IN THE SUPREME COURT OF THE STATE OF ALASKA

RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC.; ALASKA TRUCKING ASSOCIATION, INC.; ALASKA MINERS ASSOCIATION, INC.; ASSOCIATED GENERAL CONTRACTORS OF ALASKA; ALASKA CHAMBER; ALASKA SUPPORT INDUSTRY ALLIANCE, Appellants and Cross-Appellees, v. KEVIN MEYER, in his official capacity as Lt. Governor of the State of Alaska; GAIL FENUMIAI, in her capacity as Director of the Alaska Division of Elections; the STATE OF ALASKA, DIVISION OF ELECTIONS; Appellees, v. VOTE YES FOR ALASKA'S FAIR SHARE, Appellee and Cross-Appellant.	)	Supreme Court Nos. S-17834/S-17843

Trial Court Case No. 3AN-20-05901CI

THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE THOMAS A. MATTHEWS

ANSWERING BRIEF OF CROSS-APPELLANT VOTE YES FOR ALASKA'S FAIR SHARE

Filed in the Supreme Court of
of the State of Alaska on August 6, 2020.

MEREDITH MONTGOMERY,
Clerk of the Appellate Courts

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AUTHORITIES PRINCIPALLY RELIED UPON

AS 15.45.110. Circulation of petition; prohibitions and penalty.

(a) The petitions may be circulated throughout the state only in person.

(b) [Repealed, § 92 ch 82 SLA 2000.]

(c) A circulator may not receive payment or agree to receive payment that is greater than $1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than $1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.

(f) In this section,

(1) “organization” has the meaning given in AS 11.81.900;

(2) “other valuable thing” has the meaning given in AS 15.56.030(d);

(3) “person” has the meaning given in AS 11.81.900.

AUTHORITIES PRINCIPALLY RELIED UPON

AS 15.45.130. Certification of circulator.

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

(1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;

(2) that the person is the only circulator of that petition;

(3) that the signatures were made in the circulator's actual presence;

(4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c);

(7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and

(8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

INTRODUCTION

In support of placing the Fair Share Act on the ballot, 39,149 Alaskans gave their verified signatures. There is no evidence or any allegation whatsoever of any impropriety with those signatures or with how they were collected. Plaintiffs do not allege that a single signature verified by the Division of Elections was not a valid signature of an Alaskan voter. Nor do Plaintiffs allege that a single signature was gathered dishonestly or through fraud. Similarly, Plaintiffs do not allege that a single petition circulator made an inappropriate or untruthful comment while circulating the Fair Share Act petition.

Moreover, Plaintiffs have not brought forward a single decision in which a court has chosen to disenfranchise voters or block an initiative from the ballot under circumstances similar to this case. Instead, under the guise of protecting the integrity of the initiative process from the dangers of monied interests, the Appellants gathered as a proxy group for the oil industry—which has already spent millions opposing the Fair Share Act and according to public records may be funding this case as well—and rushed the parties into the superior court with expedited litigation to invalidate the signatures and remove the certified initiative from the ballot with novel statutory interpretations never before used in Alaska in the decades since the initiative statutes were enacted.

Because petition circulators were paid a salary that amounted to more than $1 when divided by the signatures they collected (disregarding any other duties for which the salaries were paid), Appellants declared all such signatures must not be counted. The superior court rightly rejected Appellants' demands, and Vote Yes for Alaska's Fair Share ("Fair Share") urges this Court to affirm that decision.

The leading Alaska case on construing the statutes at issue expressly stands against "an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong."[1] Like the industry coalition in *North West Cruiseship,* Appellants seek to impair the constitutional right of Alaskans to participate in the initiative process based on strict construal of ministerial procedures, and this Court should reject such an effort just as it did in that case. More recently, this Court reaffirmed its commitment to liberally construe the initiative process to protect the constitutional rights of Alaskans:

> We have explained on numerous occasions our deferential view toward the people's initiative right. *See, e.g., City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991) ("The usual rule applied by this court is to construe voter initiatives broadly so as to preserve them whenever possible."); *Thomas v. Bailey*, 595 P.2d 1, 3 (Alaska 1979) ("The right of initiative . . . should be liberally construed to permit exercise of that right."). When reviewing a challenge to an initiative prior to its submission to voters, we liberally construe the constitutional and statutory requirements pertaining to the use of initiatives so that "the people [are] permitted to vote and express their will on the proposed legislation." *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (alteration in original) (quoting *Cope v. Toronto*, 332 P.2d 977, 979 (Utah 1958)), *overruled in part on other grounds by McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988). "To that end 'all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.'" *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977) (quoting *Boucher*, 528 P.2d at 462).[2]

For purposes of the ballot, all this Court need do is apply its longstanding principles and affirm the superior court's holding that "[a] circulator's affidavit under AS 15.45.130 can still be properly certified even if it contains an incorrect statement regarding the

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[1] *North West Cruiseship Ass'n v. State*, 145 P.3d 573, 587 (Alaska 2006).

[2] *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 482 n.19 (Alaska 2020).

requirements for the affidavit, so long as it otherwise meets statutory requirements."[3] The lieutenant governor "may not count subscriptions on petitions not properly certified" under AS 15.45.130, but the statute expressly lists the requirements of the affidavit needed to deem the petition properly certified. Nowhere under the laws of Alaska is the lieutenant governor required or empowered to extend his ministerial duty into investigatory proceedings involving the underlying factual and legal disputes among stakeholders to confirm each and every sworn statement made in the circulators' affidavits. Appellants' suggestion that the lieutenant governor must conduct any such investigation before fulfilling his review of the petition booklets is without any statutory antecedent or even a basic statutory structure to achieve such a result. The statutory structure is clear—the lieutenant governor's role is to confirm the petition booklets are verified, and if there is a violation of AS 15.45.110(c), it is a criminal matter having nothing whatsoever to do with the lieutenant governor's role to ensure a verification is present on the petition booklet. The superior court's constitutional corollary to this holding—that if AS 15.45.130 is construed to require the invalidation of verified signatures, it violates Alaskans' free speech rights[4]—need not be reached, but should be upheld if necessary, because such a remedy is far from narrowly tailored in impairing fundamental constitutional rights.

Fair Share has filed a concurrent cross-appeal on the superior court's interpretation of AS 15.45.110(c), arguing that the doctrine of constitutional avoidance directs an interpretation applying the restriction only to per-signature compensation and thus not to

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[3] Order Re Pending Motions to Dismiss and for Summary Judgment ("Order") at 25. [Exc. 251]

[4] Order at 29. [Exc. 255]

Fair Share's signatures. However, Fair Share fully supports the superior court's holding that if AS 15.45.110(c) is interpreted as Appellants wish, it is clearly unconstitutional.[5] In *Meyer v. Grant*, the U.S. Supreme Court held:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."[6]

The *Meyer v. Grant* court decided that "Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication," adding that "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."[7] Because the Colorado statute "trenche[d] upon an area in which the importance of First Amendment protections is 'at its zenith[,]'" the Court reasoned that "the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable."[8] The Court then rejected Colorado's policy arguments:

> We are not persuaded by the State's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process. As the Court of Appeals correctly held, the former interest is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained.

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5 Order at 19-20. [Exc. 245-46]
6 *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988).
7 *Id.* at 424.
8 *Id.* at 425.

> The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.[9]

Cases since *Meyer v. Grant* have carved out exceptions for narrow restrictions and regulations, but those exceptions do not avail Appellants' position, and the same strict scrutiny applies here. Appellants bemoan the lack of evidence before the superior court, impractically suggesting the court was obliged to hold a trial on their expedited claims before it could apply clear precedent in this area of law,[10] but Appellants failed to make any showing of how the cases relied upon by the superior court did not apply to this case. At most, the principles that facial constitutional challenges are disfavored and must show the law to be unconstitutional in all applications[11] supports Fair Share's cross-appeal in the event this Court disagrees with the superior court's holding. Because the interpretation of AS 15.45.110(c) accepted by the superior court effectively bans all circulator compensation except $1 per signature, the superior court correctly held it as an unconstitutional restriction on core political speech.

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[9] *Meyer*, 486 U.S. at 425-26.
[10] Appellants' Brief at 19.
[11] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008).

STANDARD OF REVIEW

This Court reviews the granting of motions to dismiss de novo,[12] reviews issues of constitutional interpretation de novo,[13] and reviews statutory interpretations de novo.[14]

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT AS 15.45.130 DOES NOT SUPPORT THE INVALIDATION OF THE FAIR SHARE ACT INITIATIVE

A. The Requirements of the Statute Were Satisfied in This Case.

All parties agree that *North West Cruiseship* is the leading Alaska decision in this matter, and the State and Fair Share agree that the decision stands for (1) this Court's commitment to liberally construe and protect Alaskans' constitutional rights to the initiative process, and (2) this Court's accordant position that "when the legal transgression did not affect the signer's knowledge or understanding of the matter at hand—i.e. the integrity of the signature as a sign of the voter's genuine, informed support for the initiative—wholesale invalidation of all of the signatures was an improper remedy."[15] Appellants conceded that the Court's reason for allowing the exclusion of two petition pages in *North West Cruiseship* "was that the circulator's failure to follow the law may have led to the collection of these subscriptions."[16] There is no allegation that the purported violation of AS 15.45.110(c) had any effect on the integrity of Fair Share's subscriptions, so *North West Cruiseship* offers only opposition to Appellants' efforts to invalidate those

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[12] *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009).
[13] *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.2d 380, 385-86 (Alaska 2013).
[14] *Alaska Pub Def. Agency v. Superior Court*, 450 P.3d 246, 251-52 (Alaska 2019).
[15] State's Reply at 4-5 (May 19, 2020). [Exc. 108-09]
[16] Plaintiffs' Opposition and Cross-Motion at 19. [Exc. 136]

subscriptions. Appellants ignore this Court's rulings in *North West Cruiseship* and ask for precisely what this Court rejected in that case.

This Court ruled that the purpose of the AS 15.45.130 certification "is to require circulators to swear to the truthfulness of their affidavits."[17] Appellants ignore this Court's ruling that the purpose of certification is to ensure an oath by circulators and, instead, propose to substitute an unarticulated purpose so broad in reach that it could justify the disenfranchisement of tens of thousands of Alaskan voters. Appellants' efforts to metamorphosize the ministerial purpose for the AS 15.45.130 certification into a basis for disenfranchising tens of thousands of Alaskan voters must fail.

This Court has ruled that the purpose of requiring certification "is readily achieved by requiring the circulators to swear that they had stated the truth by signing under penalty of perjury."[18] Again Appellants ignore this ruling. They also ignore the fact that the circulators in this case, without exception, gave such an oath "under penalty of perjury" and fully achieved the purpose articulated by this Court for the certification. Appellants' choice to simply ignore this Court's clearly articulated holding as to when the purpose for certification has been readily achieved must also fail.

This Court has ruled that even when there is "a technical deficiency that does not impede the purpose of the certification requirement," the petition booklets should not be rejected.[19] In this case, however, Appellants have not even alleged a technical deficiency much less one that impeded this Court's articulated purpose for the certification

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[17] *North West Cruiseship,* 145 P.3d at 577 (emphasis omitted).
[18] *Id.*
[19] *Id.* at 577-78.

requirement.[20] In this case, under penalty of perjury, every circulator provided an oath as to the truthfulness of his/her affidavits and was in full compliance with every technical requirement of AS 15.45.130. Under this Court's clear holdings in *North West Cruiseship*, the circulators fully complied with AS 15.45.130, and Appellants have not articulated any deficiency to the certifications on the petition booklets.

Setting aside that the circulators fully complied with AS 15.45.130, this Court has also held, "[that it] should construe the remedial portion of AS 15.45.130 only as broadly as is necessary to address the specific error. It should avoid an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong."[21] In this case, Appellants are not able to reasonably articulate any specific error to AS 15.45.130, but nonetheless ask this Court to create out of whole cloth a novel expansive purpose for AS 15.45.130 that then requires the lieutenant governor to undertake a series of novel extra-statutory duties all for the singular purpose of disenfranchising tens of thousands of Alaskan voters who did nothing wrong. Appellants' logic is the very antithesis of this Court's rulings in *North West Cruiseship.*

Assuming *arguendo* that Appellants are concerned with the integrity of the initiative process, they have recast the certification safeguard to achieve purposes for which it was never intended, while failing to comment on the several other safeguards that worked as they were intended and did ensure the integrity of the initiative process in this case. As this Court noted in *North West Cruiseship*:

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[20] They do not allege any of the affidavits in this case have any technical deficiencies like the two pages disqualified in *North West Cruiseship.*

[21] *North West Cruiseship*, 145 P.3d at 587.

> We further note that the petition booklets were prepared with several safeguards, including (1) a warning that anyone who signs the petition knowing that he or she is not a qualified voter is guilty of a misdemeanor; (2) directions to the petition circulators that each subscriber must be a registered Alaskan voter; and (3) a certification affidavit from the petition circulator attesting, under penalty of perjury, that the signatures in each petition booklet were drawn from persons "who were qualified voters on the date of the signature." The training materials provided to petition circulators also emphasized that the subscribers must be registered voters. Given these additional safeguards, we conclude that the 1,202 signatures were properly counted.[22]

These same safeguards are present here, and did act to ensure the integrity of the initiative process for gathering signatures on the petition booklets.

North West Cruiseship simply does not empower Appellants to conjure additional requirements and remedies in the statutes, rather the case stands firmly against such efforts to stifle the constitutional right to initiative. At its core, Appellants' Complaint attempts to impose duties on the lieutenant governor that do not exist in the law and then use the supposed violation of that duty to throw out the certified signatures of tens of thousands of Alaskans, none of which have Appellants' alleged as improper.

The language of AS 15.45.130 provides no solace for Appellants. The statute expressly lists the requirements of the affidavit needed to deem the petition properly certified. Nowhere in the statute is the lieutenant governor required to extend his ministerial duty into investigation and verification of each and every sworn statement made in the circulators' affidavits to deem them properly certified, and nowhere in the statutes is the falsity of such affidavits made a basis for excluding subscriptions on otherwise properly certified petitions.

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[22] *North West Cruiseship*, 145 P.3d at 576-77.

Appellants make much of the words "properly certified" in arguing they somehow reflect the Legislature's intent for the lieutenant governor to confirm the veracity of the sworn statements;[23] but putting dictionary definitions aside, if the Legislature intended the lieutenant governor to investigate and adjudicate the veracity of every petition affidavit, it would have provided a timeframe and process for doing so. It did not, and all of Appellants' linguistic speculation fails in light of this simple reality.

Appellants continue to cite a variety of non-Alaska cases that involve actual fraud or procedural misconduct,[24] without alleging anything more in this case than proper execution of affidavits including reference to a compensation statute that Appellants' *interpret* as restricting all compensation to an unconstitutional degree. None of the Appellants' cited cases matches the circumstances of this case or has as a backdrop the clear constitutional authority present in Alaska of empowering initiatives by voters and avoiding disenfranchising these voters for the mistakes of others. Appellants' cited cases are inapposite and unpersuasive authorities as those decisions concern different circumstances from those present in this case in which no question has been raised as to the validity of the 39,149 voter signatures Appellants ask this Court to invalidate.

For example, in *Brousseau v. Fitzgerald*, the Arizona Supreme Court overturned the trial court's finding that verified signatures, contained on petitions improperly circulated by minors and other unqualified persons other than those who falsely verified the petitions, were validly counted.[25] Reasoning that "[d]efects either in circulation or signatures deal

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[23] Appellants' Brief at 31-33.
[24] Appellants' Brief at 36.
[25] *Brousseau v. Fitzgerald*, 675 P.2d 713 (Ariz. 1984).

with matters of form and procedure, but the filing of a false affidavit by a circulator is a much more serious matter involving more than a technicality," the *Brousseau* court held that allowing "the circulation of petitions by minors or other unqualified persons and certification of the petitions by persons other than the actual circulators without any sanction other than the inconvenience of showing that the signatures were in fact authentic would render the circulation requirement meaningless and possibly lead to additional falsehood and fraud by others."[26] Appellants have not alleged such falsehood and fraud here, only that Fair Share's circulators did not comply with Appellants' interpretation of a compensation provision that has nothing to do with the signatures they collected. If the circulators had certified petitions they had not personally circulated, let alone petitions circulated by unqualified persons, that would raise an issue absent in this case concerning whether the petition signers were well informed when they gave their signatures as emphasized by *North West Cruiseship*. That is not the case here. Thus *Brousseau* merely shows Appellants' claims falling far short of the reasoning they rely upon. So too are Appellants' other cases readily distinguishable from this case.[27]

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[26] *Brousseau*, 675 P.2d at 715-16.

[27] *See also State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801 (Ohio 1982) (circulator was admittedly not a qualified elector, an express and strict requirement of the Ohio law); *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75 (Me. 2002) (circulator used a false identity and raised questions regarding his signature collecting); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006) (circulators attested to signatures they had not personally gathered, used false addresses, and employed a deceitful "bait and switch" tactic to collect signatures); *Benca v. Martin*, 500 S.W.3d 742 (Ark. 2016) (violation of strict Oklahoma procedural requirement that circulator file affidavit prior to collecting signatures).

Moreover, even if Appellants' interpretation of AS 15.45.110(c) is upheld, it does not raise any question that the Alaskans who signed the petitions were anything but well-informed in doing so, and provides no justification for disenfranchising them as cautioned against in *North West Cruiseship.* Despite reaching across the country to grasp for inapplicable examples of extreme fraud and strict statutory application, Appellants cannot avoid the Alaska authority directing this Court to "liberally construe the constitutional and statutory requirements pertaining to the use of initiatives" so that "the people [are] permitted to vote and express their will on the proposed legislation."[28]

Nothing that Appellants have alleged or argued impacts this Court's clear holding that the requirements of AS 15.45.130 should be construed "only as broadly as is necessary to address the specific error" and "should avoid an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong."[29] This Court has recently affirmed a superior court order that "[t]he Alaska Constitution gives the voters great power to act independently of their elected officials" and declining to "restrict the voters' right to affirmatively take action to admonish or disapprove of an elected official's conduct in office as voters have a right to do so through the initiation, referendum, and recall process."[30] Even if Appellants' overbroad and unconstitutional interpretation of AS 15.45.110(c) is upheld, the superior court correctly held that they have failed to state a

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[28] *Meyer v. Alaskans for Better Elections*, 465 P.3d at 482 n.19 (quoting *Boucher*, 528 P.2d at 462).
[29] *North West Cruiseship,* 145 P.3d at 587.
[30] *Dunleavy v. State,* 2020 WL 2115477 at *3, 9 (2020) (*affirmed by State Division of Elections v. Recall Dunleavy,* Sup. Ct. No. S-17706, Order of May 8, 2020).

claim upon which relief can be granted because the remedy of disqualifying petitions is not available under AS 15.45.130 upon their allegations.

B. Appellants' Interpretation of AS 15.45.130 Represents an Unconstitutional Restriction on Free Speech.

The superior court offered an alternative holding that AS 15.45.130 is unconstitutional:

> In the Court's view, the remedy of not counting signatures contained in AS 15.45.130 is not narrowly tailored to accomplish the goals of integrity and enforcing veracity because there are other, less restrictive ways to accomplish those goals without stripping away the voters' rights. As such, the stated remedy under AS 15.45.130 is an unconstitutional restriction on the free speech rights of the disenfranchised voters.[31]

Appellants argue that the superior court's ruling is "foreclosed by federal law interpreting the rights to free speech and to vote" and that this Court's holding in *North West Cruiseship* regarding disenfranchisement is "unfortunate dicta" that this Court should disavow.[32] To the contrary, federal decisions do not foreclose this Court from extending further protections under the Alaska Constitution, which protects free speech "at least as broad[ly] as the U.S. Constitution"[33] and "in a more explicit and direct manner."[34] And, the holding in *North West Cruiseship* was not dicta but a central principle of the superior court decision adopted by this Court:

> The voters who signed the other pages of the two booklets *have a right to participate in the initiative process* and *should not be disenfranchised* because of the error of a circulator that had no impact upon them. This Court should construe the remedial portion of AS 15.45.130 only as broadly as is

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[31] Order at 29. [Exc. 255]
[32] Appellants' Brief at 37-44.
[33] *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 198 (Alaska 2007) (quoting *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982)).
[34] *Id.* (quoting *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980)).

> necessary to address the specific error. It should avoid an interpretation that requires a broader remedy that *disenfranchises voters* who did nothing wrong.[35]

This is not unfortunate dicta. It is an established constitutional decision that entirely disposes of Appellants' disenfranchisement effort, as the superior court correctly held.

II. THE SUPERIOR COURT CORRECTLY HELD THAT APPELLANTS' INTERPRETATION OF AS 15.45.110(c) IS AN UNCONSTITUTIONAL RESTRICTION OF POLITICAL SPEECH

A. Appellants' Construal of the Per-Signature Restriction to Apply to Hourly, Salary and Other Compensation Is Not Narrowly Tailored to Serve a Compelling Governmental Interest and Represents Unconstitutional Intrusion into Political Speech.

Protection of political speech is "at its zenith" for petition circulators because their activities are considered "core political speech" with "interactive communication concerning political change."[36] Appellants' interpretation of AS 15.45.110(c) cannot withstand constitutional scrutiny under controlling precedent because that interpretation is not narrowly construed and undermines the only arguably acceptable State interest involved in this case. Fair Share has cross-appealed the superior court's acceptance of this interpretation, but agrees with the court that if the statute is interpreted as Appellants suggest, it is clearly unconstitutional.

Appellants fail to understand the unconstitutionality of their statutory interpretation, fail to distinguish cases that pre-date the current constitutional precedent or involve fraudulent conduct not present here, fail to address whatsoever the policy basis of the

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[35] *North West Cruiseship*, 145 P.3d at 587.

[36] *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008); *Meyer v. Grant*, 486 U.S. at 421-22.

statute they purport to enforce, and fail once again to address the relevant reasoning of this Court. Instead, Appellants embrace cases upholding bans on per-signature compensation as supporting their severe restriction on all compensation.[37] But, courts such as those in *Prete* and *Jaeger* only permitted restrictions to per-signature compensation because those restrictions did not apply or affect other methods of compensation.[38] Appellants do not allege that Fair Share's circulators were paid on a per-signature basis but, rather, that their compensation divided by the actual number of signatures gathered exceeds $1. Appellants' effort to expand a per-signature restriction to all compensation of petition circulators, is akin to the complete ban on compensation that the *Meyer v. Grant* court held to a "well-nigh insurmountable" burden.[39] Appellants have utterly failed to meet *any* burden because they cannot refute the fatal fact that their interpretation applies a per-signature restriction to every form of compensation in the service of no identifiable state interest. Nor have Appellants addressed the effect of *Citizens United* and the recent *Thompson* case[40] that underscore the importance of compensation in robust political speech and the unconstitutionality of restrictions of the ilk Appellants seek to impose on political speech. All of these authorities weigh against Appellants because their sweeping interpretation is

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[37] Appellants' Brief at 19.

[38] *Prete v. Bradbury*, 438 F.3d 949, 963 (9th Cir. 2006) (explaining that less-than-strict scrutiny was only possible because the scope of the Oregon ban was limited to per-signature petition payments only); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001) (noting that state's interest in preventing signature fraud was supported with evidence that paying petition circulators per signature encouraged such fraud).

[39] *Meyer v. Grant*, 486 U.S. at 425.

[40] Fair Share's Motion at 15.

not narrowly construed or founded upon the necessary compelling state interest to justify restricting political speech.

As the superior court's analysis demonstrates,[41] the danger of unconstitutionality is acute in this area of legislation, as the Alaska Constitution protects free speech" at least as broad[ly] as the U.S. Constitution"[42] and "in a more explicit and direct manner."[43] Once the Court determines that a law impacts constitutional speech, it next addresses whether the act survives constitutional scrutiny with a multi-part inquiry.[44] First, the Court considers how the law impacts protected speech, for this determines the level of scrutiny to which the law must be subjected; next, the Court identifies and evaluates the government's interest in impacting protected speech; and lastly the Court determines how closely the means chosen by the government fit the ends served by the law.[45]

Content-neutral restrictions on free speech are subject to intermediate scrutiny, which means that they are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[46] But a content-neutral restriction will be subject to strict scrutiny if it imposes a prior restraint on speech.[47] "A prior restraint is an official

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[41] Order at 12-20. [Exc. 238-246]
[42] *Alaskans for a Common Language*, 170 P.3d at 198 (quoting *Vogler v. Miller*, 651 P.2d at 3.
[43] *Id.* (quoting *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980)).
[44] *Id.* at 204.
[45] *Id*.
[46] *Id.* at 205 (quoting *Clark v. Comty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984)).
[47] *Id.* (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

restriction imposed upon speech or other forms of expression in advance of actual publication."[48] Both the federal and Alaska Constitutions look with disfavor on broad-based prior restraint, and such restraints bear a heavy presumption against their constitutionality because of their chilling effect on potentially protected speech.[49] "[O]nly a regulation which impinges on the right to speak and associate to the least degree possible consistent with the achievement of the state's legitimate goals will pass constitutional muster."[50]

Here, the Appellants' interpretation of the per-signature restrictions in AS 15.45.110(c) applying to all forms of compensation for petition circulators amounts to a severe restriction and a prior restraint on petition circulation as a whole. The State may have a legitimate interest in combating signature fraud when petition circulators are compensated on a per-signature basis. We suggest this may be a legitimate state interest because *Meyer v. Grant* explicitly rejected initiative fraud as a legitimate basis to directly restrict compensation for petition circulators exercising their free speech rights.[51] Even assuming such a state interest may be a legitimate basis for restricting free speech, it may only survive constitutional scrutiny if the restriction is narrowly tailored to serve that specific interest. There simply is no legitimate state interest and none has been articulated by the Appellants or by any court since *Meyer v. Grant* in restricting compensation for

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[48] *Id.* (quoting *State v. Haley*, 687 P.2d 305, 315 (Alaska 1984)).
[49] *Id.* (citing *U.S. v. Nat'l Treasury Employees Union,* 513 U.S. 454, 467-68 & n. 11 (1995)).
[50] *Vogler v. Miller*, 651 P.2d at 5 (citing *Mickens v. City of Kodiak*, 640 P.2d 818, 822 (Alaska 1982)).
[51] *Meyer v. Grant*, 486 U.S. 414, 425-26.

petition circulators other than per-signature compensation. Accordingly, the application of the per-signature restriction in AS 15.45.110(c) to all forms of compensation is not in service of any legitimate state interest, is not narrowly drawn, and cannot survive constitutional scrutiny.

In *Prete*,[52] the Ninth Circuit applied *Meyer v. Grant* to an Oregon law prohibiting only per-signature compensation. In *Prete*, the Ninth Circuit found the per-signature restriction to be constitutional only because it could apply a lesser level of constitutional scrutiny than *Meyer v. Grant* since all other forms of compensation continued to be available lessening the impact to free speech and there was evidence of the state's interest in avoiding signature fraud under per-signature compensation.[53] Read properly, *Prete* is the constitutional outer edge of restricting petition circulators' compensation and free speech rights and a severe indictment of Appellants' broad interpretation of AS 15.45.110(c). Appellants' broad interpretation would restrict all compensation for petition circulators without any evidence of signature fraud whatsoever. Appellants' broad interpretation is not narrowly drawn and is well outside any legitimate state interest in restricting petition circulators' free speech rights. Simply stated, Appellants' broad interpretation is well beyond the restrictions to free speech permitted under *Meyer v. Grant* and *Prete*.

As part of its analysis, the *Prete* court considered the Eighth Circuit's decision upholding a ban on per-signature payments in North Dakota. In *Jaeger*, the Eighth Circuit

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[52] *Prete*, 438 F.3d 949.
[53] *Id.* at 964-70.

distinguished North Dakota's prohibition on paying initiative-petition circulators "on a basis related to the number of signatures obtained" (i.e., the same type of restriction at issue here) from the complete prohibition on paid petition circulators in *Meyer v. Grant*. In *Jaeger*, the court noted that the state had an "important interest in preventing signature fraud" in the initiative process, and that the state had supported that interest with evidence that paying petition circulators per signature encouraged such fraud. *Id.* at 618.

As in *Prete* and *Jaeger*, no state interest has been offered here to justify imposing severe restrictions on the free speech rights of petition circulators. As noted above, the *Prete* court emphasized that its application of less-than-strict scrutiny was only possible because the scope of the Oregon ban was limited to per-signature petition payments only and there was evidence of signature fraud.[54] The *Prete* court also noted that the Oregon ban "barr[ed] only payment of petition circulators on the basis of the number of signatures gathered" and did not "prohibit adjusting salaries or paying bonuses according to validity rates or productivity."[55] The notion of restricting *all* forms of compensation for petition circulators to an amount equal to $1 per signature actually gathered—*de facto* restricting all forms of compensation—is the type of unconstitutional intrusion into political speech the U.S. Supreme Court rejected in *Meyer v. Grant* and the Ninth Circuit was careful to limit in *Prete*.

Both *Meyer v. Grant* and *Prete* highlight the fatal constitutional flaws of Appellants' broad interpretation in this case and demand strict scrutiny of AS 15.45.110(c) to prevent

[54] *Id*. at 963.
[55] *Id*. at 968.

unconstitutional infringement into the petition circulators' rights to political speech. The superior court correctly held that the broad restriction does not survive constitutional scrutiny. It should also not be overlooked that the judicial bore tide is to permit and protect the constitutional right to use compensation and money in the exercise of political speech. *Prete* was decided in the era prior to the U.S. Supreme Court's landmark decision in *Citizens United v. Federal Election Comm'n* that narrowed the justifiable state interest in restricting political contributions to actual quid pro quo corruption and its appearance.[56] The Ninth Circuit has overturned some of Alaska's contribution limits in light of *Citizens United*, and the U.S. Supreme Court recently suggested that the Ninth Circuit may not have gone far enough in applying its precedent.[57] Recent clear precedent continues to provide increasing constitutional protection to the use of money in robust political speech and stands against the type of restrictions to political speech inherent in Appellants' broad interpretation of AS 15.45.110(c).

B. Appellants' Arguments Regarding the Record Are Unpersuasive.

Appellants argue the superior court erred in facially invalidating AS 15.45.110(c) because "Fair Share failed to meet its burden of providing evidence that Alaska's statutory cap on the payment of circulators created a burden on petition circulation in Alaska."[58] The superior court properly assumed Appellants' allegations in their Complaint were correct for the purposes of considering Fair Share's and the State's dispositive motions. Moreover, Appellants' own arguments reflect a robust factual framework supporting the

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[56] *Citizens United*, 558 U.S. 310, 359-60 (2010.
[57] *Thompson v. Hebdon*, 140 S.Ct. 348, 350 (2019).
[58] Appellants' Brief at 17-18.

superior count's constitutional holdings. The petition circulators at issue exercised their constitutional rights to engage in political speech successfully more than 30,000 times in gathering signatures from Alaska voters, and an untold number of times unsuccessfully. During this entire extensive exercise of the petition circulators' constitutional rights to engage in political speech, Appellants do not factually allege a single case of improper behavior, an improper representation, or even an attempt to mislead or defraud a single Alaskan voter by the petition circulators.

Appellants also factually allege the 24 petition circulators at issue were paid a salary, and were not paid based on the number of signatures they gathered.[59] Appellants also factually allege the salary paid to the petition gatherers when divided by the number of signatures they gathered exceeded $1.[60] Appellants do not factually allege a single circumstance in which petition circulators had the financial incentive to engage in "bounty hunting" based on being paid for each signature gathered.

Based on this factual framework, Appellants argue that neither Fair Share nor the petition circulators have the constitutional right to engage in such political speech merely because the salary of the petition circulators when divided by the number of signatures they gathered exceeded $1. In fact, Appellants are asking this Court to not only severely restrict the constitutional rights of Fair Share and the petition circulators to engage in political speech on these facts, but also to hold that the exercise of the political speech is a Class B misdemeanor under AS 15.45.110(e) and is punishable by up to 90 days in jail and a fine

[59] Complaint at 5 ¶ 22. [Exc. 005]
[60] *Id.* at 6 ¶ 24. [Exc. 006]

of up to $2,000. Frankly, it would be hard to imagine the factual basis for a more severe restriction more broadly applied against constitutional rights to engage in robust political speech than the one before this Court.

In *Meyer v. Grant,* the court fully agreed with the Court of Appeals that similar restrictions impose "a direct restriction which 'necessarily reduces the quantity of expression. . . .'"[61] In doing so, the Meyer *v. Grant* court held, "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change."[62] As a result, the *Meyer v. Grant* court held that similar restrictions involve "a limitation on political expression subject to exacting scrutiny."[63] In doing so, the court noted that such restrictions "limits the number of voices who will convey appellees' message" and, "therefore, limits the size of the audience they can reach."[64] It also noted that such restrictions "makes it less likely that appellees will garner the number of signatures necessary" thus "limiting their ability to make the matter the focus of statewide discussion."[65] Each of these observations are applicable to the facts alleged by Appellants in this case. Appellants are seeking to limit Fair Share's reach and voice.

As a practical matter, there is no reason for Fair Share or the State to advance more evidence in support of their positions. If there is any failure, it is not the failure of Fair Share or the State to advance evidence, but it is in the failure of Appellants to allege an

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[61] *Meyer*, 486 U.S. at 419 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).
[62] *Id.* at 421.
[63] *Id.* at 420 (citing *Buckley,* 424 U.S. at 45).
[64] *Id.* at 422-23.
[65] *Id.* at 423.

evidentiary issue that could avoid the superior court's resolution of the dispositive motions. It is disingenuous for Appellants to suggest the failure of evidence lies at the feet of Fair Share, the State, or the superior court when Appellants' factual allegations are assumed correct and the remaining issues are legal and not factual.

It is also important to note that Appellants did not appeal or otherwise object to the superior court's ruling on the dispositive motions without further evidence, and, thus Fair Share does not believe this issue is properly before this Court. Appellants brought this expedited lawsuit to bring these legal issues before this Court for decision prior to the printing of the November ballots. Now that Fair Share has been forced in part to accommodate Appellants' request for expedited treatment, Appellants should not be heard to complain about the challenges resulting from their own success in expediting this case to this Court.

Fair Share has been forced in the middle of a campaign to divert valuable resources and time to respond to a meritless lawsuit by an industry group whose goal seems to be to undermine the initiative process for the purpose of helping powerful international producers avoid having to pay Alaskans a fair share for their oil. Appellants' desire to find ways to waste more of Fair Share's and this Court's time with new and evolving legal issues such as its new evidentiary concerns is disingenuous and corrosive to the integrity of the initiative process. Initiatives are an exercise in direct democracy and this Court should be sensitive to Appellants' efforts to use the Alaska courts to undermine the Fair Share Act and the initiative process.

Finally, as with much of their case, Appellants' notion that the superior court could not reach the constitutionality of the statute without a full evidentiary record is not supported by the case cited by Appellants. In *Washington State Grange*,[66] the U.S. Supreme Court reversed the Ninth Circuit's determination that a Washington State initiative, I-872, was facially unconstitutional because it found that concerns regarding voter confusion amounted to "sheer speculation" in the absence of evidence.[67] But *Washington State Grange* does not stand for the proposition that standing precedent cannot be applied without unique evidence; on the contrary, the Court looked to its precedent in *California Democratic Party v. Jones*,[68] but distinguished that case because "unlike the California primary, the I–872 primary does not, by its terms, choose parties' nominees."[69] Here, Appellants have not and cannot distinguish the long line of precedent since *Meyer v. Grant* applying constitutional scrutiny to restrictions on circulator compensation, because there is no basis for distinguishing the compensation in those cases from the compensation at issue in this case.

Core political speech is core political speech, and the superior court was not barred from applying clear precedent simply because Appellants brought expedited litigation with no realistic opportunity for development of an evidentiary record. There is no meaningful difference in the impact of restrictions on circulator compensation between prior cases and

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[66] 552 U.S. 442 (2008).
[67] *Id.* at 454.
[68] 530 U.S. 567 (2000).
[69] *Washington State Grange*, 552 U.S. at 453.

this matter. If anything, *Washington Grange* supports Fair Share's cross-appeal on the issue of constitutional avoidance to save the statute with a narrower interpretation.

CONCLUSION

Appellants' case fails as a matter of law because the petition circulators properly certified the petitions under AS 15.45.130. Appellants' interpretation of AS 15.45.130 is contradicted by *North West Cruiseship* and virtually every other statute in AS 15.45 governing the initiative process. When the "per-signature" restriction is properly interpreted and applied, it should not be applied to other forms of compensation; and Appellants' case fails as a matter of law because the petition circulators did not enter into an agreement in violation of AS 15.45.110(c). If the "per signature" restriction is interpreted more broadly to apply to all forms of compensation, it is, as the superior court found, an unconstitutional impairment of political speech. While Fair Share disagrees that the superior court's statutory interpretation of AS 15.45.110(c) is the only plausible interpretation, it completely agrees that, if it is interpreted more broadly to apply to all forms of compensation, it is clearly unconstitutional.

Petition circulators are engaged in "core political speech" for which constitutional protection is "at its zenith"[70] in scrutinizing restrictions on their activity. Appellants' interpretation of AS 15.45.110(c) cannot withstand constitutional scrutiny under controlling precedent because that interpretation is not narrowly construed and actually undermines the only arguably acceptable State interest presented in this case, forcing all circulators into the very "bounty hunting" that the Legislature sought to reduce.

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[70] *Nader v. Brewer*, 531 F.3d at1035; *Meyer v. Grant*, 486 U.S. at 421-22.

But, regardless of the interpretation of AS 15.45.110(c), Appellants' claims still fail as a matter of law because the remedy of disenfranchising 39,149 Alaskan voters is not available under the facts of this case. Appellants have not alleged a single improper signature among the 39,149 the lieutenant governor verified as correct. There is no basis for blocking the Fair Share Act from the ballot. Appellants' interpretation of AS 15.45.130 is contradicted by virtually every other statute in AS 15.45 governing the initiative process and would, if adopted by this Court, permit large well-financed industry interests to frustrate the very purposes underlying Alaskans' constitutional rights to pass laws directly through initiative without obstruction. Fair Share respectfully urges this Court to roundly reject Appellants' efforts to use the court system as another piece of their campaign against the Fair Share Act and to uphold the constitutional right of Alaskans to engage in political speech without unconstitutional intrusion and to vote on this critical issue of public policy.

DATED this 6th day of August, 2020.

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