be necessary, the Division asks for an order that includes the following: the appellants will file the opening brief by

Byron Mallott, et al. v. Stand for Salmon
Unopposed Motion to Expedite Appeal

Supreme Court No. S-16862
Page 3 of 4

January 12, 2018; if the sponsors do not file a petition with signatures that satisfy the requirements of AS 15.45.140 before the legislature convenes, the case can proceed on a normal schedule. The Division will notify the Court of the status of the signatures upon making that determination. If the sponsors file a petition with signatures that satisfy the requirements of AS 15.45.140 before the legislature convenes, the appellee's brief will be filed by February 23, 2018 and the appellant's reply brief will be filed by March 15, 2018. The parties request that oral argument will be scheduled for April 26, 2018, which the clerk's office has indicated is an argument day for the Court.

When the legislature adjourns, the Division will immediately notify the Court of whether 17FSH2 has established a right to appear on either the primary election ballot or on the general election ballot, and by which printing deadline the Division will require this Court's ruling on constitutionality.

DATED November 9, 2017

JAHNA LINDEMUTH
ATTORNEY GENERAL

By: 

Joanne M. Grace
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Byron Mallott, et al. v. Stand for Salmon
Unopposed Motion to Expedite Appeal

Supreme Court No. S-16862
Page 4 of 4

Exhibit 1
Page 6 of 6