Print Form

IN THE SUPREME COURT OF THE STATE OF ALASKA

DOCKETING STATEMENT B

For Use With Petitions for Hearing, Petitions for Review, and Original Applications and as a Notice of Intent to File Sentence Petition

(for court system use)

No. _____

INSTRUCTIONS FOR MULTIPLE PARTIES OR ATTORNEYS: If there are multiple parties or attorneys, repeat the appropriate box. This may be done on a separate page. Please clearly indicate which attorney represents which party.

1. TYPE OF PETITION

Type of Petition	Court of Appeals or Superior Court Case Number	Date of Distribution of Decision or Order to be Reviewed	Superior Court Judge	Subsequent Proceedings
a. ☐ Petition for Hearing from Court of Appeals				Petition for Rehearing: ☐ not filed ☐ filed. Date filed: _____ ☐ Date of distribution of order denying petition: _____
b. ☐ Petition for Hearing from Superior Court				
c. ☒ Petition for Review ☐ Notice of Intent to file Sentence Petition	3AN-20-07858CI	October 5, 2020	Dani Crosby	Motion for Reconsideration: ☒ not filed ☐ filed. Date filed: _____ ☐ denied by order distribution: _____ ☐ deemed denied under Civil Rule 77(k)(4).
d. ☐ Original Application ☐ from Court of Appeals case No. _____ ☐ from trial court case. No. _____ ☐ Other. Explain: _____				Judge _____.

2. PETITIONER

a. Name: Kevin Meyer, Gail Fenumiai, and State of Alaska,	b. Status in the Trial Court: ☐ Plaintiff ☒ Defendant ☐ Other. Specify: _____.
c. Petitioner Mailing Address (**not** attorney's address): PO Box 110017	
City: Juneau State: Alaska Zip Code: 99811-0017	d. Telephone: (907) 465-4611

3. PETITIONER'S ATTORNEY

a. Name: Laura Fox	b. Bar Number: 0905015	
c. Attorney Mailing Address: 1031 West Fourth Avenue, Suite 200	d. Telephone: (907) 269-5722	e. Fax: (907) 258-4978
City: Anchorage State: Alaska Zip Code: 99501	f. Firm/Agency: Department of Law	

4. RESPONDENT

a. Name: Arctic Village Council et al.	b. Status in the Trial Court: ☒ Plaintiff ☐ Defendant ☐ Other. Specify: _____.
c. Respondent Mailing Address: C/O Native American Rights Fund	
City State Zip Code	d. Telephone

5. RESPONDENT'S ATTORNEY

a. Name ☐ Court Apptd Natalie Landreth			b. Bar Number 0405020	
c. Attorney Mailing Address 745 West Fourth Avenue, Suite 502			d. Telephone (907) 276-0680	e. Fax (907) 276-2466
City Anchorage	State Alaska	Zip Code 99501	f. Firm/Agency Native American Rights Fund	

6. CONSTITUTIONAL ISSUES

Is the constitutionality of a state statute or regulation at issue in this proceeding? ☒ Yes ☐ No
If yes, cite statute or regulation: AS 15.20.081(d); AS 15.20.066(b)(2)

7. SENTENCE PETITIONS ONLY

a. ☐ Excessiveness of the sentence is the ONLY issue.

b. ☐ A transcript of the sentencing proceeding is requested because Petitioner is indigent.
(If petitioner has not been adjudicated indigent by the trial court, a completed, financial statement affidavit form must be attached.)

8. ATTACHMENTS

The following items are submitted with this form (**a, b, or c must be check unless this is a notice of intent to file sentence petition):**

a. ☒ The original petition for review and SIX copies or ☐ petition for hearing from the superior court and SIX copies; OR

b. ☐ The original petition for hearing from the court of appeals and NINE copies; OR

c. ☐ The original application and SIX copies.

d. ☒ A copy of the judgment or order from which relief is sought attached to the original petition and EACH copy.

e. ☐ A $250 filing fee or ☐ a motion to appeal at public expense (financial statement affidavit form must be included).
☐ a motion to waive filing fee (if basis for motion is inability to pay, financial statement affidavit form must be included).
☒ no filing fee is required because appellant is ☐ represented by court-appointed counsel.
☒ the state or an agency thereof.
☐ an employee appealing denial of benefits under AS 23.20 (Employment Security Act)

f. A motion for expedited action ☒ submitted ☐ not submitted.

g. A motion for stay of trial court proceedings ☐ submitted ☐ not submitted

October 6, 2020
Date

/s/ Laura Fox
Signature of Petitioner or Petitioner's Attorney

CERTIFICATE OF SERVICE

I certify that on _____ a copy of this docketing statement and all attachments (except filing fee) were

mailed	delivered	to **All Parties** in the trial court (listed)
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____

Signature:_____

anc.law.ecf@alaska.gov

E M E R G E N C Y

IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and the ALASKA DIVISION OF ELECTIONS,	)	Supreme Court No.: S-_____
Petitioners,	)	
v.	)	
ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Respondents.	)	

Trial Court Case No.: **3AN-20-07858 CI**

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE (907) 269-5100

EMERGENCY MOTION FOR EXPEDITED DECISION ON THE STATE'S PETITION FOR REVIEW
(Appellate Rule 504)

Petitioners, State of Alaska, Division of Elections, Kevin Meyer, and Gail Fenumiai, make this Emergency Motion for Expedited Decision on their Petition for Review filed today. Expedited action is necessary because this dispute concerns the State's ability to apply a statutory witness requirement for absentee by-mail ballots in the upcoming general election. Thousands of absentee ballots—with instructions explicitly requiring that the voters have their ballots witnessed—have already been distributed, voters have already begun to cast their ballots, and election day is fast

approaching. On October 5, 2020, the superior court granted but did not implement a preliminary injunction directing the Division to suspend the witness requirement and directing the parties to agree to, or separately propose, a public awareness campaign. If this Court were to affirm the superior court's preliminary injunction, the Division would need to initiate a significant, expedited public awareness campaign to help assure voters are informed that the statute has been suspended and are not misled or confused about the absentee voting process.

For example, if the superior court orders any mailings, it will take the Division 7-10 days to print and mail a postcard to all registered voters. Voters would then need additional time to receive the postcard, act on the information provided by the Division, and vote and return their ballots before next month's election—all while accounting for the likelihood that mail may be delayed. Additionally, until this Court definitively rules on the matter, there is an ongoing risk that voters might misunderstand the superior court's ruling—even if it is stayed—and believe that the witness requirement is no longer in force. If voters submit unwitnessed ballots, and the witness requirement is ultimately upheld by this Court, those voters will be disenfranchised.

For these reasons, the State requests that the Court rule by close of business Monday, October 12, 2020. This will minimize the risk of confusion or potential disenfranchisement to voters and allow the Division as much time as possible to education and inform voters about the changes to absentee voting requirements.

Counsel for the State has notified counsel for the respondents of the State's

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intention to file this emergency motion and the related petition for review. All grounds advanced in support of this motion were submitted to the superior court. This motion is based upon Alaska Rules of Appellate Procedure 402 and 504 and supported by the attached affidavit of counsel and written statement of facts.

Opposing counsels' telephone numbers and addresses are:

Natalie Landreth
Native American Rights Fund
2801 B Street, Suite 401
Anchorage, Alaska 99501
(907) 276-0680

Stephen Koteff
ACLU of Alaska Foundation
ACLU of Alaska
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99503
(907) 263-2007

Ezra D. Rosenberg
Lawyers' Committee for Civil Rights Under Law
1500 K Street, NW Suite 900
Washington, DC 20005
(202) 662-8600

Dale E. Ho
American Civil Liberties Union Foundation, Inc. (New York)
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7866

DATED October 6, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: /s/ *Laura Fox*
Laura Fox
Assistant Attorney General
Alaska Bar No. 0905015
State of Alaska; Department of Law
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IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and the ALASKA DIVISION OF ELECTIONS,	)	Supreme Court No.: S-_____
Petitioners,	)	
v.	)	
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Respondents.	)	

Trial Court Case No.: **3AN-20-07858 CI**

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WRITTEN STATEMENT OF FACTS IN SUPPORT OF EMERGENCY MOTION FOR EXPEDITED ACTION

The petitioners, the State of Alaska, Division of Elections, Kevin Meyer, and Gail Fenumiai ("the State") provide the following statement of facts in support of this emergency motion:

1. Alaska Statute 15.20.081(d), the "statutory witness requirement," requires that a voter who is voting an absentee ballot by mail must sign the voter's certificate on the absentee ballot envelope in the presence of a designated official or in the presence of an individual who is 18 years of age or older, "who shall sign as a witness and attest to the date on which the voter signed the certificate in the individual's presence, and, in addition, the voter shall certify, as prescribed in AS 09.63.020, under penalty of perjury,

that the statements in the voter's certification are true."

2. In May 2020, the State began ordering absentee ballot envelopes, which include instructions on how to comply with the statutory witness requirement for absentee by-mail ballots.

3. In August 2020, during the ongoing COVID-19 pandemic, the State conducted primary elections with the witness requirement in place.

4. On September 8, 2020, Respondents filed their complaint in case number 3AN-20-07858 CI. They alleged the witness requirement was unconstitutional as applied, and requested an order directing the State to "preliminarily and permanently" suspend the witness requirement and modify election materials, including absentee by-mail ballots, "during the COVID-19 pandemic."

5. On September 8, 2020, Respondents filed a motion for preliminary injunction to enjoin the State's enforcement of the witness requirement.

6. On September 19, 2020, the State began mailing absentee ballots to military and oversees voters, in accordance with federal law.

7. On September 21, 2020, the State filed its opposition to the motion for preliminary injunction and moved to dismiss the case based on the doctrine of laches. In accompanying documents, the State also notified respondents that it planned to mail absentee ballots to voters in Alaska beginning as early as September 28, 2020. This decision was consistent with AS 15.20.081(c), which requires that after receipt of an absentee ballot application, "the absentee ballot and other absentee voting material shall

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be sent as soon as they are ready for distribution."

8. On September 28, 2020, Respondents filed a motion for a temporary restraining order to prevent the State from mailing absentee ballots, then planned to begin on or after October 2, 2020.

9. On September 30, 2020, the superior court issued an order denying Respondents' motion for temporary restraining order. The superior court also indicated it would not order any modification to the absentee ballots.

10. On October 1, 2020, the superior court heard oral argument on Respondents' motion for preliminary injunction and the State's motion to dismiss.

11. On October 5, 2020, the superior court issued a written decision, granting Respondents motion for preliminary injunction, but declining to give the order immediate effect to allow the parties time to provide further briefing and argument on how the Division should implement the injunction. The court gave the parties until 4:30 p.m. on October 6, 2020 to submit a stipulation detailing how the court's order would be implemented or—if they could not agree—separate proposed orders. By delaying the effective date of the order, the superior court also contemplated that the Division might seek review from this Court, recognizing that "if Defendants seek review from the Alaska Supreme Court, they may wish to request a stay of this order—by delaying entry of the preliminary injunction order, the court may avoid confusion that would result from issuing an order eliminating the Witness Requirement, then staying it while the matter is before the Alaska Supreme Court."

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12. On October 6, at 11:49 p.m, counsel for the State contacted counsel for Respondents and informed them of the State's intent to file a petition for review and this emergency motion for expedited decision, proposing that Respondent's file their opposition by close of business on Wednesday, October 7.

13. She responded proposing that they file their response on Friday, October 9 by noon, with argument on Monday, if the court wishes.

14. If the witness requirement is suspended, the Division will need time to provide voter education and outreach. Tens of thousands of absentee ballots have already been sent out and the Division will have to engage in a variety of publicity measures to inform voters if the witness requirement is suspended.

15. Ballots must be voted and postmarked on or before election day, November 3, 2020.

16. The United States Postal Service recommends voters mail their ballots at least one week in advance of the State's deadline. This calculates to October 27, 2020. This date does not account for the geographic realities in Alaska, nor does it take into account the real potential for mail delays in the weeks leading up to the election.

17. In order to be counted, all domestic absentee by-mail ballots must be received by the Division by November 13, 2020, overseas ballots by November 18.

18. Given the risk of confusion to voters about potential changes to absentee ballot requirements involving changes to the witness requirement, the fact that voting is already underway, and the need for the Division to fulfill its mission and ensure

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accuracy and fairness in the election, the Division will need as much time as possible to educate voters about changes to the absentee voting process if this Court affirms the superior court's decision.

19. The Division therefore requests an order from this Court no later than Monday, October 12. This will provide the Division with much-needed to time to conduct education and outreach efforts as contemplated by the superior court's ruling.

DATED October 6, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: /s/ *Margaret Paton Walsh*
Margaret Paton Walsh
Chief Assistant Attorney General
Alaska Bar No. 0411074

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IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and the ALASKA DIVISION OF ELECTIONS,	)	Supreme Court No.: S-_____
Petitioners,	)	
v.	)	
ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Respondents.	)	

Trial Court Case No.: **3AN-20-07858 CI**

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Margaret Paton Walsh, state after being duly sworn and based upon personal knowledge that:

1. I am one of the Assistant Attorneys General assigned to represent petitioners in this petition for review.

2. At 11:49 p.m. on Tuesday, October 6, 2020, I spoke with Natalie Landreth, counsel for the respondents in this matter, and informed her that the State would be filing an emergency petition for review.

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3. I informed Ms. Landreth that we intended to ask for a decision no later than Monday, October12 because of the emergent situation.

4. She responded proposing that they file their response on Friday, October 9 by noon, with argument on Monday, if the court wishes.

Margaret Paton Walsh

SUBSCRIBED AND SWORN TO before me this 6th day of October, 2020 at Anchorage, Alaska.

Notary Public in and for the State of Alaska
My commission expires: w/ office

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Trial Court Case No.: **3AN-20-07858 CI**

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ORDER
(EMERGENCY MOTION)

Upon consideration of the emergency motion filed by Petitioners, State of Alaska, Division of Elections, Kevin Meyer, and Gail Fenumiai, and any opposition to it, we find that the upcoming election and the necessity of providing any public notification well in advance provide good cause to expedite action on the petition for review. Accordingly, the emergency motion is GRANTED and we will issue our decision on or before close of business Monday, October 12, 2020.

Respondents may have until 4:30 p.m. Wednesday, October 7, 2020 to file any opposition to the petition.

_____
Supreme Court for the State of Alaska

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IN THE SUPREME COURT OF THE STATE OF ALASKA

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MOTION TO ACCEPT OVER LENGTH PETITION FOR REVIEW

The petitioners, State of Alaska, Division of Elections, Kevin Meyer, and Gail Fenumiai, request that the Court accept the attached overlength petition for review under Alaska Rule of Appellate Procedure 503(a). This request is justified by the significance of the issue before the Court, the proximity of the 2020 general election, and the State's responsibility to inform the Court of the legal and practical ramifications of the superior court's preliminary injunction as soon as possible. Given the timeframe of this case, the State of Alaska will not have the opportunity to provide an additional round of appellate briefing, unlike in many petition cases. The State therefore needs to assure the Court is fully apprised of the issues now.

While Appellate Rule 403(b)(2) limits petitions for review to 15 pages, the State's petition is 28 pages. Normally, counsel for the State would devote further time and resources to conforming the petition to the page limit. But because the superior court issued the preliminary injunction on October 5, 2020 and the State—and its voters—have an interest in immediate review by this Court, counsel for the State was unable to do so.

Petitioners request the Court grant this motion and accept the overlength petition for review as filed.

DATED October 6, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: /s/ *Laura Fox*
Laura Fox
Assistant Attorney General
Alaska Bar No. 0905015

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IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and the ALASKA DIVISION OF ELECTIONS,	)	Supreme Court No.: S-_____
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Trial Court Case No.: **3AN-20-07858 CI**

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ORDER
(MOTION TO ACCEPT OVERLENGTH PETITION)

Upon consideration of the motion to accept the overlength petition filed by Petitioners, State of Alaska, Division of Elections, Kevin Meyer, and Gail Fenumiai, the motion is GRANTED and we accept the petition for filing.

_____
Supreme Court for the State of Alaska

anc.law.ecf@alaska.gov

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KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,	)	
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v.	)	
ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Respondent.	)	Supreme Court No. **S-** _____

Trial Court Case No. **3AN-20-07858 CI**

PETITION FOR REVIEW

INTRODUCTION

The primary election has come and gone, the Division of Elections has begun mailing an unprecedented volume of absentee ballots to voters, and some voters have already begun to vote. The superior court has now granted an injunction that changes election rules midstream, suspending a longstanding absentee voting law—the requirement of a single adult witness signature—mere weeks before the general election. But the plaintiffs sued too late to justify this disruptive remedy, which at this point will lead at best to confusion and at worst to disenfranchisement of some voters and heightened distrust of the election itself. The witness requirement is a reasonable, standard security measure that can be safely satisfied in the context of this pandemic.

Indeed, the individual plaintiffs successfully voted in the primary, and their evidence identifies no voter who will not vote if this longstanding statute stands. The Court should grant the petition for review and reverse the preliminary injunction.

BACKGROUND

I. Voting procedures

Alaskan voters have many possible ways to vote, including absentee, early, special needs, and in person.[1] No excuse is required to vote absentee in Alaska.[2] Voters who wish to vote absentee, other than absentee-in-person (that is, in front of an Absentee Voting Official),[3] must apply in advance for a ballot.[4] They can submit their application online, by email, by fax or by mail. They can choose between by-mail or electronic delivery. The Division of Elections sends by-mail absentee ballots to overseas and military voters 45 days before the election as required by federal law,[5] and to other voters starting approximately 25 days before the election. By statute, all absentee ballots submitted to the Division must be witnessed by an adult.[6]

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1 *See* AS 15.20.064 (early voting); AS 15.20.072 (special needs voting); AS 15.20.081 (absentee voting); AS 15.15 (in-person voting).

2 AS 15.20.081(a).

3 AS 15.20.061.

4 AS 15.20.081.

5 52 U.S.C. § 20302. *See also* AS 15.20.081(k).

6 AS 15.20.081(d); AS 15.20.066(b).

Voters who choose to receive their ballot by mail are sent a ballot, a secrecy sleeve, a return envelope, and an instruction sheet.[7] The return envelopes are non-standard and must be ordered at least six weeks in advance. [Appx. A at ¶7] The back of the envelope instructs "Your signature MUST be witnessed" and contains a space for a witness to sign and date the envelope and provide the location of witnessing. [Appx. B] The envelope warns that "False statements by the voter or by the attesting witness on the certificate are punishable by law." [Appx. B] It contains a perforated flap that reminds voters of various required steps, including witnessing. [Appx. B]

Voters may vote and return their absentee ballots as soon as they wish, up to election day. Absentee ballots will be counted if the Division receives them by mail up to ten days after the election,[8] but only if they were voted on or before election day: that is, if they are postmarked on or before election day,[9] or, if the postmark is absent or illegible, if the witness signature is dated on or before election day.[10]

Alaskans who are unable to vote in person due to age, illness, or disability may also take advantage of special-needs voting. This is done by having a personal representative bring them a ballot picked up from a polling place, early voting location, or Absentee Voting Official.[11] The personal representative witnesses the voter's vote and

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[7] AS 15.20.030.

[8] General election ballots mailed overseas will be accepted up to fifteen days after the election. AS 15.20.081(h).

[9] AS 15.20.081(e).

[10] *See* 6 AAC 25.560; AS 15.20.081(e).

[11] AS 15.20.072.

returns the ballot for the voter.[12] No advance application is required for special needs voting.[13]

Beginning seven days before the election, the Absentee Ballot Review Board convenes to review received absentee ballot envelopes for compliance.[14] They typically first check for a voter signature and identifier; if these are lacking, they reject the ballot. They next check for a witness signature; if there is none, they reject it for lack of a witness, without checking other things like the voter's registration status or date, whether the voter's identifier matches, whether the voter already voted by another method, whether the envelope is actually empty, and so forth.[15] This method of counting may therefore inflate the number of ballots rejected for lack of a witness signature as opposed to other reasons—that is, a ballot rejected for lack of a witness signature would not necessarily have been counted had it been witnessed. [Appx. C at ¶3] Voters whose absentee ballots are rejected are later notified of the reason for the rejection.[16]

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12 *Id.*

13 *Id.*

14 *See* AS 15.20.190 (describing the make-up and duties of the review board); AS 15.20.201 (time of district absentee ballot counting review); AS 15.20.203 (describing procedure for absentee ballot counting review).

15 *See* AS 15.20.203(a), (b).

16 AS 15.20.203(h), (i).

II. The 2020 election cycle

The state and federal governments issued emergency declarations about the COVID-19 pandemic in March.[17] The Division began preparing for a massive increase in by-mail absentee voting in May, including printing hundreds of thousands of absentee ballot envelopes. [Appx. A at ¶14] By early June, the Division had ordered more than seven times as many absentee ballot envelopes than it had used in 2016 or 2018. [Appx. A at ¶14 & Exh. C]

The 2020 primary election occurred on August 18. The Division went to great lengths to protect voters and election workers from COVID-19 exposure, including having masks, gloves and hand sanitizer at every polling place; arranging booths, tables, and waiting areas to maintain social distancing; and conducting distance-delivery training of poll workers. [Appx. A at ¶3] The REAA election is today.[18]

In the primary, 456 absentee ballots (1.05% of those returned) were rejected due to lack of a witness signature—the lowest rate of rejection for that reason in the last five statewide elections and less than half the rate in the last two primary elections. [Appx. A at ¶10] Every voter whose ballot was rejected for lack of a witness signature in the primary has been notified of the deficiency. [Appx. A at ¶11]

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[17] The federal declaration, issued March 13, 2020, can be found here: https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/. The state Declaration, issued March 11, 2020, can be found here: https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Disaster-Packet.pdf.

[18] Alaska Division of Elections website, "Election Dates and Hours," https://www.elections.alaska.gov/Core/electiondatesandhours.php.

The Division began sending mail-in absentee ballots to military and overseas voters on September 19 as required by federal law. [Appx. A at ¶15] The Division began sending in-state and domestic absentee ballots this week. [*See* Appx. E at ¶3] The deadline to apply for a by-mail absentee ballot is October 24.[19]

III. This lawsuit

The plaintiffs sent the Division a letter describing their concerns about the absentee ballot witness requirement on August 31. [Appx. F] The Lieutenant Governor responded promptly on September 4. [Appx. G] The plaintiffs filed their complaint, with a motion for preliminary injunction, on September 8. [Appx. H, I] The Division opposed and cross-moved to dismiss on laches grounds. [Appx. J]

On September 28, the plaintiffs requested a temporary restraining order to stop the Division from beginning to mail absentee ballots to voters without first modifying the materials to eliminate the witness requirement. [Appx. K] Opposing that motion, the Division explained that it is statutorily required to send absentee ballots and other absentee voting materials "as soon as they are ready for distribution," and noted the importance of providing voters sufficient time to receive and return their ballots.[20] The superior court denied the TRO, recognizing that "as a practical matter, it would not be reasonable to require the Division of Elections to modify absentee ballot packets even if the court granted the Plaintiffs' Motion for Preliminary Injunction." [Appx. L at 3]

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[19] Alaska Division of Elections website, "Election Dates and Hours," https://www.elections.alaska.gov/Core/electiondatesandhours.php.

[20] AS 15.20.081(c).

The court held oral argument on the preliminary injunction and cross-motion to dismiss on October 1. On October 5, the court issued a written order rejecting the Division's laches defense and granting the plaintiffs' motion for a preliminary injunction, concluding that the plaintiffs showed a "clear likelihood of success on the merits of their claim that the Witness Requirement impermissibly burdens Alaskans' right to vote." [Appx. M at 13-14] The court's order did not include the parameters of the injunctive relief, instead instructing the parties to "submit a stipulated order detailing how the court's order shall be implemented by the Division," or, failing agreement, to submit separate proposed orders by 4:30 p.m. on October 6. [Appx. M at 14]

ARGUMENT

I. The Court should grant the petition for review.

This Court's discretionary review is warranted under at least two sections of Appellate Rule 402(b). Under (b)(1), postponement of review will result in injustice because after the election it will be too late for the Division to obtain meaningful review of the superior court's order. And under (b)(2), the superior court's decision involves important questions of law on which there is substantial ground for difference of opinion, and immediate review will advance important public interests.

II. The Court should reverse the preliminary injunction.

Although the Court "review[s] the issuance of preliminary injunctions for abuse of discretion," it "review[s] de novo the superior court's legal determinations in issuing the preliminary injunction," and applies its "independent judgment to constitutional law

issues."[21] The Court should reverse the preliminary injunction because the superior court was wrong on the law and because, in these mid-election circumstances, the injunction is "the result of improvident exercise of judicial discretion."[22] The superior court accepted the plaintiffs' speculation rather than requiring actual supporting evidence—which is necessary to support the extraordinary remedy of a preliminary injunction—and gave short shrift to the Division's concerns about last-minute suspension of election laws.

A. The plaintiffs had to show a clear probability of success on the merits to justify a preliminary injunction.

A "[p]laintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard."[23] But the lower "balance of hardships" standard applies only if the defendant can be "adequately protected"—that is, "only where the injury which will result from . . . the preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[24] The Court must "[a]ssume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction."[25] If the defendant cannot be adequately protected, the

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[21] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

[22] *See id*. at n.11 (quoting *State v. Kluti Kaah Native Vill. of Copper Ctr*., 831 P.2d 1270, 1272 n.4 (Alaska 1992)).

[23] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

[24] *State v. Kluti Kaah Native Vill. of Cooper Center*, 831 P.2d 1270, 1273 (Alaska 1992) (quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991)).

[25] *Alsworth*, 323 P.3d at 54.

plaintiff must make a "clear showing of probable success on the merits."[26]

The superior court correctly concluded that the higher showing is required here. [Appx. M at 11] In the elections context, there is "simply no way for the state's interests to be adequately protected" where a preliminary injunction will "prevent the state from administering an election pursuant to its own election laws."[27] And while the monetary cost of voter outreach to explain this last-minute change in the law could be indemnified by a bond, the practical harm of requiring the Division's limited staff to perform yet another task in the middle of an extraordinarily difficult election cycle cannot be indemnified, nor can the harms of voter confusion and decreased confidence in the election. Under these circumstances, even assuming the plaintiffs face irreparable harm—which their evidence failed to establish—an injunction is at best "a zero-sum event, where one party will invariably see unmitigated harm to its interests."[28] Thus, the plaintiffs had to make a clear showing of probable success on the merits.

B. The plaintiffs are not clearly likely to succeed on the merits because they sued too late and their claims are barred by laches.

The plaintiffs are unlikely to succeed because they sued too late. They have been taking pandemic precautions since March, yet waited until September to sue. In the

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[26] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (quoting *Kluti Kaah Native Vill.*, 831 P.2d at 1272).

[27] *Metcalfe*, 110 P.3d at 978-79. Similarly, the Ninth Circuit has recognized that "election cases are different from ordinary injunction cases" because "[i]nterference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003).

[28] *Id.*

meantime, the Division conducted a primary election (in which the plaintiffs successfully participated) and prepared an unprecedented volume of absentee ballot materials for the general election on which the witness requirement is clearly printed.

Laches is a complete defense when a party delays unreasonably in seeking relief and the delay results in prejudice to the defendant.[29] "The essence of laches is not merely the lapse of time, but also a lack of diligence in seeking a remedy, or acquiescence in the alleged wrong and prejudice to the defendant."[30] In time-sensitive situations like this one, delay of even a few months can warrant application of laches.[31]

The plaintiffs were aware of the pandemic and the witness requirement months ago. The state and federal governments issued emergency declarations in March.[32] Plaintiff Elizabeth Jones reports beginning her efforts to avoid contact with others in late February, and plaintiff Barbara Clark in March. [Appx. N at ¶6; Appx. O at ¶5] Plaintiff Arctic Village began imposing restrictions as early as March 13, and had its first lockdown on May 16. [Appx. P at ¶¶6, 8] The superior court concluded that it was not unreasonable for the plaintiffs to wait until September to sue given the unpredictability of the pandemic, but affiliates of plaintiff the League of Women Voters of Alaska filed

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29 *Kollander v. Kollander*, 322 P.3d 897, 903 (Alaska 2014).

30 *Id* at 903.

31 *See City & Borough of Juneau v. Breck*, 706 P.2d 313, 315, 317 (Alaska 1985).

32 The federal declaration, issued March 13, 2020, can be found here: https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/. The state Declaration, issued March 11, 2020, can be found here: https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Disaster-Packet.pdf.

similar lawsuits in other states in the spring and summer,[33] as did other plaintiffs.[34] Although Alaska's infection numbers were initially lower than those of other states, the plaintiffs acknowledged they began to "grow exponentially" in June. [Appx. Q at 9]

Despite their awareness and the lawsuits in other states, the plaintiffs let months—and an entire primary election—come and go without filing suit. This unreasonable delay resulted in prejudice to the Division because it is too late to modify election materials to remove the witness requirement and effectively educate the public about a change in the law. Absentee ballot return envelopes, which instruct voters on the witness requirement, must be ordered at least six weeks in advance—even if the Division had ordered new

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[33] *See* Appx. H at ¶13 (alleging that plaintiff League of Women Voters of Alaska is an affiliate of the national League of Women Voters); *see, e.g.*, *Democratic Nat'l Committee v. Bostelmann*, — F.Supp.3d —, 2020 WL 1638374 at *1 (W.D.Wis. 2020) (listing League of Women Voters of Wisconsin as a plaintiff, dated April 2, 2020, and noting three consolidated cases "all filed in the last two weeks"); *League of Women Voters of Virginia v. Virginia Bd. of Elections*, — F.Supp.3d —, 2020 WL 4927524 at *3 (W.D. Va. 2020) (reciting that the League of Women Voters of Virginia sued on April 17); League of Women Voters of Minnesota, "LWVMN Challenges Absentee Ballot Signature Witness Requirement" (May 19, 2020), https://www.lwvmn.org/league-news/2020/5/19/lwvmn-challenges-absentee-ballot-signature-witness-requirement.

[34] *See Thomas v. Andino*, — F.Supp.3d —, 2020 WL 2617329 at *8 (D.S.C. 2020) (reciting "[o]n April 22, 2020, Thomas Plaintiffs filed their Complaint for Injunctive and Declaratory Relief"); *People First of Alabama v. Merrill*, — F.Supp.3d —, 2020 WL 3207824 at *1 (N.D.Al. 2020) (reciting "the plaintiffs filed this lawsuit on May 1"); *NAACP of Minnesota v. Simon*, Minnesota State Court, Second District, County of Ramsey, Case No. 62-CV-20-3625. A copy of the complaint dated June 4 is available online at https://www.aclu.org/legal-document/complaint-naacp-minnesota-dakotas-area-state-conference-v-simon; *Chambers v. North Carolina*, North Carolina Superior Court, Wake County, Case No. 20 CVS 500124. A copy of the complaint dated July 10 is available online at https://www.aclu.org/legal-document/complaint-chambers-v-state-nc.

envelopes the day plaintiffs sued, they would still not have been able to send the ballots to all absentee voters sufficiently in advance of the election. [Appx. A at ¶7]

The superior court focused on the prejudice to the Division of having to conduct last-minute voter outreach about a change in the law—pointing out that it was not ordering the Division to reprint ballot envelopes—but ignored the more important and concerning prejudice to voters and the election system. [Appx. M at 6-7] Voters are not expecting a change in the law mid-cycle, particularly after just completing a primary. Voters whose primary ballots were rejected for lack of a witness have already been informed. [Appx. A at ¶11] Absentee voting materials clearly state the witness requirement. [Appx. B] Thousands of absentee ballots have already gone out for the general election, and more will go out soon. [Appx. A at ¶15] Voters may begin voting them and returning them immediately.

Inconsistent and changing instructions create a serious risk of voter confusion and attendant problems. As the U.S. Supreme Court recognized in *Purcell v. Gonzalez*, "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[35] The superior court's order changes fundamental voting rules and requires the Division to now quickly try to educate the public in contradiction of both explicit statutory language and the Division's own printed materials that clearly require a witness signature. This will at best be confusing and at worst undermine the Division's

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[35] 549 U.S. 1, 4 (2006).

credibility. Some voters will not understand and believe that witnessing is still required, creating inconsistencies among voters. Others may get a garbled message, and will think they do not need to fill out the envelope cover sheet at all, resulting in their disenfranchisement. Even voters who understand the change risk being disenfranchised because the ballot envelopes ask *the witness* to date the vote, not the voter. [Appx. B] The date of the witnessing is critical, because in every election, some ballots arrive after election day without a legible postmark and yet may still be deemed timely and counted based on the witness signature date.[36] [Appx. C at ¶4] Without the witness requirement, many envelopes will not get dated, and if the postal service fails to legibly postmark the envelope, those voters will be disenfranchised.

What's more, the eleventh-hour court elimination of a statutory fraud-prevention measure may tarnish the election's validity in the eyes of the public and even cause some voters to doubt the legitimacy of the result. Public confidence in Alaska's elections is built, in part, on the ground rules the legislature has set, the expectations voters have developed over time, and the fairness and security of the elections framework. The media has been reporting a widespread climate of suspicion across the nation regarding the security of by-mail absentee voting in this election.[37] If Alaska's witness requirement is

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[36] 6 AAC 25.560.

[37] *See e.g.* CNN.com, "Trump's false claims on mail-in voting do more to harm elections than threat of fraud, experts say," Bob Ortega and Scott Bronstein (September 3, 2020) https://www.cnn.com/2020/09/03/politics/election-threat-trump-mail-in-voting-claims-invs/index.html; Foxnews.com, "Dems 'ignoring' mail-in ballot voter fraud, 'burying their head in the sand': Katie Pavlich," Caleb Parke (September 3, 2020) https://www.foxnews.com/politics/mail-in-voting-dems-katie-pavlich; USAtoday.com,

suspended at the last minute for what is already a highly fraught election, voters may perceive the election system as weak, malleable, or unreliable. The superior court's order does not reinstate previous well-known rules or simply require additional voter education—it suspends a longstanding voting mandate the legislature selected as one thread in the fabric of the absentee voting process. While some voters may be attuned to the developments of this case and may appreciate the reasons underlying the court's decision, others will understand nothing other than that the rules suddenly changed right before the general election. This type of late-stage change, after a successful primary election, may needlessly foster voter distrust in our election system.

On top of all of this, placing new administrative burdens on the Division during this critical pre-election period does not serve the public interest in a safe, smoothly run election, especially given the existing difficulty of conducting elections during the pandemic. The Division has limited staff that is already maxed out administering and certifying the REAA election and preparing for the general election, including by implementing new infection-control measures and processing more absentee ballot applications and materials than ever before. [Appx. A at ¶3, 14 & Exh. C]

A delay of even a few months can trigger laches where the plaintiff was aware of an issue but stood by while the defendant moved forward. In *City and Borough of Juneau*

"Trump suggests that North Carolina voters should test mail-in system by trying to vote twice," Jeanine Santucci (September 2, 2020) https://www.usatoday.com/story/news/politics/elections/2020/09/02/trump-suggests-north-carolina-residents-try-vote-twice-test/5699548002/.

v. Breck, the plaintiff voiced objections to a city construction project, but waited to sue until four months after the city had signed a contract and construction had begun.[38] The superior court granted a preliminary injunction, but this Court reversed on laches grounds.[39] The plaintiff should have realized when the contract was signed that the city's decision was irreversible, and the delay caused significant prejudice since the city had already invested substantial funds and construction was partially complete.[40] The Court also took into consideration the prejudice to the city's taxpayers.[41] This Court should similarly take into account the prejudice to the Division and the public from a last-minute change in a long-established, familiar absentee voting process.

If the plaintiffs had sued in May or June, the Court could have ordered relief in time for the Division to obtain ballot envelopes that did not explicitly require a witness signature, train its employees, and pursue a meaningful educational campaign so that voters understood what was required and why the rules had been changed. These steps— which would have helped minimize voter confusion and safeguard public confidence in the election— are no longer possible. The plaintiffs are thus unlikely to succeed on the merits because their claims are barred by laches.

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38 706 P.2d 313, 314-15 (Alaska 1985).

39 *Id.* at 314.

40 *Id.* at 315-316.

41 *Id.* at 316.

C. The plaintiffs are not clearly likely to succeed on the merits because the witness requirement is constitutional.

The "government must play an active role in structuring elections" which "will invariably impose some burden upon individual voters," so the State "must be granted some leeway" in running elections.[42] The Court has adopted the U.S. Supreme Court's "flexible standard" for examining election laws, which "involves a careful balancing" of interests.[43] Under this Court's formulation of the test, it must (1) "determine whether the claimant has in fact asserted a constitutionally protected right," (2) "assess 'the character and magnitude of the asserted injury to the rights,"' (3) "weigh 'the precise interests put forward by the State as justifications for the burden imposed by its rule,'" and (4) "judge the fit between the challenged legislation and the state's interests in order to determine 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"[44]

The plaintiffs claim that what would otherwise be a reasonable election law has become unreasonably burdensome in the context of the pandemic. But their evidence does not support this claim—on the contrary, it shows that even vulnerable voters could safely vote in the primary. They have not identified even one voter who has said that she or he will not vote in the general election if the requirement remains in place. It was an abuse of discretion for the superior court to enjoin enforcement of an election security

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42 *Green Party of Alaska*, 118 P.3d at 1059-60.

43 *Id*.

44 *Id*. at 1061.

measure less than a month before the election and after voting has begun, without any substantive evidence supporting the plaintiffs' claims of harm.

1. The witness requirement imposes a minimal burden.

The burden of having an absentee ballot witnessed is no different than the burden of any other day-to-day life activity during the pandemic—it is less convenient and requires protective measures, but it can still be done safely.

The basic public health recommendations for infection prevention—handwashing, mask wearing, and maintaining six feet of distance from others—have been consistent and largely unchanged for months.[45] Even for high-risk people, such as older adults and those with medical conditions, the CDC does not recommend avoiding all contact with anyone for any length of time even at a distance—rather, it says "limit your interactions with other people as much as possible," and "take precautions to prevent getting COVID-19 when you do interact with others."[46]

An absentee voter may now need to take precautions, but can still vote safely. A voter can mark a ballot and sign the envelope without coming into close or extended contact with another person or touching a shared surface without prompt handwashing. A

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[45] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Prevent getting sick," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/index.html.

[46] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "People with certain medical conditions," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Older adults," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

voter may sign inside a car or home, while a witness looks on from outside a closed window. Or a voter may sign outdoors while a witness looks on from six, ten, or twenty feet away. A voter and witness need not approach each other to exchange the envelope—they may pass it through a window or mail slot, or leave it on the ground and retreat inside or to a safe distance. They may wear masks, sanitize their hands immediately before and after, and accomplish the entire process in under a minute. A voter may ask a physician, gas station attendant, VPSO, grocery clerk, mechanic, visiting nurse, or family member to witness. The individual plaintiffs themselves describe coming into appropriately distanced, masked contact, often outdoors, with other people while doing important errands.[47] [Appx. N at ¶7; Appx. O at ¶¶5-7] Any of these people could witness an absentee ballot while following health guidance. [Appx. N at ¶7; Appx. O at ¶5]

Indeed, the August primary election demonstrates this. Both individual plaintiffs voted. [Appx. N at ¶5; Appx. O at ¶4] Arctic Village allowed its lockdown enforcement patrollers to offer door-to-door absentee-in-person voting, which it is free to do again for the general election. [Appx. R at ¶4][48] And the percentage of absentee ballots not counted for lack of a witness signature in the primary was less than at any prior election in the

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[47] The superior court's order referred to the individual plaintiffs as being "immunocompromised" and "at a higher risk of contracting COVID-19," but that finding is not supported by either of their affidavits. [Appx. M at 9; Appx. N, O]

[48] Arctic Village's affiant, Tiffany Yatlin, alleges that that the post office is the only location at which residents may get a document notarized and that it is closed to the public, but the affidavit itself was witnessed by the postmaster on September 3, tending to suggest that notarization continues to be available by appointment. Ms. Yatlin also states that community members are distributing mail to residents; presumably these individuals could witness absentee ballots while doing so. *See* Appx. P at ¶10.

past four years. [Appx. A at ¶10 & Exh. C] There is thus no evidence in the record to show that the witness requirement is overly burdensome in the context of the pandemic.[49]

2. The witness requirement is justified by state interests.

The Division's mission is to ensure public confidence in the electoral process by administering elections with the highest level of professional standards, integrity, security, accuracy and fairness.[50] The witness requirement serves two compelling state interests: deterring voter fraud and instilling public confidence in the results. In the current context, maintaining this longstanding rule serves additional compelling state interests: preventing voter confusion and distrust.

Fraud related to absentee ballots is rare, but not unheard of.[51] In March of this year, an Alaska legislator and two associates were indicted on multiple counts of voter fraud after the Division detected irregularities in absentee ballot applications.[52] [Appx. S

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[49] *Cf. Crawford v. Marion County Election Bd.*, 553 U.S. 181, 199-200 (2008) (holding that alleged burdens on voting that were not supported by record evidence were insufficient to outweigh state's interest in *Anderson-Burdick* analysis).

[50] Alaska Division of Elections, https://elections.alaska.gov/.

[51] The superior court said that "According to the Heritage Foundation, voter fraud in Alaska is exceedingly rare," citing to the plaintiffs' motion. [Appx. M at 12] But the database cited in the plaintiffs' motion is entitled "A Sampling of Recent Election Fraud Cases from Across the United States" and it "presents a sampling of recent proven instances of election fraud from across the country." This database "is not an exhaustive or comprehensive list. It does not capture all cases and certainly does not capture reported instances that are not investigated or prosecuted. It is intended to demonstrate the vulnerabilities in the election system and the many ways in which fraud is committed." *See* The Heritage Foundation, *A Sampling of Voter Fraud Cases from Across the United States*, https://www.heritage.org/voterfraud.

[52] *See State v. Ledoux*, 3AN-20-02172CR; *State v. Simpson*, 3AN-20-02173CR; *State v. Vaught*, 3AN-20-02174CR.

at ¶2-5] After noticing many applications in the same handwriting, the Division began following up and—after receiving applications for dead voters—notified the Alaska State Troopers. [Appx. S at ¶2-6] The investigation was broadly covered in the media.[53]

The absentee ballot witness requirement helps deter fraud by adding a verification that the person who filled out the ballot sealed it in the envelope and signed it. The legislature views this requirement as meaningful: it chose to maintain it in 2005 when it reduced the number of non-official witnesses from two to one, removed a citizenship requirement, and added new accountability for witnesses.[54] And the legislature did not remove the witness requirement when considering pandemic-related election legislation

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[53] *See, e.g.,* Anchorage Daily News, Devin Kelly and Alex DeMarban, "Alaska Elections officials report voting 'irregularities' in east Anchorage house district primary" (August 28, 2018) (available online at https://www.adn.com/politics/2018/08/27/alaska-elections-officials-report-voting-irregularities-in-east-anchorage-house-district-primary/); Anchorage Daily News, Alex DeMarban, "Winner emerges in Anchorage House race, but GOP asserts felony-level vote fraud" (August 30, 2018) (available online at https://www.adn.com/politics/2018/08/28/ledoux-gains-lead-in-anchorage-house-race-marked-by-discovery-of-suspicious-ballots/); Alaska Public Media, Andrew Kitchenman, "Alaska Rep. Gabrielle LeDoux charged with voter misconduct" (March 13, 2020) (available online at https://www.alaskapublic.org/2020/03/13/alaska-rep-gabrielle-ledoux-charged-with-voter-misconduct/); Anchorage Daily News, James Brooks, "Anchorage legislator and 2 associates charged with election misconduct" (March 14, 2020) (available online at https://www.adn.com/politics/2020/03/13/state-to-file-criminal-charges-against-anchorage-legislator-and-two-others-alleging-election-misdeeds/).

[54] *See* 2005 Alaska Laws 1st Sp. Sess. Ch. 2 (H.B. 94). Amending AS 15.20.066 (electronic delivery absentee ballots) and AS 15.20.081 (by-mail absentee ballots) to change number of non-official witnesses from two to one and remove requirement of U.S. citizenship, and amending AS 15.20.030 to add: "The [absentee ballot] envelope with the voter's certificate must include a notice that false statements made by the voter or by the attesting official or witness on the certificate are punishable by law").

earlier this year.[55] This Court should not lightly disregard the legislature's view of the requirement's importance to the election process.[56]

This is particularly true here, because the legislature and State health and elections officials are in the best position to account for and address the responsibilities and risks facing voters, and those officials are uniquely responsible and accountable to Alaskans. As Chief Justice Roberts recently recognized in reviewing state action in the context of the pandemic, "the Constitution entrusts the safety and the health of the people to the politically accountable of the officials of the states."[57] "When those officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'"[58] Here, rather than acknowledging the import of state officials' role and giving latitude to the decisions of the State's elected officials, the superior court simply substituted its own policy judgment for that of the legislature.

That a determined fraudster might forge a witness signature does not render the statute useless. The requirement likely deters more pedestrian fraud, like a spouse filling

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55 *See* 10 Session Laws of Alaska 20 (April 9, 2020) at Section 9. *See also* House Judiciary Committee Minutes (March 21, 2020).

56 *See State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 980-81 (Alaska 2005) (discussing the importance of deference to the legislature in election policy).

57 *Andino v. Middleton*, 592 U.S. ___, 2020 WL 5887393 (Oct. 5, 2020) (Kavanaugh, J., concurring in grant of application for stay of district court order enjoining South Carolina witness requirement) (citing *South Bay Pentecostal Church v. Newsom*, 590 U.S. ___,___ (2020) (Roberts, C.J., concurring in denial of application for injunctive relief)).

58 *Id*. (*quoting Marshall v. United States*, 414 U.S. 417, 427 (1974)) (alteration in original).

out and mailing a spouse's ballot. It conveys to voters the formality of the official act, making it akin to voting in person at the polls—not simply filling out a mail-in survey. And Division employees may notice irregularities in fraudulently witnessed absentee ballots that could prompt an investigation, similar to the way employees detected the recent fraudulent absentee ballot application scheme.[59]

When assessing election statutes, Alaska courts consider the practices of other states.[60] Alaska's witness requirement is within the mainstream of state absentee ballot verification practices, most of which require either witnessing or signature matching.[61] Most states that do not require witnessing will not count an absentee ballot if a voter's signature does not match one on file.[62] Alaska has no such signature-matching process.[63]

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[59] The Division's inability to identify recent incidents of absentee voter fraud related to the witness requirement does not negate this interest. As the Court has explained, "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 981 (Alaska 2005) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)).

[60] *See Metcalfe*, 110 P.3d at 980 ("We view this analysis—comparing Alaska's ballot-access requirements with the requirements of other states—as one reasonable way to determine whether less restrictive alternatives exist").

[61] *See* National Association of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options," Table 14 "How States Verify Voted Absentee Ballots," https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

[62] The Municipality of Anchorage uses signature matching in its by-mail voting process. *See* Anchorage Municipal Code 28.70.030(C) ("The signature on the ballot declaration must be compared with the signature(s) in the voter's voter registration file using the standards in this subsection").

[63] AS 15.20.203 lists the reasons for excluding absentee ballots, and a signature that differs from the voter's signature on file is not one of them. An X or any other mark to

Thus, although Alaska is one of only eleven states with a witness requirement, removing it would not simply place Alaska on equal footing with other states.

There are currently only two adversarial[64] cases in which trial courts have enjoined a state's witness requirement due to the pandemic,[65] and yesterday the U.S. Supreme Court stayed the effect of one of those injunctions.[66] As for the other case, the U.S. Supreme Court previously stayed effect of an earlier injunction from the same district court.[67] The district court's renewed effort to enjoin the requirement is currently on appeal, with briefing to be completed shortly.[68] Thus, the U.S. Supreme Court has made clear that it disfavors such injunctions.[69]

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affirm the sworn statement is sufficient to count the ballot. *See* 6 AAC 25.550(b). The Division's voter database includes images of voter's signatures, which can aid in fraud detection, but the Division does not routinely check for signature match and cannot exclude a ballot on this basis alone. *See* AS 15.20.203.

[64] Some states entered into consent judgments agreeing not to enforce their absentee ballot witnessing requirements. *See League of Women Voters of Virginia v. Virginia Bd. of Elections*, — F.Supp.3d —, 2020 WL 4927524 (W.D. Va. 2020); *Common Cause Rhode Island v. Gorbea*, — F.Supp.3d —, 2020 WL 4365608 (D.R.I. 2020). The United States Supreme Court has distinguished that line of cases from the adversarial line of cases. *See Republican Nat'l Committee v. Common Cause Rhode Island*, — U.S. —, 2020 WL 4680151 (August 13, 2020).

[65] *See People First of Alabama v. Merrill*, — F.Supp.3d —, 2020 WL 5814455 (N.D. Ala. Sept. 30, 2020); *Middleton v. Andino*, — F.Supp.3d —, 2020 WL 5591590 (D.S.C. Sept. 18, 2020).

[66] *Andino v. Middleton*, 592 U.S. ___, 2020 WL 5887393 (Oct. 5, 2020).

[67] *See Merrill v. People First of Alabama*, — U.S. —, 2020 WL 3604049 (July 2, 2020).

[68] *See Merrill v. People First of Alabama*, Case No. 20-13695 pending before the 11th Circuit.

[69] In any event, both those cases are factually distinguishable from this one. Unlike Alaska, Alabama requires two adult witnesses, which was important to the court's

In other adversarial cases over witness requirements, courts have denied preliminary injunctions or dismissed cases.[70] A district court in Wisconsin initially granted an injunction only to have it stayed the next day by the Seventh Circuit.[71] After an evidentiary hearing, the district court ruled that it would not enjoin the requirement for the general election, and it appears that decision will stand on appeal.[72] Similarly, a federal court and a state court in North Carolina denied preliminary injunctions in parallel cases.[73] The federal court reasoned that, with appropriate precautions, the risk of

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analysis. *See People First of Alabama v. Merrill*, — F.Supp.3d —, 2020 WL 5814455 at *47 (N.D. Ala. Sept. 30, 2020) (discussing challenges to plaintiffs of "encountering two adults simultaneously"). And the director of the South Carolina Division of Elections publicly disavowed and recommended repeal of that state's absentee ballot witnessing requirement, which greatly swayed that court's analysis. *Middleton v. Andino*, — F.Supp.3d —, 2020 WL 5591590 at *32 (D.S.C. Sept. 18, 2020).

[70] *See, e.g.*, *Clark v. Edwards*, — F.Supp.3d —, 2020 WL 3415376 (M.D.La. 2020) (dismissing on lack of standing grounds).

[71] *Democratic Nat'l Committee v. Bostelmann*, Not Reported in Fed. Rptr., 2020 WL 3619499 (7th Cir. 2020) ("the district court did not give adequate consideration to the state's interests").

[72] *Democratic Nat'l Committee v. Bostelmann*, — F.3d —, 2020 WL 5796311 (7th Cir. Sept. 29, 2020) (giving appellants one week to show cause why appeal should not be dismissed).

[73] *Democracy North Carolina v. North Carolina State Bd. of Elections*, — F.Supp.3d —, 2020 WL 4484063 (M.D.N.C. 2020); *Chambers v. State*, North Carolina Superior Court, Wake County, Case Number: 20 CVS 500124 (Order on Injunctive Relief, September 3 2020) ("State Defendants would be required to replace or modify existing absentee ballot envelopes… Any modification or redaction of information contained on the existing envelopes would be a time-, labor-, and cost-intensive process. Indeed, such a process will create delays in mailing ballots … and would likely lead to voter confusion … [Therefore] the Court concludes the balance of the equities weighs in Defendants' favor.") A copy of the order is available online at https://www.acluofnorthcarolina.org/sites/default/files/field_documents/20200903162856_scan.pdf.

infection with COVID-19 from witnessing was so low that it did not create a significant burden on voters.[74] The court noted a recent incident of absentee voter fraud, which it found relevant even though it did not directly involve the witness requirement.[75] And the court found that the witness requirement served the state's interests "not only [in] deterring fraud at the outset but also in establishing certain minimal standards to allow for detection, investigation, and ultimately rejection of fraudulent ballots."[76]

Finally, the Court must also consider the Division's interest in not changing an elections requirement at this very late date. As addressed above, a court order eliminating a fraud-prevention measure in the middle of the election could create confusion and distrust in the Division and the election result. [*See supra* discussion of laches]

Federal courts have long recognized the profound stakes of interfering in the immediate lead-up to an election.[77] As discussed above, the U.S. Supreme Court just yesterday stayed a district court order enjoining South Carolina's witness requirement[78] and earlier stayed a district court order enjoining Alabama's witness requirement.[79] And

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[74] *Democracy North Carolina*, 2020 WL 4484063 at *36.

[75] *Id.*

[76] *Id.* at *35.

[77] *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (vacating a Ninth Circuit injunction because of "the imminence of the election and the inadequate time to resolve the factual disputes"); *see also Crookston v. Johnson*, No. 16–2490, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason").

[78] *Andino v. Middleton*, 592 U.S. ___, 2020 WL 5887393 (Oct. 5, 2020).

[79] *Merrill v. People First of Alabama*, — U.S. —, 2020 WL 3604049 (2020). The preliminary injunction stayed by the Court was much narrower than the injunction requested here, and would only have waived the witness requirement for "absentee voters

the Seventh Circuit stayed enforcement of a preliminary injunction in Wisconsin.[80]

The plaintiffs thus failed to show a clear likelihood of success on the merits of their as-applied constitutional challenge to the witness requirement because keeping it in place serves important state interests and creates minimal burdens for voters. The Court should grant the petition and reverse the preliminary injunction.

DATED October 6, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: /s/ *Laura Fox*
Laura Fox
Alaska Bar No. 0905015

Lael Harrison
Alaska Bar No. 0811093

Margaret Paton Walsh
Alaska Bar No. 0411074
Assistant Attorneys General

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who determine it is impossible or unreasonable to safely satisfy that requirement in light of the COVID-19 pandemic, and who provide a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the Centers for Disease Control has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19." *See People First of Alabama v. Merrill*, — F.Supp.3d —, 2020 WL 3207824 at *29 (N.D. Ala. 2020).

[80] *Democratic Nat'l Committee v. Bostelmann*, Not Reported in Fed. Rptr., 2020 WL 3619499 at *2 (7th Cir. 2020) ("the district court did not give adequate consideration to the state's interests").

anc.law.ecf@alaska.gov

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Plaintiffs,	)	
v.	)	
KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,	)	Case No.: 3AN-20-07858 CI
Defendants.	)	

AFFIDAVIT OF GAIL FENUMIAI

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Gail Fenumiai, declare under penalty of perjury that the following is true and correct:

1. I am the director of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. I was first appointed as director in January 2008 and had worked in the Division for approximately 10 years before my appointment. I ended my first tenure as director in July 2015 and then was reappointed by Lieutenant Governor Kevin Meyer in January 2019.

2. The Division of Elections began considering how best to conduct

elections in pandemic conditions as early as April. In May, the Lieutenant Governor made the decision to conduct the election in the traditional manner. The Division began preparing for an increase in absentee voting at that time.

3. The COVID-19 pandemic has created many new challenges for the Division. The Division must arrange for social distancing, masks, gloves, and sanitizing in over 440 polling places around the state for the primary and general elections; recruit election workers to staff those polling places in a year when far fewer people are willing to serve in this role; create new distanced training to avoid unnecessary exposure for smaller communities and Division employees; and process an unprecedented number of absentee ballot applications and ballots. This is all while adjusting our own internal workplace protocols to protect the safety of Division employees and poll workers.

4. Registered Alaska voters have four basic options for voting: absentee, early, special needs, and in person. No excuse is required to vote absentee. Voters can vote absentee-in-person before an Absentee Voting Official beginning fifteen days before an election. These voters do not need to apply in advance for an absentee ballot. There are approximately 140 in-person absentee voting locations across the state.

5. The State also has between seven and ten early voting sites, depending on the election, which start opening as early as 15 days before the election. These sites have ballots for all 40 house districts. The early voting process is essentially the same as the in-person voting process and does not require advance application.

6. Voters who wish to vote absentee, other than by absentee-in-person voting, must apply in advance for a ballot. Voters can submit their application online,

by email, by fax or by mail. Voters can choose between receiving their ballot by mail or by electronic delivery. The voter must print his or her own ballot if the voter chooses to receive it by electronic delivery and return it in the same way as a mailed ballot or return it by fax.

7. Voters who choose to receive their ballot by mail are mailed a ballot, a secrecy sleeve for the ballot, a return envelope for the ballot, and an instruction sheet. Due to the non-standard nature of the absentee ballot envelopes, printing orders must be placed at least six weeks in advance. An exemplar of the return envelope for the ballot is attached to this affidavit as Exhibit A, and a copy of the instruction sheet is attached as Exhibit B.

8. Voters may vote and return their absentee ballots as soon as received. Voters may return their absentee ballots by mail or by any reasonable method on or before election day, including by hand delivery or placement in a secure ballot drop-box designated by the Division. However, ballots will only be accepted after election day if received by mail and postmarked on or before election day. If the ballot arrives after election day but is not postmarked, it will still be accepted if the witness signature is dated on or before election day. Absentee must be received by mail within ten days following the election to be counted if postmarked within the United States and within 15 days for general election ballots postmarked outside the United States.

9. The Division preliminarily reviews and logs all absentee ballots on arrival. No ballots are rejected or opened at this time. The Absentee Ballot Review Board makes the final determination of whether a ballot should be rejected or accepted.

10. Exhibits C, D and E contain true and correct data, based on my review of records regularly kept in the Division's databases, regarding absentee voting in the 2020, 2018 and 2016 primary elections and the 2018 and 2016 general elections.

11. The Division has already notified absentee voters whose 2020 primary election ballots were rejected of the rejection and the reason for it.

12. The Division recruited poll workers to conduct in-person voting in Arctic Village on the day of the 2020 primary election and we sent election materials to those workers in advance. We also recruited an Absentee Voting Official to conduct absentee-in-person voting up to election day out of the Tribal Council office.

13. COVID-19 shutdowns in locations scheduled to have in-person voting on primary election day, including Arctic Village, caused myself and my staff great concern about ensuring that voters in those locations who had not yet voted early or absentee were still able to cast their votes. This was a source of great stress and effort for us in the week leading up to the primary election. My staff and I, and the Lieutenant Governor and his staff, worked diligently with local and tribal governments and poll workers in those locations to ensure that voting was available on election day. It is my understanding that, in the end, every location that was supposed to have in-person voting on primary election day actually had in-person voting or had absentee-in-person voting made available to all voters, despite COVID-19 shutdowns.

14. The Division began preparing months ago for an increase in absentee voting due to COVID-19 concerns. We placed our first order for 64,500 absentee ballot envelopes in April at a cost of $20,830.00. We placed a second order for 233,500

absentee ballot envelopes on June 5. This second order cost $53,845.10. The third order of 112,500 envelopes was placed on August 5 and cost $31,117.50 and is scheduled to arrive on September 22. The Division has already sent out for printing the instructional cover sheets to be mailed with them.

15. On September 19, the Division began mailing out about 8,800 general election absentee ballots to military and overseas voters, and an additional approximate 3,500 ballots to Alaskans entitled to receive an early mailing. Although our target date for sending out in-state and domestic general election absentee ballots is October 9, we will begin sooner if possible given the very large volume of absentee voting we expect for the general election. We have already processed about 70,000 absentee ballot applications for the general election. If possible, we intend to start sending out these absentee ballots as early as September 28.

16. The Division hires temporary employees to review and log absentee ballots in addition to its own staff. For the primary election, the Division utilized 5-7 temporary employees in Region I, 5.5 temporary employees in Region II, 3 temporary employees in Region III and 2 temporary employees in Region IV. The majority of these temporary employees continue to be employed with the Division and will work the general election. They already received their training in advance of the primary.

17. The Division has already made efforts to inform voters about the requirement that absentee ballots be witnessed for the 2020 election cycle. Information about the witnessing requirement is on our website, and we placed reminders on social media after we were informed that postal officials would no longer be available to act as

witnesses. Staff giving informal advice to voters over the phone would also have given advice consistently with the requirement if asked.

Gail Fenumiai

SUBSCRIBED AND SWORN to before me this 18 day of September, 2020.

STATE OF ALASKA
OFFICIAL SEAL
Stacy L. Stuart
NOTARY PUBLIC
My Commission Expires With Office

Notary Public in and for Alaska
My commission expires: w/office

	20PRIM	18PRIM	16PRIM	18GENR	16GENR
Total absentee ballots rec'd requiring witnessing*	43,545	7,485	6,152	27,980	36,566
Total rejected for witnessing	458	159	132	384	425
% by-mail rejected for witnessing	1.05%	2.12%	2.15%	1.37%	1.16%

* This includes ballots sent by-mail, fax, online and Federal Write-In Absentee Ballot (FWAB)

Return Address:

Official Return Ballot Envelope

Mail your ballot and have it postmarked by Election Day

To be opened only by the Absentee Review Board

E36F1 (Rev. 7/1/19)

U. S. Postal
FIM

First class postage required

Election USPS Logo Here

DIVISION OF ELECTIONS
REGION I ELECTIONS OFFICE
PO BOX 110018
JUNEAU AK 99811-0018

Intelligent Mail Barcode Here

1. **You MUST Sign AND Provide One Identifier**

Voter Certificate, Signature and Identification

I declare that I am a citizen of the United states and that I have been a resident of Alaska for at least 30 days. I have not requested a ballot from any other state and am not voting in any other manner in this election. If I had this certificate attested by a witness, other than an authorized official, it was because no official empowered to administer an oath was reasonably available. **I certify, under penalty of perjury, that the foregoing is true and accurate.**

Voter Signature: _____

Voter Identifier: _____ _____ _____ _____

Voter No. | AK Driver's License No. | Date of Birth | Last 4 of SSN

2. **Your Signature MUST be Witnessed**

Witness Affidavit

Have your signature witnessed by an authorized official or, if an authorized official is not reasonably available, by someone 18 years of age or older.

Signed in my presence:

This _____ day of _____ 20 _____, at _____.
(City & State or Country)

Witness Signature: _____

If authorized official, official title: _____

Warning: False statements made by the voter or by the attesting witness on the certificate are punishable by law.

Review Board Use Only

Count Code:_____ Sequence No.:_____

No Count Code:_____ Initials:_____

E36B (Rev. 7/1/2019)

Before Sealing this Envelope

Did you...

- ❑ Sign the envelope?
- ❑ Provide ONE identifier?
- ❑ Have your signature witnessed?
- ❑ Applied postage to front of this envelope?

This envelope MUST BE postmarked by Election Day

anc.law.ecf@alaska.gov

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK, Plaintiffs, v. KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS, Defendants.	)	Case No.: 3AN-20-07858 CI

AFFIDAVIT OF JULIE HUSMANN

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Julie Husmann, declare under penalty of perjury that the following is true and correct:

1. I am the Election Supervisor of the Anchorage office of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. One of my job duties is to oversee the Absentee Ballot Review Board, which checks absentee ballots for compliance with state law before counting. This includes checking that the voter was legally permitted to cast the vote.

2. The Absentee Ballot Review Board typically first convenes in the week before an election, and continues to convene until all absentee ballots are reviewed.

3. When reviewing an absentee ballot, the Board typically first checks to see if the ballot was signed by the voter and whether the voter provided an identifier. If either the signature or the identifier is missing, the ballot is logged as rejected for that reason. The Board then checks to see if the ballot was witnessed. If not, the ballot is logged as rejected for that reason. If the ballot is rejected for lack of witnessing, the Board does not typically check further for compliance. For example, we would likely not check the postmark date, whether the identification number matched the voter registration information, whether the voter was properly registered, whether the voter already voted by another method, whether the secrecy sleeve actually contains a ballot, and so forth.

4. If an absentee ballot arrives by mail after election day without a legible postmark, we check to see if the witness signature was dated. If it was dated on or before election day, we accept the ballot despite the lack of postmark. Occasionally we do get this type of ballot.

5. In the 2018 primary election, I was informed by Carol Thompson of concerns about absentee voter fraud in House District 15. Therefore, we worked with the Department of Law to conduct a careful review of targeted absentee ballots received from that District. Any ballots confirmed to be fraudulent were not counted. Any ballots that were flagged as potentially fraudulent, but not confirmed, were set aside and tallied separately. They were never comingled with other ballots. After the election, those

ballots were provided to the Alaska State Troopers to assist in their fraud investigation.

Julie Husmann

SUBSCRIBED AND SWORN to before me this 21 day of September, 2020.

Notary Public in and for Alaska
My commission expires: 4/Notice

State of Alaska
Notary Public
Doreen R. Barber

anc.law.ecf@alaska.gov

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Plaintiffs,	)	
v.	)	
KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,	)	Case No.: 3AN-20-07858 CI
Defendants.	)	

AFFIDAVIT OF GAIL FENUMIAI

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Gail Fenumiai, declare under penalty of perjury that the following is true and correct:

1. I am the director of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. This is my second affidavit filed in this matter.

2. The October 9 "target date" listed on the Division's website for sending out absentee voting materials for the November general election has always been just that: a target date. The "target date" for the primary election was July 24, 2020; but

ballots were mailed starting July 22.

3. For weeks now, the Division has been diligently working to process applications in an attempt to get as many ballots out in the first mailing as possible. The absentee ballots arrived ahead of schedule and the Division decided to begin mailing as soon as possible, which at this time is likely to be sometime between October 2 through 5. That decision had nothing whatsoever to do with this lawsuit. Our goal has only been to give Alaska absentee voters as much time as possible to receive, vote and return their ballots to us, and to give ourselves as much time as possible to prepare and send absentee voting materials and to process returned ballots.

4. I understand that the plaintiffs in this lawsuit have suggested that, instead of reprinting absentee ballot envelopes to remove the witnessing requirement, the Division place stickers over the parts of the envelopes related to witnessing, and/or include a flyer with the absentee ballots. Possibly the stickers would be preprinted with information about dating the envelope. Neither of these options is realistically practical or possible.

5. Absentee ballot materials to be mailed to voters are not prepared by hand. They are prepared by mail inserter equipment. First, voters' addresses are printed on the return ballot envelopes for each house district using a separate piece of equipment. The outer envelope, return envelope, ballot, secrecy sleeve and instructions are then placed into inserter bins. The equipment inserts all of these materials into the outer envelopes, , and seals them. The equipment that is used to process the mailings only has a certain number of inserter slots and we already use all the inserter slots available with what we

insert already: the outer envelope, return envelope, instructions, ballot and secrecy sleeve.

6. Inserting an additional flyer would require unsealing and re-sealing the envelopes completed by the equipment, which may not be physically possible. Unsealing the outer envelopes would ruin the seal and the division does not have an adequate supply of outer envelopes to use to replace existing ones. In any case, we do not have staff capacity to do this work. Our staff is currently completely taken up with other work related to both the REAA election and general election.

7. The instruction sheets for the absentee ballot mailings have already been printed. That printing took about four days.

8. We do not have in stock any kind of sticker that would be appropriate to cover up the portions of the absentee ballot return envelope that address witnessing. I do not know how or where we would order something like that. It would take time to research and place an order. I also do not know whether it would be possible to have those stickers printed with instructions about dating the envelope as part of an order or whether the Division would have to find a way to do that with our own printers. I do not know how long it would take to fulfill an order or, once fulfilled, if it would be possible to print the stickers on our own printers.

9. However, we do not have the staff capacity to undertake this kind of sticker-placing project at this late date. Again, Division staff is already completely maxed out with the work that they need to do to prepare and administer the REAA and general elections. I do not have staff available to assign to this type of project.

10. Also, I do not know how the stickers might affect the inserter machine. It is possible these stickers could catch in the equipment and slow processing or damage the ballot package and/or equipment.

Gail Fenumiai

SUBSCRIBED AND SWORN to before me this 28 day of September, 2020.

STATE OF ALASKA
OFFICIAL SEAL
Stacy L. Stuart
NOTARY PUBLIC
My Commission Expires With Office

Notary Public in and for Alaska
My commission expires: _____

August 31, 2020

Lieutenant Governor Kevin Meyer
Director Gail Fenumiai
Alaska Division of Elections
P.O. Box 110017
Juneau, AK 99811
by email only to: kevin.meyer@alaska.gov
gail.fenumiai@alaska.gov

Re: Let every Alaskan vote: waive the absentee witness requirement

Dear Lieutenant Governor Meyer and Director Fenumiai:

There is no job more paramount in our democracy than the job of voter. In November, Alaskans will elect our President, our U.S. Senator and U.S. Representative, and 51 state legislators, and we'll decide two ballot measures. Turnout for August's primary reflects this year's importance: over 133,000 Alaskans voted—more than in the 2018 or 2016 primaries—a third of whom voted by mail, online, or by fax.[1] November's significance and August's numbers foretell similarly high turnout in the general election.

For August's voters, voting by mail made sense because, as the Lt. Governor's chief of staff Josh Applebee testified, in this global COVID-19 pandemic, "voters may therefore wish to avoid going to the polls, standing in close proximity, and using touch screens or handling ballots."[2]

Yet, the Division of Elections' enforcement of Alaska Statutes 15.20.066(b)(2) and 15.20.081(d), which require Alaskans who vote by mail or electronic transmission to have

[1] Alaska Division of Elections, *Primary, General and Statewide Special Election Results*, https://www.elections.alaska.gov/doc/info/ElectionResults.php.

[2] Declaration of Josh Applebee, docket no. 25 at ¶ 7, Disability Law Center of Alaska v. Meyer, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020).

witnesses sign their ballots, disenfranchises many voters. So we write to ask you not to enforce this requirement this fall: let every qualified voter freely vote during this pandemic.

In Alaska, every "qualified voter may vote an absentee ballot for any reason."[3] Alaskans who are in "high-risk group[s] who must be particularly careful to avoid exposure to COVID-19,"[4] including those whom you have recognized as "people 65 and older" and "with certain underlying medical conditions,"[5] may wish to vote absentee so as to, in Mr. Applebee's words, "avoid going to the polls, standing in close proximity, and using touch screens or handling ballots."[6]

Voters who are concerned about getting COVID-19 should be able to easily cast their absentee ballots: that's why you "reach[ed] out to encourage [the] high-risk group" of 65 and older voters "to vote absentee," because it "was a reasonable measure that comported with the public health information available at the time."[7] And as you said, "The more people who vote absentee the easier it will be for those who go to the polls to maintain social distance and limit their potential exposure to COVID-19."[8] And we appreciate your promise that "[t]he Division is doing everything it can to avoid . . . forcing many voters . . . to choose between going to potentially crowded polling places or being disenfranchised."[9]

Enforcing the witness requirement, however, forces this very choice on voters. For many Alaskans who, for example live alone or who are single parents with children,[10] getting a witness and maintaining safe social distancing isn't feasible.[11] But, without a witness, their votes will be rejected and uncounted. You recognized that Alaska should not force voters

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[3] Alaska Stat. § 15.20.010.

[4] Defs.' Opposition to Motion for Preliminary Injunction, docket no. 22 at 8, *Disability Law Center of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020).

[5] *Id.*

[6] Applebee Decl. at ¶ 7.

[7] Defs.' Opposition to Motion for Preliminary Injunction at 19.

[8] *Id.* at 21.

[9] *Id.* at 28.

[10] Absentee voters' witnesses must be at least 18. Alaska Stat. §§ 15.20.066(b)(2)(C) & 15.20.081(d).

[11] Alaska's Chief Medical Officer Dr. Anne Zink testified, "The most effective ways to minimize the spread of the disease continue to be social distancing, frequent handwashing or sanitizing, and wearing adequate face coverings that cover the nose and mouth." Declaration of Anne Zink, docket no. 23 at ¶ 7, *Disability Law Center of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020).

into the Sophie's Choice of a fatal virus or democratic disenfranchisement: please don't enforce the witness requirement and make Alaskans choose between their health or their vote.

Alaskans' right to vote is fundamental, guaranteed by the United States and Alaska Constitutions,[12] and the health consequences of COVID-19 are dire: 1 out of 5 people become seriously ill and require hospitalization,[13] and while "[o]ur understanding of this virus is constantly evolving,"[14] we know that of the almost 6 million Americans it has infected, it has killed more than 182,000.[15]

In upholding Alaskans' fundamental right to elect our public servants, and "to avoid . . . forcing many voters . . . to choose between going to potentially crowded polling places or being disenfranchised,"[16] the Division of Elections should recognize that enforcing the witness requirement now is unwise and poor policy. Its harm of disenfranching Alaskans is not offset by any good: instances of voter fraud are so incredibly rare that the witness requirement cannot serve a compelling purpose, especially since there is no way to confirm the identity of a witness who signs another's ballot.

COVID-19 is serious and so too is the right to vote, free from unnecessary ballot barriers. Alaska should continue its "long history of expanding voting access and facilitating voters' exercise of their right to vote,"[17] by not enforcing the absentee witness requirement now, in this global pandemic.

By Friday, September 4, we hope to hear that you're putting the safety of our democracy and the safety of Alaska first, and will make this commitment. Please contact Stephen Koteff, the ACLU of Alaska's legal director, at skoteff@acluak.org.

Thank you.

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[12] U.S. Const. amend. I, XIV, XV, XIX, and XXVI; Alaska Const. art. V.

[13] World Health Organization, *Q&A on coronaviruses: What are the symptoms of COVID-19?*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses.

[14] Zink Decl. at ¶ 2.

[15] Centers for Disease Control and Prevention, *CDC COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker.

[16] Defs.' Opposition to Motion for Preliminary Injunction at 28.

[17] *Id.* at 3.

Sincerely,

/s/
Joshua A. Decker
Executive Director
American Civil Liberties Union of Alaska Foundation

/s/
Natalie Landreth
Senior Staff Attorney
Native American Rights Fund

/s/
Kristen Clarke
President and Executive Director
Lawyers' Committee for Civil Rights Under Law

Lieutenant Governor Kevin Meyer
STATE OF ALASKA

September 4, 2020

Stephen Koteff, Legal Director ACLU of Alaska
1057 W Fireweed Ln Ste 207
Anchorage, AK 99503
Via Email Only

Dear Mr. Koteff,

Thank you for your letter of August 31 concerning the upcoming statewide elections. My office has been working diligently with the Division of Elections and our Department of Law to evaluate our options for the upcoming general election.

I am sure you would agree that election integrity begins with following the law. If an election is not conducted legally by following the statutes duly passed by the legislature, there can be no basis to believe in the election's integrity. Making exceptions to the statutes, even on a piecemeal basis, would erode the foundation upon which Alaskans have built their faith in the election process.

The Office of Lt. Governor lacks the power to unilaterally waive the statutory witness requirement. The witness requirement is central to the absentee ballot statutory scheme and is not a mere procedural requirement. AS 15.20.081(d) sets forth the witness requirement, and AS 15.20.203(b)(2) mandates that an absentee ballot be rejected and not counted if it is not properly witnessed.

If my office were to ignore this clear statutory language and count ballots that were not properly witnessed, those absentee ballots could later be invalidated in a court challenge. It would be irresponsible for me to tell voters not to follow the witness requirement and risk their votes not counting.

Like you, I care deeply about every Alaskan's safety during this pandemic, and we have learned a lot over these past several months about how to best prevent spreading the virus. Just like going to the grocery store or receiving deliveries at your home, maintaining a social distance of six feet and wearing masks goes a long way and both of these can be accomplished for witnessing a ballot. Witnessing could also take place through a window if necessary. Although not ideal, we are all having to change the way we do things, and I would encourage voters to think creatively about how to fulfill this requirement in a safe manner.

Sincerely,

Kevin Meyer

Kevin Meyer
Lieutenant Governor

Juneau Office: Post Office Box 110015 • Juneau, Alaska 99811 • 907-465-3520 voice • 907-465-5400 fax
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK, Plaintiffs, v. KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-20-_____ COPY Original Received SEP - 8 2020 Clerk of the Trial Courts

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COMPLAINT

1. This lawsuit concerns the burdens on the fundamental right to vote of organizational Plaintiffs' members and individual Plaintiffs during a deadly pandemic because the Alaska Division of Elections requires that Plaintiffs and eligible Alaskan voters who wish to cast absentee ballots by mail or by electronic transmission sign their absentee ballot envelopes in the presence of a notary or other official authorized to administer oaths or, alternatively, sign their ballots in the presence of a witness who is at least eighteen years old and obtain a signature from the witness ("Witness Requirement"). AS 15.20.081(d); AS 15.20.066(b)(2).

2. Individual Plaintiffs live alone, are immunocompromised, and have been self-isolating since the first cases of COVID-19 in Alaska became known and Organizational Plaintiffs have members who are in similar positions.

3. These voters cannot vote in person without a significant risk to their health because they reasonably fear that they may contract COVID-19 at the polls.

4. They also cannot vote by mail without a significant risk to their health because they are neither able to notarize their mail-in ballots nor find an individual who is at least eighteen years old to witness and attest to their mail-in ballots without potential exposure to COVID-19.

5. Alaska state law, thus, leaves these voters no recourse in the midst of a pandemic, leaving them with an untenable choice: risking their health and well-being to vote or not vote at all.

6. Neither is permissible. Plaintiffs and similarly situated voters have a right to protect their health and safety. But it is beyond question that the right to vote is a "precious" and "fundamental" right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). Even the most basic of other rights are "illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

7. Alaska's Constitution expressly guarantees the right to vote as fundamental. Article V, Section 1 provides, in pertinent part, "Every citizen of the United States who is at least eighteen years old, who meets registration residency requirements which may be

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prescribed by law, and who is qualified to vote under this article, may vote in any state or local election." Alaska Const., art. V, § 1.

8. Article I, Section 1 guarantees that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." *Id.* art. I, § 1. The Alaska Constitution also enshrines absentee voting, "Methods of voting, including absentee voting, shall be prescribed by law." *Id.* art. I, § 3.

9. Alaska's requirement that Plaintiffs sign their absentee ballots "in the presence" of a witness and obtain a witness signature leaves Plaintiffs and their members and similarly situated Alaskans with no way to vote safely, and through no fault of their own.

10. This amounts to a significant unconstitutional burden on the right to vote of organizational Plaintiffs' members and individual Plaintiffs during this pandemic.

11. Plaintiffs, thus, ask this Court to use its equitable powers to grant injunctive and declaratory relief ordering Defendants to not enforce the Witness Requirement in the upcoming November 2020 general election and direct boards of elections to not reject returned absentee ballots that do not satisfy the Witness Requirement and declare its application unconstitutionally burdensome on Plaintiffs' right to vote during the COVID-19 pandemic.

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PARTIES

Plaintiffs

A. Organizational Plaintiffs

12. Arctic Village Council (the "Tribe") is a federally recognized Indian tribal government whose governing body is recognized by the Secretary of the U.S. Department of the Interior as Arctic Village. The Tribe exercises powers of self-governance and jurisdiction over its Neets'ąjj Gwich'in tribal members living in Arctic Village. The Tribe is responsible for the health, safety, and welfare of its members. Arctic Village Council sues in a representational capacity parens patriae on behalf of the affected tribal members it represents. Arctic Village is situated on the southern boundary of the Arctic National Wildlife Refuge, along the east fork of the Chandalar River and about 100 miles north of Fort Yukon, Alaska. The Tribe has been extremely concerned about the pandemic which has devastated Native communities all over the United States. The Tribe is aware that COVID-19-related deaths among Native communities is highest among any demographic group in the United States. In response to the pandemic, the Tribe has taken a series of drastic measures to prevent the spread of the virus that, if not contained, has the potential to decimate Arctic Village's entire population. To that end, in March and April 2020, the Tribe put in place strict social distancing guidelines, closed tribal facilities to the public, ordered tribal staff to work from home, closed the Village to all outside visitors, and restricted air carrier passenger service to the Village. After a recent outbreak of COVID-19, the Tribe undertook even more drastic measures—a community-wide shelter in place

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order that restricted all residents from gathering with any person outside of their households and prohibited residents from congregating at community facilities such as: the tribal office, the community hall, the village store, and the post office. The pandemic has severely restricted the ability of village members to vote in person, the predominant method of voting in past elections. Since the most recent outbreak and the shelter-in place order around May 16, 2020, the Tribe has had to restrict in-person voting because it requires members to congregate in close spaces. As a way to avoid person-to-person contact and promote safety, the Council is encouraging community members to vote by mail and leave their absentee ballots in their mailboxes for postal pick up. But Alaska's Witness Requirement serves as an absolute bar for many members who are self-isolating, do not have access to a notary because of shelter-in place requirements, and do not have any one at least eighteen years old to sign and witness their signing absentee ballots. Voting is important for the Arctic Village community because it allows them to exercise their voice in the democracy. If the Witness Requirement is not lifted for the upcoming general election, members of Arctic Village will not be able to vote in the upcoming general election and will be forced to choose between their right to vote and their health.

13. The League of Women Voter of Alaska ("LWVAK") is a nonpartisan political organization that works to encourage informed and active participation in government and to influence public policy through education and advocacy. LWVAK is an affiliate of the League of Women Voters of the United States. LWVAK has approximately 350 members throughout Alaska. Like the other Plaintiffs (and most

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Americans), LWVAK's members have had their daily lives altered by COVID-19. Many of these members are adhering to strict social distancing protocols to avoid contracting or spreading the coronavirus. Many of LWVAK's members are senior citizens and are therefore particularly vulnerable to COVID-19 due to their age. Some of these members live by themselves and would have to violate distancing protocols to have their ballots witnessed. Thus, some of LWVAK's members are registered voters who, under the current law, will face a choice between risking their health in order to vote or not voting at all because of Alaska's Witness Requirement for absentee voting. LWVAK has diverted and will need to continue to divert resources from its voter registration, voter education, and voter mobilization activities towards advocating against and educating voters about the Witness Requirement, to prevent the Requirement from disenfranchising its members and the voters the organization serves. If mail voters were not required to have their mail-in ballot envelopes signed by a witness, LWVAK could spend less of its volunteer resources and time on educating voters about the witness requirement, and more on its other critical activities including registering voters without conducting in-person registration drives and educational events.

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B. Individual Plaintiffs

14. Elizabeth L. Jones is seventy-one years old, lives alone in a log cabin in Fairbanks, Alaska, and has voted in person in every general election since she became eligible to vote 50 years ago. She is not able to vote safely in person in this year's general election because she is at high risk of contracting COVID-19. Ms. Jones is at increased risk

for severe illness from COVID-19 because of her age and because she has three underlying health conditions: she has high blood pressure, is obese, and is in the initial stages of chronic obstructive pulmonary disease or COPD. She has been self-isolating at her home since late February, only leaving her home when necessary and choosing curbside service for groceries, prescription drugs, garbage drop-off, and veterinarian service for her dog in order to avoid contact with others. Her daughter, who lives in Oklahoma, developed COVID-19, had severe symptoms, and eventually recovered. Ms. Jones is afraid that she will not be so lucky and may not survive the illness if she contracted it. Ms. Jones believes that the only way she can safely vote is by mail. Because she lives alone, she does not have access to anyone who is at least eighteen years old who could serve as a witness to her absentee ballot. She also does not have access to a notary anywhere near her and is not comfortable going into a notary office to get her absentee ballot notarized. Ms. Jones voted by mail in the August primary and had to ask her United States Postal Service ("USPS") letter carrier to witness her ballot; however, because of a recent USPS directive, Ms. Jones's letter carrier will not be allowed to witness her ballot in the general election. If the Witness Requirement remains in place for the upcoming general election, Ms. Jones will be forced to choose between her right to vote and an unacceptable risk to her health.

15. Barbara Clark is seventy-two years old and lives alone. She is a "super voter" and votes in every major election. She does not believe she can vote safely in person in this year's general because she is at high risk of contracting COVID-19. She has two underlying health conditions that put her at increased risk for severe illness from COVID-19: high

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blood pressure and obesity. She has been self-isolating at her home since early March, not even leaving to get food, which she gets delivered. She has left home only for other necessities such as a medical appointment and obtaining a COVID-19 test; she estimates that she has left her home for such necessities fewer than a dozen times in the last six months. Ms. Clark believes that the only way she can safely vote is by mail. Because she lives alone, she does not have access to anyone who is at least eighteen years old who could serve as a witness to her absentee ballot. She also does not have access to a notary anywhere near her and is not comfortable going into a notary office to get her absentee ballot notarized. If the Witness Requirement remains in place for the upcoming general election, Ms. Clark will be forced to choose between her right to vote and an unacceptable risk to her health.

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C. Defendants

16. Defendant Kevin Meyer is sued in his official capacity as the Lieutenant Governor of the State of Alaska. As Lieutenant Governor, Defendant Meyer "control[s] and supervise[s] the division of elections" and "appoints a director of elections." AS 15.10.105(a). The "director serves at the pleasure of the lieutenant governor." *Id.* Defendant Meyer has an office located at 550 West 7th Avenue, Suite 1700, Anchorage, AK 99501.

17. Defendant Gail Fenumiai is sued in her official capacity as the Director of the Alaska Division of Elections. Under state law, the Director "provide[s] general administrative supervision over the conduct of state elections, and may adopt regulations

under AS 44.62 (Administrative Procedure Act) necessary for the administration of state elections." AS 15.15.010. The Director also oversees general election administration by "act[ing] for the lieutenant governor in the supervision of central and regional election offices . . . and all other matters relating to the employment and training of election personnel, and the administration of all state elections as well as those municipal elections that the state is required to conduct." AS 15.10.105(a). Defendant Fenumai is located at 240 Main Street, 4th Floor, Juneau, AK 99801.

18. Defendant the Alaska Division of Elections ("DOE") "is the state agency charged with overseeing and administering elections in Alaska." *Id.* Defendant is located at 240 Main Street, 4th Floor Juneau, AK 99801.

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JURISDICTION AND VENUE

19. This Court has original jurisdiction over this action under AS 22.10.020 because Plaintiffs seek injunctive and declaratory relief in a civil action.

20. Venue is proper in the Third Judicial District of Alaska under Alaska Rule of Civil Procedure 3(c)(2) because one or more of the Defendants have offices in this District.

21. Venue is also proper in the Third Judicial District under Alaska Rule of Civil Procedure 3(c)(1) because one or more of Plaintiffs' claims arise in this District.

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FACTUAL ALLEGATIONS

A. COVID-19 Pandemic

22. The novel coronavirus, SARS-CoV-2, causes a deadly disease known as COVID-19. The World Health Organization ("WHO") declared the COVID-19 disease a pandemic on March 11, 2020.

23. Since health officials observed the first known case of the COVID-19 disease in December 2019, COVID-19 has spread throughout the world. Globally, as of September 8, 2020, COVID-19 has infected more than 27 million individuals and has caused more than 881,400 deaths.

24. The COVID-19 pandemic has had an especially severe impact on the United States. The first known death in the United States caused by COVID-19 occurred in February 2020. Since then, the United States has observed more than six million official cases of COVID-19 and more than 188,000 deaths.

25. The virus that causes COVID-19 is highly contagious and spreads through a variety of ways, including the respiratory droplets that an infected person produces when they cough, sneeze, or talk; or through contact between individuals. The virus enters the body through the nose, mouth, or eyes, and then attaches to a protein, which then enters the cell and replicates. Each infected cell can release millions of copies of the virus before the cell breaks down and dies. An infected person who coughs and sneezes can leave respiratory droplets on surfaces where it can remain in an infectious state for several hours to days without a human host.

26. COVID-19 is a dangerous virus. In addition to the large number of deaths in the United States and throughout the world, the WHO estimates that as many as 20% of all individuals to become infected with the virus will require hospital treatment. Even COVID-19 patients who eventually recover from the disease can suffer serious long-term health impacts, such as damaged lung tissue, permanent loss of respiratory capacity, and damage to the kidneys, heart, and liver.

27. The risks of severe illness, complications, and death due to COVID-19 increase with age. Early COVID-19 data from China reported a fatality rate of 3.6% among individuals in their sixties, a fatality rate of 8.0% among individuals in their seventies, and a fatality rate of 14.8% among individuals over the age of eighty. Early epidemiologic data from the United States showed similar results.

28. In addition to age, several other underlying health factors increase the risks associated with COVID-19. People with underlying health conditions (such as heart disease, diabetes, and lung disease such as chronic obstructive pulmonary disease (COPD)), weakened immune systems, cancer or high blood pressure, and who are pregnant or obese are considered populations at an increased risk for severe illness from COVID-19.

29. COVID-19 also disproportionately impacts members of racial minority groups, such as Native Americans and Alaska Natives. For example, in Alaska, Native people make up 15.6% of the population but 43% of deaths. In Arizona, Native Americans make up 4% of the population and 12% of deaths. In New Mexico, they

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account for only 9% of the population but nearly 54% of deaths—by far the starkest disparity. In Wyoming, they comprise 2% of the population but 43% of deaths. The alarming rates at which COVID-19 is killing Native Americans and Alaska Natives can be attributed to decades of discrimination in housing, employment, and health care. Today, ongoing discrimination in testing and treatment continues to fuel significant disparities in COVID-19 cases and outcomes.

30. The severity of the COVID-19 pandemic in the United States has prompted government officials to undertake drastic measures to combat the virus. President Trump declared a national emergency on March 13, 2020. The governors of all fifty states eventually declared states of emergency. These developments resulted in restrictions being placed on large gatherings, requests that people practice social distancing, and changes to election times and procedures.

31. The Centers for Disease Control and Prevention ("CDC") urges Americans to adhere to social distancing measures (for example, staying home as often as possible and maintaining at least six feet of physical distance from other people when outside the home) to minimize person-to-person contact and reduce the spread of COVID-19. The CDC emphasizes that these measures are crucial for reducing an individual's risk of becoming infected with the disease and for preventing the transmission of the disease throughout the population.

32. Public health experts anticipate that the virus that causes COVID-19 will continue to spread through the fall and winter given the low level of immunity to the

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virus in the general population. CDC Director Robert Redfield warned in April that the combination of the COVID-19 pandemic and regular cold and flu season in the fall and winter could produce an even greater strain on hospitals and the health care system than the initial outbreak of the virus the United States has caused so far.

33. Given the likelihood that the COVID-19 pandemic will continue through the upcoming fall and winter, public health experts and other researchers have expressed concerns regarding the safety of in-person voting during the upcoming November 2020 election. In April 2020, Dr. Anthony Fauci, head of the National Institute of Allergy and Infectious Diseases, expressed concerns regarding a surge in COVID-19 cases in the fall. He stated that he "can't guarantee" that in-person voting will be safe for the November election. A recent study from the National Bureau of Economic Research, using data from the Wisconsin state primary election in April 2020, found a statistically significant relationship between in-person voting and an increase in COVID-19 cases. Thus, eligible voters, particularly those voters in at-risk groups, face health risks for voting in person in upcoming elections.

B. COVID-19 in Alaska

34. On March 11, 2020, Governor Michael Dunleavy declared a public health emergency advising all state executive departments coordinate COVID-19 emergency responses.

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35. Alaska's first known case of COVID-19 was on March 12, 2020. As of September 8, 2020, Alaska had more than 6,600 confirmed cases, and 39 resulting deaths. The numbers are only rising.

36. Anchorage Municipality in particular is one of the State's primary hotspots. As of September 8, 2020, Anchorage has 3,425 of Alaska's total cases and the majority of new cases in Alaska.

37. Due to the public health risks associated with COVID-19, the Governor issued a series of public health mandates with the goal of reducing person-to-person contact and slowing the spread of the disease. The Governor issued a public health mandate closing State-operated facilities to the public on March 17, 2020. On March 18, 2020, the Governor announced the temporary closure of bars and restaurants to the public. On March 19, 2020, the Governor directed doctors, hospitals, and surgical centers to temporarily postpone elective surgeries.

38. The Governor announced the closure of public and private schools on March 20, 2020. Although the original order was supposed to expire starting May 1, 2020, the Governor extended the closure of schools for the duration of the academic school year. Since then, many school districts, including the school districts in Anchorage, Juneau, and Fairbanks, have resumed fall classes with remote learning only.

39. On March 27, 2020, the Governor issued a public health order mandating all Alaska residents to practice social distancing and ordering the temporary closure of non-essential businesses to slow the spread of COVID-19 throughout the State. The same

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day, the Governor ordered temporary restrictions on intrastate travel between different communities throughout the State.

40. Alaska began "phase one" of its plan to gradually re-open the state economy in late April. The State continues to encourage residents to practice social distancing and to avoid contact with others whenever possible.

41. Alaska has adopted travel-related restrictions requiring entrants to complete a traveler declaration form, arrive with proof of negative COVID-19 results or get tested for COVID-19 as soon as they arrive, and self-quarantine for at least fourteen days while waiting for test results.

42. Despite the easing of travel and stay-at-home restrictions at the state level, local boroughs and communities have enacted their own restrictions. On July 31, 2020, the Mayor of Anchorage ordered a "four week reset," which limited the size of outdoor gatherings, mandated social distancing, and prohibited bars and restaurants from offering indoor service from August 3 to August 30, 2020. On August 28, 2020, the Mayor modified this order to allow bars and restaurants to operate at 50% capacity, while recognizing that there continues to be widespread community transmission and concerning outbreaks among vulnerable populations.

43. On April 30, 2020, Governor Dunleavy signed H.B. 124, which allows a remotely located individual to comply with personal appearance before a notary by using communication technology. The law provides that a notary may perform a notarial act using communication technology for a remotely located individual if the notary has (a)

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personal knowledge of the identity of the individual; (b) obtained satisfactory evidence of the identity of the remotely located individual by oath or affirmation from a credible witness appearing before the notary; or (c) obtained satisfactory evidence of the identity of the remotely located individual by using a government-issued identification card, a credential analysis of the identification card and at least one type of identity proofing. The law goes into effect January 1, 2021.

44. Similarly, Fort Yukon adopted a local shelter-in-place order and curfew. The municipality also restricted intrastate travel except for cargo, essential workers, medical workers, and law enforcement.

45. Other local municipal and tribal governments that have adopted temporary social distancing and stay-at-home orders since the beginning of the pandemic include Coffman Cave, Juneau, Kake, Tenakee Springs, Thorne Bay, St. Paul, and Wrangell.

46. Several local municipal and tribal governments have also enacted restrictions or prohibitions on intrastate and interstate travel to and from their communities. These villages include Koyukuk, Venetie, Arctic Village, Chalkyitsik, Nulato, and Huslia, as well as Akiak, Adak, Ambler, Atka, Elim, Emmonak, Galena, Kake, Larsen Bay, McGrath, St. Michael's, Newhalen, St. Paul, Unalakleet, and Yakutat.

47. Plaintiff Arctic Village has strict social distancing guidelines in place since March and April and more recently, after an outbreak, a shelter-in-place order that restricts large gatherings outside of community members' homes.

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48. Many other Alaska Native tribal governments have enacted similar self-isolation measures to protect the safety of their community members, particularly tribal elders who are at an increased risk for COVID-19 death due to their age and lack of immunity.

49. Tribal leaders, including Plaintiff Arctic Village Council, feel a heightened need to take these precautions because they believe local outbreaks have the ability to decimate their populations and quickly overwhelm under resourced tribal hospitals and healthcare facilities. At the same time, Tribal leaders are acutely aware that their communities are rural and not in close proximity to other major population centers with larger health care facilities.

50. State health officials are concerned that the hospital intensive care units will be overwhelmed sooner than anticipated, and, as a result, borough officials are considering implementing additional safety precautions to attempt to curb the dramatic increase in cases.

C. Vote-by-Mail and Absentee Voting in Alaska

51. Alaska's constitution enshrines the right to vote by mail: "Methods of voting, including absentee voting, shall be prescribed by law." Alaska Const. art. V, § 3.

52. Alaska's Democratic presidential primary election was originally planned for April 4, 2020. Given the onset of the COVID-19 pandemic and its associated health concerns, in-person voting for the Democratic primary was cancelled and the election was conducted by mail.

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53. Alaska held its primary elections on August 18, 2020, and Alaska will hold its the general election on November 3, 2020. The Alaska Division of Elections intends to follow normal state protocols and will allow for in-person voting in the general election.

54. As an alternative to in-person voting, Alaskans are permitted to vote by mail, by fax, and online using absentee ballots.

55. State officials anticipate an increase in mail-in voting because of the ongoing COVID-19 pandemic.

Pre-COVID-19 Mail-In Voting

56. In Alaska, any qualified voter can vote absentee by mail, fax, or online without an excuse. AS 15.20.081(a). A voter can apply for an absentee ballot up until ten days before an election by sending the application over mail, fax, or scanning it to the director of the regional election office. AS 15.20.081(a)–(b). Another individual can apply for an absentee ballot on behalf of a qualified voter if that individual has a written general or special power of attorney. *Id.*

57. For domestic voters, the application for an absentee ballot must include the address or, if the application requests delivery of an absentee ballot by electronic transmission, the telephone electronic transmission number, to which the absentee ballot is to be returned, the applicant's full Alaska residence address, and the applicant's signature. *Id.*

58. After a local election office receives an absentee ballot application, the Director must send the voter an absentee ballot and other absentee voting materials by the

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most expeditious mail service and as soon as the materials are ready for distribution. AS 15.20.081(c).

59. If the application requests electronic transmission of the absentee ballot, election officials must send the absentee ballot and other absentee voting materials by electronic transmission. AS 15.20.066.

60. Once the voter receives the absentee ballot, the voter must sign the voter certification in the presence of a notary or other official authorized to administer oaths or, if these are unavailable, then in the presence of a witness who is at least eighteen years old. AS 15.20.081(d).

61. An absentee voter must provide proof of identification or other information to aid in the establishment of the voter's identity, either at the time the voter applies for an absentee ballot or when the voter signs the voter certification. AS 15.20.081(f); 6 AAC 25.510.

62. A first-time voter who registered by mail or by facsimile or other electronic transmission and has not met the identification requirements when the voter registered, must provide either a copy of a driver's license, state identification card, current and valid photo identification, birth certificate, passport, or hunting or fishing license; or a copy of a current utility bill, bank statement, paycheck, government check, or other government document; any of these items must show the name and current address of the voter. AS 15.20.081(f).

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63. An absentee voter who returns the absentee ballot by mail, whether provided to the voter by mail or by electronic transmission, must use first class mail service and mail the ballot to the election supervisor for the house district in which the voter seeks to vote. The ballot must be postmarked on or before election day. The election supervisor has to receive the ballot by the close of business on the tenth day after the election. AS 15.20.081(e).

64. An absentee voter who returns the absentee ballot by electronic transmission must either return the ballot to the Division of Elections by mail or by electronic transmission. If the voter returns the ballot by mail, the ballot must be postmarked on or before election day and the election supervisor must receive the ballot by the close of business on the tenth day after the election. If the voter sends the ballot by electronic transmission, the Division of Elections must receive it not later than 8:00 p.m. Alaska time on election day.

65. Under Alaska law, absentee counting boards cannot count absentee ballots that are missing an official or witness attestation. AS 15.20.203(b)(2).

Temporary Modifications to Mail-In Voting in Light of the COVID-19 Pandemic

66. For the August primary and November general elections, Alaska broadened its absentee ballot system and is now allowing anyone to request a ballot by email or fax.

67. Alaska has not lifted all barriers however—the Witness Requirement remains intact and voters still have to print out the ballot and either fax it or procure postage and mail it back to election offices.

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68. Until recently, a voter could have an official from the USPS witness their ballot. But on August 13, 2020, the USPS informed the Director that postal service employees "are prohibited from serving as witnesses in their official capacity while on duty[.]"

69. For the November 3 general election, the deadline to receive mail-in absentee applications is October 24, 2020. The deadline to receive electronic transmission applications is November 2, 2020.

D. Burdens on Plaintiffs and Plaintiffs' Members Right to Vote from the Application of Alaska's Witness Requirement

70. On August 31, 2020, Defendants Fenumiai and Meyer were placed on notice that imposing the Witness Requirement in the upcoming general election violated the Article V, Section 1 and Article I, Section 1 of the Alaska Constitution during a pandemic.

71. On September 4, 2020, Defendants Fenumiai and Meyer responded that the Witness Requirement, AS 15.20.081(d), will remain in place for the upcoming general election and election boards will reject unwitnessed absentee ballots under AS 15.20.203(b)(2).

72. In the August primary election, 62,455 Alaskans requested absentee ballots. Officials predict that number will rise in the upcoming general election. In the primary election, 456 absentee ballots were rejected because of "improper or insufficient witnessing."

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73. There is no end in sight for the COVID-19 pandemic. Because the pandemic will continue into the fall and winter, Alaskan voters will risk exposure to COVID-19 if they wish to vote in person in the upcoming election.

74. And if they vote absentee, they stand to lose their right to vote if they are unable to comply with the Witness Requirement.

75. The Witness Requirement burdens Alaska Native voters in particular. As of 2019, the Census Bureau estimated American Indian and Alaska Native residents make up 15.6% of the citizen voting-age population. This population has also faced some of the highest COVID-19-related deaths in Alaska and the Nation.

76. Plaintiff Arctic Village Council's community members are under a strict shelter-in-place order that prohibits members of any household from gathering with anyone outside of their households including at public places like the post office. Voting by mail is the only way that Arctic Village Council's members can vote in the upcoming election as in-person voting is not an option for them. Because many members do not live with anyone at least eighteen years old, the Witness Requirement is an absolute bar to their voting.

77. The Witness Requirement significantly burdens older voters with underlying health conditions. As of 2018, approximately 18% of Alaska's population is made up of residents age sixty or older. As of late 2016, individuals sixty-five years old and over made up 13.2% of Alaska's citizen voting-age population.

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78. Plaintiff League of Women Voters of Alaska has many members are senior citizens and are therefore particularly vulnerable to COVID-19 due to their age. Some of these members live by themselves and would have to violate distancing protocols to have their ballots witnessed. Thus, some of LWVAK's members are registered voters who, under the current law, will face a choice between risking their health in order to vote or not voting at all because of Alaska's witnessing requirement for mail voting. Furthermore, LWVAK has diverted and will need to continue to divert resources from its voter registration, voter education, and voter mobilization activities towards advocating against and educating voters about the witness requirement, to prevent the requirement from disenfranchising its members and the voters they serve.

79. Plaintiffs Ms. Jones and Ms. Clark are high-risk voters with underlying health conditions. They are self-isolating because of the pandemic. They do not have access to a notary or anyone at least eighteen years old to witness and sign their absentee ballots. Although Ms. Jones had her USPS letter carrier witness her primary ballot, that option is no longer available to her because the USPS recently issued a directive prohibiting postal service employees from witnessing ballots while on duty.

80. Forcing Plaintiffs' members and individual Plaintiffs to choose between risking their health and safety by increasing their potential exposure to COVID-19 and not participating in the election at all is an unconstitutional burden on Alaska citizens' fundamental right to vote.

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81. Because it necessitates coming into contact with other individuals and increasing potential exposure to COVID-19, Alaska's Witness Requirement makes even absentee voting at home unsafe for self-isolating, high-risk individuals who must avoid contact with other people. For these individuals, not only is in-person voting foreclosed, so is absentee voting. Thus, the Witness Requirement unconstitutionally restricts the fundamental right to vote for these high-risk and self-isolating citizens.

82. Even if the State has an interest in preventing election fraud, the Witness Requirement does not achieve that objective, let alone present a narrowly tailored means of accomplishing that goal. Alaska is only one of just twelve states to have a witness requirement. Election fraud data throughout the United States suggests that states lacking a witness requirement can still administer a mail-in voting regime without a significant increase in fraud.

83. In the context of a pandemic, the Witness Requirement's burden on voters' ability to safely cast their absentee ballots significantly outweighs the benefits to the State in enforcing the Witness Requirement.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

Violation of the Right to Vote, Alaska Const., Art. V, § 1

84. Plaintiffs re-allege and incorporate by reference the allegations in the preceding paragraphs.

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85. Article V, Section 1 of the Alaska Constitution guarantees the right to vote to all adult United States citizens residing in Alaska. When a state election law is alleged to cause a deprivation of this fundamental right, courts in this state analyze the constitutionality of the provision by weighing "the character and magnitude of the asserted injury to the rights" against the "precise interests put forward by the State as justification for the burden imposed by its rule." *State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)).

86. To cast an absentee ballot, an Alaska voter must obtain the signature of a notary or other "person qualified to administer oaths," or a witness at least eighteen years old at the time the voter executes the voter certificate on the ballot if a notary is not reasonably available. AS 15.20.081(d); *see also* 6 AAC 25.550. In the context of a global pandemic that has already claimed the lives of nearly two-hundred-thousand across the country and a significant number of Alaskans, and required social distancing of the entire population, Alaska's Witness Requirement for absentee voting places a substantial and impermissible burden on Plaintiffs' the fundamental right to vote in violation of Article V, Section 1 of the Alaska Constitution.

87. Making Plaintiffs, including those who are at increased risk of complications from COVID-19, choose between voting in person or coming into contact with a witness or notary, thereby risking their health and safety, or not voting at all

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because they cannot safely secure the signature of a witness or notary, violates Plaintiffs' right to vote under Article V, Section 1 of the Alaska Constitution.

88. In the midst of an ongoing public health crisis, there is no state interest in favor of enforcing Alaska's mandatory notary and witness requirements that justifies the burden placed on Plaintiffs' constitutional right to vote. Defendants may not deprive Plaintiffs of their fundamental right to vote—secured by Article V, Section 1 of the Alaska Constitution—by enforcing the mandatory witness requirements for mail-in voting.

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SECOND CAUSE OF ACTION

Violation of Equal Rights, Alaska Const., Art. I, § 1

89. Plaintiffs re-allege and incorporate by reference the allegations in the preceding paragraphs.

90. Article I, Section 1 of the Alaska Constitution guarantees that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." When a law that is alleged to violate the guarantee of equal rights, courts select a level of scrutiny on a sliding scale depending on the particular right or classification at issue. Courts employ a higher level of scrutiny when the challenged law implicates a fundamental right or suspect classification, and a lower level of scrutiny when less important rights or less suspect classifications are at issue. *See Alaska Pacific Ins. Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984).

91. The courts of this state have long recognized that the right to vote is a fundamental right under the Alaska Constitution. *See, e.g.*, *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982). Thus, courts in this state apply the strictest level of scrutiny under Article I, Section 1's sliding scale framework when the challenged law concerns the fundamental right to vote. *See Peloza v. Freas*, 871 P.2d 687, 690 (Alaska 1994). Accordingly, courts will invalidate the complained-of statute unless the government provides a compelling state interest and there is no less restrictive alternative to the state's chosen means to achieve its objectives. *See Alaska Pacific Ins. Co.*, 687 P.2d at 269–70.

92. The Witness Requirement burdens Plaintiffs' right to vote during a pandemic because it forces them to choose between their health and the right to vote. It unequally allocates these burdens to eligible voters who are unable to feasibly secure a witness signature because they live alone, must self-isolate to avoid exposure to COVID-19, or both. In other words, the Witness Requirement treats a class of voters such as Plaintiffs or Plaintiffs' members (i.e., who are self-isolating, immunocompromised, and unable to locate a witness who is at least eighteen years old without exposing themselves to the virus) differently from those individuals who easily have access to a witness potentially because they live with the person.

93. Defendants do not have a compelling state interest in enforcing the Witness Requirement during a pandemic. Any purported interest in preventing voter fraud can be achieved through less restrictive means, especially when the application of the Witness

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Requirement threatens to disenfranchise hundreds if not thousands of eligible, Alaska voters.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants and:

i. Declare the Witness Requirement, codified at AS 15.20.066(b)(2) and 15.20.081(d), and 6 AAC 25.550 and 6 AAC 25.680, unconstitutional and invalid during the COVID-19 pandemic because it violates Plaintiffs' rights under Article V, Section 1 and Article I, Section 1 of the Alaska Constitution.

ii. Preliminarily and permanently enjoin enforcement of the Witness Requirements during the COVID-19 pandemic;

iii. Order Defendants to issue guidance instructing all state and local election officials to count otherwise validly cast mail-in ballots that do not comply with the Witness Requirements, for all Alaska primary, general, state, local, and municipal elections held during the COVID-19 pandemic;

iv. Order Defendants to modify election materials, including mail-in ballots, to reflect the elimination of the Witness Requirements for the November 2020 general election and any future elections held during the COVID-19 pandemic and conduct a public education campaign concerning the elimination of the Witness Requirement in coordination with local officials

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before and during the absentee balloting period;

v. Declare that Plaintiffs are the prevailing party and are constitutional public interest litigants under AS 09.60.010(c) and award them full reasonable attorneys' fees and costs, under applicable Alaska state statutes, including AS 09.60.010; and

vi. Grant such other and further relief as the Court deems just and proper.

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Respectfully submitted,

Date: September 8, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, I mailed by Certified Mail and emailed a true and correct copy of the foregoing to:

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,

Plaintiffs,

v.

KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-20-_____

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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1. *Plaintiffs are more likely than not to prevail on the claim that the Witness Requirement impermissibly burdens Alaskans' right to vote under Article 5, Section 1 of the Alaska Constitution.* 24

2. *Plaintiffs are more likely than not to prevail on the claim that the Witness Requirement violates the guarantee of equal rights under Article 1, Section 1 of the Alaska Constitution.* 27

V. CONCLUSION 30

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I. INTRODUCTION

Plaintiffs seek to vindicate the fundamental right to vote of their members, themselves, and of all Alaskans during an unprecedented general election that will be held under the pall of a worldwide pandemic responsible for killing hundreds of thousands in the United States alone. But Plaintiffs, eligible Alaska voters, cannot safely vote. This is because Alaska imposes a burdensome and onerous requirement that voters who vote absentee by mail or by electronic means must either sign their absentee ballot envelopes in the presence of a notary or other official authorized to administer oaths or, alternatively, sign their ballots in the presence of a witness 18 years old or older and obtain a signature from the witness ("Witness Requirement"). This requirement creates a substantial risk to the health of voters and places a significant unconstitutional burden on their right to vote.

More than 62,455 Alaskans requested absentee ballots in the August 18 primary election and state officials predict that number will rise in the upcoming general election.[1] Plaintiffs and Plaintiffs' members are among those who seek to vote absentee by mail or electronic means because it is the only way they can safely vote in the upcoming election. Because COVID-19 disproportionately affects members of Native communities, Arctic Village Council shut down its in-person polling locations and enforced a strict shelter-in-place order that prohibits village residents from gathering with anyone outside of their

[1] James Brooks, *More Than 1,200 Absentee Ballots Were Rejected in Alaska's Primary. Civil Rights Groups Are Asking for a Fix*, Anchorage Daily News (Sept. 3, 2020), https://www.adn.com/politics/2020/09/02/more-than-1200-absentee-ballots-were-rejected-in-the-primary-civil-rights-groups-are-asking-for-a-fix/.

households, including at the post office. Ex. A, Yatlin Decl. ¶ 8. At least 50 residents live in households without a person who is 18 years of age or older. *Id.* ¶¶ 10–11. Plaintiff League of Women Voters ("LWVAK") has members who are senior citizens and especially vulnerable to COVID-19 because of their age. Ex. B, Andree Decl. ¶¶ 7–9. Plaintiffs Elizabeth Jones and Barbara Clark live alone and have been self-isolating since the beginning of the pandemic because they are at high risk of contracting the COVID-19 virus. Ex. C, Jones Decl. ¶¶ 9–10, 14, 16; Ex. D, Clark Decl. ¶¶ 5–8, 11. The only way they can safely vote is absentee. They cannot access notaries without exposing themselves to the virus and do not have access to a witness over 18 years of age. Unless Alaska lifts the Witness Requirement in the upcoming general election and local election boards count returned absentee ballots without notary or witness certificates, Plaintiffs' members and Plaintiffs stand to lose their right to vote in a historic election.

Without preliminary and permanent injunctive relief from this Court, Plaintiffs will be forced to make an unreasonable choice— risking their health to exercise a constitutional right or foregoing that right altogether. This presents an unacceptable dilemma. Plaintiffs therefore ask this Court to declare unconstitutional the application of the Witness Requirement during a pandemic and enjoin Defendants from enforcing the Witness Requirement in the November 3, 2020 general election and in all elections held during the COVID-19 pandemic.

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II. BACKGROUND

A. COVID-19 Pandemic

The novel coronavirus, SARS-CoV-2, causes a deadly disease known as COVID-19. The World Health Organization declared the COVID-19 disease a pandemic on March 11, 2020.[2] Globally, COVID-19 has infected more than 27 million individuals and has caused more than 881,400 deaths.[3]The pandemic has had an especially severe impact on the United States. The first known COVID-19-related death in the United States occurred in February 2020.[4] Since then, the United States has experienced more than 6 million official cases of COVID-19 and more than 188,000 deaths.[5]

In addition to the large number of deaths in the United States and throughout the world, the WHO estimates that as many as twenty percent of all individuals to become infected with the virus will require hospital treatment.[6] Even COVID-19 patients who eventually recover from the disease can suffer serious long-term health impacts, such as

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[2] *Rolling Updates on Coronavirus Disease (COVID-19)*, World Health Org. (July 31, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen.

[3] World Health Organization, *Coronavirus Disease (COVID-19) Pandemic: Numbers at a Glance*, World Health Org. (Sept. 8, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019.

[4] Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/article/coronavirus-timeline.html.

[5] *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, Ctrs. for Disease Control & Prevention (Sept. 8, 2020). https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

[6] *Q&A on Coronaviruses (COVID-19)*, World Health Org. (Apr. 17, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses.

damaged lung tissue, permanent loss of respiratory capacity, and damage to the kidneys, heart, and liver.[7]

B. COVID-19 in Alaska

On March 11, 2020, Governor Michael Dunleavy declared a public health emergency advising all state executive departments coordinate COVID-19 emergency responses.[8] Alaska's first known case of COVID-19 was on March 12, 2020.[9] As of September 8, Alaska had more than 6,600 confirmed cases and 39 resulting deaths.[10] The numbers are only rising. The Municipality of Anchorage in particular is one of the State's primary hotspots. Anchorage has at least 3,425 of Alaska's total cases and the majority of new cases in Alaska.[11]

Due to the public health risks associated with COVID-19, the Governor issued a series of public health mandates with the goal of reducing person-to-person contact and

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[7] *See Coronavirus Disease 2019 (COVID-19): Clinical Care Guidance*, Ctrs. for Disease Control & Prevention (June 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html; *What Are the Long-Term Effects of COVID-19?*, HACKENSACK MERIDIAN HEALTH (July 29, 2020), https://www.hackensackmeridianhealth.org/HealthU/2020/07/29/what-are-the-long-term-effects-of-covid-19/.

[8] Office of Governor Mike Dunleavy, *State of Alaska Declaration of Public Health Disaster Emergency* (Mar. 11, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Disaster-Packet.pdf

[9] Governor Michael J. Dunleavy, *First Case of COVID-19 Confirmed by Alaska State Public Health Laboratory is an International Resident* (Mar. 12, 2020), https://gov.alaska.gov/newsroom/2020/03/12/first-case-of-covid-19-confirmed-by-alaska-state-public-health-laboratory-is-an-international-resident/#:~:text=March%2012%2C%202020%20(,Anchorage%20on%20March%2011.

[10] *Alaska Coronavirus Response Hub*, Alaska Dep't of Health & Social Servs. (Aug. 7, 2020), https://coronavirus-response-alaska-dhss.hub.arcgis.com/.

[11] *Id.*

slowing the spread of the disease, including: the temporary closure of state-operated facilities to the public; the temporary closure of bars and restaurants to the public; the temporary postponement of elective surgeries;[12] and the closure of public and private schools for the duration of the school year.[13] Since then, many school districts, including the school districts in Anchorage,[14] Juneau,[15] and Fairbanks,[16] have resumed fall classes with remote learning only.

On March 27, the Governor issued a public health order mandating all Alaska residents to practice social distancing and ordering the temporary closure of non-essential businesses to slow the spread of COVID-19 throughout the State. The same day, the

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[12] Governor Michael J. Dunleavy, *COVID-19 Health Mandate 2.1* (Mar. 16, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/03.16.20-COVID-19-Health-Mandate-002.pdf; Governor Michael J. Dunleavy, *COVID-19 Health Mandate 3.1* (Mar. 17, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/03172020-SOA-COVID-19-Health-Mandate-003.pdf; Governor Michael J. Dunleavy, *COVID-19 Health Mandate 5.1 – Elective Procedures* (Mar. 19, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Health-Mandate-005.pdf.

[13] Governor Michael J. Dunleavy, *COVID-19 Health Mandate 8.1 – State of Alaska – Public and Private Schools* (Mar. 20, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/03202020-SOA-COVID-19-Health-Mandate-008.pdf; Governor Michael J. Dunleavy, *COVID-19 Health Mandate 013 – K-12 Public and Private Schools* (Apr. 9, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/04092020-SOA-COVID-19-Health-Mandate-013.pdf.

[14] Emily Goodykoontz, *Anchorage School District Will Begin Year With Online-Only Classes*, Anchorage Daily News (July 24, 2020), https://www.adn.com/alaska-news/education/2020/07/24/anchorage-school-district-will-begin-year-with-online-only-classes/.

[15] Sean Maguire, *Juneau School District Set to Reopen with Online-Only Classes On Aug. 24*, Alaska News Source (Aug. 4, 2020), https://www.alaskasnewssource.com/2020/08/04/juneau-school-district-set-to-reopen-with-online-only-classes-on-aug-24/.

[16] Robyne, *Fairbanks Schools to Start Online*, Alaska Pub. Media (July 28, 2020), https://www.alaskapublic.org/2020/07/28/fairbanks-schools-online/.

Governor also announced an order temporarily restricting intrastate travel between different communities throughout the State.[17]

The State began "phase one" of its plan to gradually re-open the state economy in late April.[18] Nonetheless, the State continues to encourage Alaskans to practice social distancing and to avoid contact with others whenever possible.[19] The State has also adopted travel-related restrictions requiring entrants to complete a traveler declaration form, arrive with proof of negative COVID-19 results or get tested for COVID-19 as soon as they arrive, and self-quarantine for at least 14 days while waiting for test results.[20]

Despite the easing of travel and stay-at-home restrictions at the state level, local boroughs and communities have enacted their own restrictions. On July 31, 2020, the Mayor of Anchorage ordered a "four-week reset," which limited the size of outdoor gatherings, mandated social distancing, and prohibited bars and restaurants from offering

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[17] Governor Michael J. Dunleavy, *COVID-19 Health Mandate 011 – Social Distancing* (Mar. 27, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/03272020-SOA-COVID-19-Health-Mandate-011.pdf; Governor Michael J. Dunleavy, *COVID-19 Health Mandate 012 – Intrastate Travel – Limiting Travel between Communities to Critical Infrastructure or Critical Personal Needs* (Mar. 27, 2020), https://gov.alaska.gov/wp-content/uploads/sites/2/03272020-SOA-COVID-19-Health-Mandate-012.pdf.

[18] Governor Michael J. Dunleavy, *Governor Unveils Path to Reopening Alaskan Economy*, (Apr. 21, 2020), https://gov.alaska.gov/newsroom/2020/04/21/governor-unveils-path-to-reopening-alaskan-economy/; *COVID-19 Health Mandates*, State of Alaska, https://covid19.alaska.gov/health-mandates/ (last visited Sept. 7, 2020).

[19] *COVID-19 (Coronavirus) Information*, State of Alaska, https://covid19.alaska.gov/ (last visited Aug. 7, 2020).

[20] *COVID-19 Traveler Information*, State of Alaska, https://covid19.alaska.gov/travelers/ (last visited Sept. 7, 2020).

indoor service from August 3 to August 30.[21] On August 28, the Mayor modified this order to allow bars and restaurants to operate at 50% capacity, while recognizing that there continues to be widespread community transmission and concerning outbreaks among vulnerable populations.[22]

Similarly, Fort Yukon adopted a local shelter-in-place order and curfew and restricted intrastate travel except for cargo, essential workers, medical workers, and law enforcement.[23] Other local municipal and tribal governments that have adopted temporary social distancing and stay-at-home orders since the beginning of the pandemic include Coffman Cave, Juneau, Kake, Tenakee Springs, Thorne Bay, St. Paul, and Wrangell.[24] Several local municipal and tribal governments have also enacted restrictions or prohibitions on intrastate and interstate travel to and from their communities. These villages include Koyukuk, Venetie, Arctic Village, Chalkyitsik, Nulato, and Huslia,[25] as

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[21] Mayor Ethan Berkowitz, *Municipality of Anchorage: Proclamation of Emergency Order EO-15: "Four-Week Reset"* (July 31, 2020), https://www.muni.org/covid-19/documents/eo-15_signed.pdf; Morgan Krakow & Annie Berman, *Anchorage Will Halt Indoor Service At Restaurants and Bars, Shrink Gathering Size Limits Starting Monday*, ANCHORAGE DAILY NEWS (Aug. 3, 2020), https://www.adn.com/alaska-news/anchorage/2020/07/31/anchorage-will-halt-dine-in-service-at-restaurants-and-bars-shrink-gathering-size-limits-starting-monday/.

[22] Mayor Ethan Berkowitz, *Municipality of Anchorage: Proclamation of Emergency Order EO-14-v2* (Aug. 28, 2020), https://www.muni.org/covid-19/documents/eo-14v2.final.pdf.

[23] Zaz Hollander, *Fort Yukon and Copper River Communities Avoided Coronavirus for Months. Now Cases are Rising in Both.*, ANCHORAGE DAILY NEWS (July 21, 2020), https://www.adn.com/alaska-news/rural-alaska/2020/07/21/fort-yukon-and-copper-river-communities-avoided-coronavirus-for-months-now-cases-are-rising-in-both/.

[24] *Actions and Policy*, Alaska Municipal League, https://www.akml.org/covid-19-information/actions-policy/ (Sept. 7, 2020).

[25] Kyle Hopkins, *Remote Alaska Villages Isolate Themselves Further in effort to Shield Against Coronavirus*, ProPublica (Mar. 22, 2020), *available at*

well as Akiak, Adak, Ambler, Atka, Elim, Emmonak, Galena, Kake, Larsen Bay, McGrath, St. Michael's, Newhalen, St. Paul, Unalakleet, and Yakutat.[26]

Many Alaska Native tribal governments, including Plaintiff Arctic Village Council, enacted strict isolation measures to protect the safety of their community members, particularly tribal elders who are at an increased risk for COVID-19 due to their age and lack of immunity.[27] These leaders feel a heightened need to take extra precautions because COVID-19 has ravaged Native communities and because outbreaks can quickly overwhelm local health care systems and because rural communities do not have easy access to other major population centers with larger health care facilities.[28] COVID-19 outbreaks have the potential to decimate Alaska Native populations.

C. Impacted Populations

Though COVID-19 can impact anyone, people representing certain demographic populations and with certain underlying conditions are at a much higher risk of contracting the disease and experiencing severe consequences – these groups are older individuals, immunocompromised individuals, and members of racial minority groups.

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https://www.propublica.org/article/remote-alaska-villages-isolate-themselves-further-in-effort-to-shield-against-coronavirus.

[26] Alaska Municipal League, *supra* note 24.

[27] Alejandro De La Garza, *Alaska's Remote Villages Are Cutting Themselves Off to Avoid Even 'One Single Case' of Coronavirus*, Time (Mar. 31, 2020), https://time.com/5813162/alaska-coronavirus/; Kyle Hopkins, *Remote Alaska Villages Isolate Themselves Further in Effort to Shield Against Coronavirus*, ProPublica (Mar. 22, 2020), *available at* https://www.propublica.org/article/remote-alaska-villages-isolate-themselves-further-in-effort-to-shield-against-coronavirus.

[28] De La Garza, *supra* note 27; Hopkins, *supra* note 25.

In addition to age, several other underlying health factors increase the risks associated with COVID-19. People who have underlying health conditions (such as heart disease, diabetes, cancer, high blood pressure, obesity, and lung disease such as chronic obstructive pulmonary disease (COPD)), have weakened immune systems, , or who are pregnant are considered populations at an increased risk for severe illness from COVID-19.[29]

COVID-19 also disproportionately impacts Indigenous people and other people of color, and has had an especially disproportionate impact on Native Americans and Alaska Natives. For example, in Alaska, Indigenous people make up approximately 15.6% of the population but 43% of deaths.[30] In Arizona, Native Americans make up 4% of the population and 12% of deaths.[31] In New Mexico, they account for only 9% of the population but nearly 54% of deaths—by far the starkest disparity.[32] In Wyoming, they comprise 2% of the population but 43% of deaths. The alarming rates at which COVID-19 is killing Native Americans and Alaska Natives can be attributed to decades of discrimination in housing, employment, and health care. Today, ongoing discrimination

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29 *Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions*, Ctrs. for Disease Control & Prevention (July 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

30 *Racial Data Dashboard*, The COVID Tracking Project (Sept. 7, 2020), https://covidtracking.com/race/dashboard.

31 *Id.*

32 *Id.*

in testing and treatment continues to fuel significant disparities in COVID-19 cases and outcomes.[33]

D. Witness Requirement

In Alaska, any qualified voter can vote absentee without an excuse.[34] After a local election office receives an absentee ballot application, the Director must send the voter an absentee ballot and other absentee voting materials by the most expeditious mail service and as soon as the materials are ready for distribution.[35] If the application requests electronic transmission of the absentee ballot, the election officials must send the absentee ballot and other absentee voting material by electronic transmission.[36]

Once the voter receives the absentee ballot, the voter must sign the voter certification in the presence of a notary or other official authorized to administer oaths or, if these are unavailable, then in the presence of a witness who is 18 years old or older.[37] An absentee voter must provide proof of identification or other information to aid in the establishment of the voter's identity, either at the time the voter applies for an absentee

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33 *See Coronavirus Disease 2019: Health Equity Considerations & Racial & Ethnic Minority Groups*, Ctrs. for Disease Control & Prevention (July 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fracial-ethnic-minorities.html; John Eligon & Audra D. S. Burch, *Questions of Bias in Covid-19 Treatment Add to the Mourning for Black Families*, N.Y. Times (May 20, 2020), https://www.nytimes.com/2020/05/10/us/coronavirus-african-americans-bias.html.

34 AS 15.20.081(a).

35 AS 15.20.081(c).

36 *Id.*

37 AS 15.20.081(d) and AS 15.20.066(b)(2).

ballot or when the voter signs the voter certification.[38] A first-time voter who registered by mail or by facsimile or other electronic transmission and has not met the identification requirements when the voter registered, must provide either a copy of a driver's license, state identification card, current and valid photo identification, birth certificate, passport, or hunting or fishing license; or a copy of a current utility bill, bank statement, paycheck, government check, or other government document; any of these items must show the name and current address of the voter.[39]

Alaska has demonstrated its ability to temporarily modify the state election laws to account for the unique burdens imposed on voters by the pandemic. In July, Defendant Meyer unilaterally "mail[ed] voters aged 65 and older paper absentee ballot application forms," because they're "a high-risk group who must be particularly careful to avoid exposure to COVID-19,"[40] and these "voters may therefore wish to avoid going to the polls, standing in close proximity, and using touch screens or handling ballots."[41]

The State has not suspended the Witness Requirement, however, meaning that voters still have to obtain a signature from a qualified witness to properly execute their absentee ballots. This is impossible for Plaintiffs' members and individual Plaintiffs who

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38 AS 15.20.081(f); 6 AAC 25.510.

39 AS 15.20.081(f).

40 Defs.' Opp. to Mot. for Preliminary Injunction, Dkt. No. 22, at *8, *Disability Law Ctr. of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020).

41 Decl. of Josh Applebee, Dkt. No. 25, at ¶ 7, *Disability Law Center of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020). Applebee is Lt. Gov. Meyer's Chief of Staff. *Id.* at ¶ 1.

are both above 65 years old and self-isolating and do not have access to a witness over 18 years of age. Ex. A, Yatlin Decl. ¶ 11; Ex. B, Andree Decl. ¶ 7; Ex. C, Jones Decl. ¶¶ 9–10; Ex. D, Clark Decl. ¶ 7. According to the 2018 American Community Survey, 25.7% of Alaskans live alone and 7.3% of those living alone are 65 years or older.[42] The Witness Requirement, thus, stands to disenfranchise a significant percentage of Alaska's population, including Plaintiffs and Plaintiffs' members.

In the August 18 primary election, 456 ballots were rejected because of "improper or insufficient witnessing."[43] On August 31, 2020, Defendants Fenumiai and Meyer were placed on notice that imposing the Witness Requirement in the upcoming general election violated the Articles V, § 1 and I, § 1 of the Alaska Constitution during a pandemic. Ex. E, Letter to Gail Fenumiai and Kevin Meyer (Aug. 31, 2020). On September 4, 2020, Defendants Fenumiai and Meyer responded that the Witness Requirement, AS 15.20.081(d), will remain in place for the upcoming general election and election boards will reject unwitnessed absentee ballots under AS 15.20.203(b)(2). Ex. F, Response Letter from Gail Fenumiai and Kevin Meyer (Sept. 4, 2020).

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[42] U.S. Census Bureau, *American Community Survey 2018 5-Year Estimates: Selected Social Characteristics Alaska*, https://data.census.gov/cedsci/table?g=0400000US02&y=2018&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2018.DP02 (last visited Sept. 7, 2020).

[43] Brooks, *supra* note 1.

III. APPLICABLE LAW

A. Standard for a preliminary injunction

Preliminary injunctions are governed by Alaska Rule of Civil Procedure 65 and related case law. When determining whether to grant a preliminary injunction, the Court must apply one of two standards: "balance of the hardships" or "probability of success on the merits."[44] If a party is unable to meet one of the standards, and the court must then apply the alternate standard.

Under the "balance of hardships" standard, the court engages in a three-pronged analysis: the moving party must show (1) that it will suffer certain and irreparable harm if the court does not issue the preliminary injunction; (2) that the opposing party is "adequately protected" if the injury is small compared to the moving party's injury; and (3) that the issues raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be "frivolous or obviously without merit."[45] Assuming that the moving party satisfies the first two prongs, the court can grant the injunction.[46] If the court determines that the moving party has not successfully met the "balance of hardships" standard, it alternately evaluates the motion under the "probable success on the merits" standard.[47] Applying this standard requires the court to evaluate the underlying legal claims

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[44] *See State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992).

[45] *Id.* (quoting *Messerli v. Dept. of Natural Resources*, 768 P.2d 1112, 1122 (Alaska 1989)); *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970)).

[46] *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 176 (Alaska 1992) (citing *A.J. Indus. Inc.*, 470 P.2d at 540–41).

[47] *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

of the case and determine that the moving party is "more likely than not" to ultimately prevail.[48]

IV. ARGUMENT

Plaintiffs prevail under both the balance of the hardships standard and the probability of success on the merits standard.

A. Plaintiffs have standing to bring their claims.

The only requirement for an individual plaintiff to have interest-injury standing is to show that he or she has "an interest adversely affected by the conduct complained of."[49] Courts define "interest" loosely—it can be anything from a concrete economic injury to something "intangible" like an aesthetic or environmental interest.[50] Moreover, the magnitude of the injury can be quite small: "an identifiable trifle is enough for standing to fight out a question of principle."[51] Individual Plaintiffs stand to be disenfranchised in the upcoming general election if the State enforces the Witness Requirement. Plaintiffs meet the liberal standing requirements under Alaska's standing law.

Similarly, organizational standing exists if: "(1) its [the organization's] members would otherwise have standing to sue in their own right; (2) the interests it seeks to

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48 *Id.*

49 *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987).

50 *Id.*

51 *Id.* (quoting *Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 n.7 (Alaska 1975)).

protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[52] Plaintiffs Arctic Village Council and LWVAK have members who will not be able to safely vote in the upcoming general election if the State enforces the Witness Requirement. Ex. A, Yatlin Decl. ¶ 11; Ex. B, Andree Decl. ¶¶ 8–9. Both Plaintiffs are also having to divert resources to educate members on how to vote given that they cannot safely vote absentee. Ex, A Yatlin Decl. ¶ 12; Ex. B, Andree Decl. ¶ 9.

Plaintiff Arctic Village Council also has representational capacity parens patriae on behalf of the affected tribal members it represents. Thus, neither the claims asserted nor the relief requested by Arctic Village Council requires the participation of individual members of the Tribe in this litigation. In *State Dep't of Health and Social Servs. v. Native Village of Curyung*, 151 P.3d 388, 399 (Alaska 2006), the Alaska Supreme Court found that tribal villages could bring claims as parens patriae on behalf of their members, alleging that violations of the rights of their members harm the villages as a whole."

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B. Plaintiffs prevail under the "balance of hardships" standard.

1. *Plaintiffs will suffer certain and irreparable harm.*

Plaintiffs face the danger of irreparable harm because the right to vote is fundamental and losing that right constitutes irreparable harm. The Alaska Supreme Court has held that "[n]o right is more precious in a free country than that of having a voice in

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52 *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 915 (Alaska 2000).

the election of those who make the laws under which, as good citizens, we must live," further noting that "[o]ther rights even the most basic, are illusory if the right to vote is undermined."[53]

Plaintiffs face the danger of serious health consequences or even death if they vote in person or try to locate a notary—making absentee or mail-in voting the only way that they can safely cast a ballot in the upcoming general election. The Witness Requirement prevents Plaintiffs and Plaintiffs' members from being able to vote safely even by mail or electronic means. Plaintiffs Jones and Clark are elderly, live alone, and are immunocompromised, with high blood pressure, obesity, and chronic obstructive pulmonary disease (COPD). Ex. C, Jones Decl. ¶¶ 10–11; Ex. D, Clark Decl. ¶ 7. They do not have an adult to witness their signing and sign their absentee ballots. *See id.* They do not have access to notaries and the State's new law allowing for remote notarization does not go into effect until January 1, 2021.[54] Plaintiffs have voted in past elections and want to continue to exercise their fundamental, democratic right in the upcoming general election. Ex. C, Jones Decl. ¶¶ 4, 13, 17; Ex. D, Clark Decl. ¶¶ 3–4, 13. They cannot, not without risking their health.

Plaintiff Arctic Village Council and its members face severe burdens if the State does not lift its Witness Requirement. Ex. A, Yatlin Decl. ¶ 10–11. The entire village has

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[53] *Vogler v. Miller* 551 P.2d 1, 3 (Alaska 1982) (citing *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)

[54] Alaska Legis. H.B. 124, http://www.akleg.gov/basis/Bill/Text/31?Hsid=HB0124Z (signed into law Apr. 30, 2020).

been on lockdown with a strict shelter-in-pace order since members of the tribe contracted COVID-19 and brought it back to the village. *Id.* ¶ 8. The Tribe is taking extreme precautions to ensure the disease does not spread to other members because it is aware that COVID-19 has ravaged Native communities and has the potential to decimate its tribe. *Id.* ¶¶ 6–9. Vote in person for the general election will be difficult, if not impossible for Tribe members especially because there is no end in sight to the pandemic. *Id.* ¶ 9. The only way village members can safely vote is by absentee ballot—but at least 50 members do not have anyone over the age of 18 in their home to witness and sign their absentee ballot envelopes. *Id.* ¶ 11. These members will be disenfranchised in the upcoming election. Some, such as the members of Arctic Village, will be deprived of their right to vote altogether. This harm cannot be cured.

Courts in Alaska have found that restrictions that threaten voters' ability to cast their ballots give rise to irreversible and irreparable harm. In *Nick v. Bethel*, the federal district court in Alaska found that the plaintiffs had shown irreparable harm to Yup'ik-speaking voters' right to vote because the State refused to provide voter language assistance under Section 203 of the Voting Rights Act.[55] The court concluded at the outset that, "given the importance accorded an individual's constitutional right to vote," the State had to provide poll worker training around Section 203, hire a language assistance coordinator fluent in the Yup'ik language, recruit bilingual poll workers, and

[55] 2008 WL 11456134, at *3 (D. Alaska, July 30, 2008).

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provide election-related materials such sample ballots in Yup'ik, among other relief the plaintiffs' sought.[56]

And this Court has found irreparable harm in cases with much lower stakes than the case at bar. Most irreparable harm cases have involved financial harm.[57] In *Olsen Logging*, this Court granted an employer's request to enjoin payment of worker's compensation until the appeal of the award was final because the potential difficulty in recovering the amount of the payment after distributing it to the employee constituted an adequate irreparable harm to the employer.[58] Here, the burden is much more significant than the financial loss the plaintiffs experienced in *Olsen Logging*.

There is no question that Plaintiffs, here, will suffer irreparable harm because they will be unnecessarily deprived of their fundamental constitutional right to vote guaranteed under the Alaska Constitution.

2. *Defendants' interests are adequately protected.*

Second, the Court must determine whether the interests of the non-moving party are "adequately protected." "Such protection exists where 'the injury that will result from the injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted.'"[59]

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56 *Id.* at 6.
57 *See, e.g.*, 832 P.2d at 174–76.
58 *Id.*
59 *Metcalfe*, 110 P.3d at 978–79.

In *Vogler v. Miller*, the Supreme Court of Alaska considered the constitutionality of a state statute that required independents and candidates of small political parties to submit a petition showing that they received at least 3% of the vote cast at the last election to secure their place on the ballot for the next election.[60] The plaintiff, a gubernatorial candidate of a small political party and who received 1.9% of the total votes cast in the last election, sued on the grounds that the statute violated Alaska's constitutional guarantees of free speech and the right to vote.[61] The Supreme Court noted that the state's interests in ensuring uniform elections, avoiding the need to amend the statute every few years, and ensuring that candidates had enough support to appear on the ballot could have been adequately protected by a less restrictive alternative—"achieved equally well by a signature requirement of, for example, 1% of voters as by the 3% requirement."[62]

Similarly, in *Alsworth v. Seybert*, the Supreme Court found that the state's interest in ensuring elected officials refrain from publicly speaking on issues of personal interest did not outweigh the plaintiffs' interest in the fundamental constitutional right to free speech.[63] The Supreme Court concluded that a lower court's order barring two elected officials from publicly speaking and endorsing a mining project was a prior restraint on members' right to free speech under Article 1, Section 5 of the Alaska Constitution.[64]

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60 651 P.2d 1, 2 (Alaska 1982).
61 *Id.*
62 *Id.* at 5.
63 323 P.3d 47, 56 (Alaska 2014).
64 *Id.*

Defendants' injury is slight compared to the irreparable harm Plaintiffs stand to suffer as to their fundamental constitutional rights absent injunctive relief. It is not clear what the purpose is for the Witness Requirement considering the potential for voter fraud remains "infinitesimally small," despite the fact that 250 million votes have been cast in the United States since 2000, with 31 million votes being cast in the 2018 elections alone.[65] In Oregon, a state that conducts elections primarily by absentee ballot, only "0.00001 percent of all votes cast" by mail in the past twenty years were proven fraudulent.[66] And in Alaska, the incidents of fraud are practically nonexistent. According to the Heritage Foundation, there have been 3 reported cases of fraud in Alaska, none of which had to do with ineligible voting. Allegedly, the first involved fraudulent signatures collected on a petition and the two other cases allegedly involved the same individual, a Mexican citizen, who completed voter registration applications in 2000, 2002, and 2004 and received a criminal conviction.[67] Voter fraud is quite simply not a problem in Alaska, and it bears no relation to the Witness Signature requirement that now threatens to significantly burden voters.

Alaska law has less restrictive alternatives to protecting the integrity of the ballot already—in the numerous safeguards and deterrents besides the Witness Requirement.

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[65] Wendy Weiser & Harold Ekeh, The False Narrative of Vote-By-Mail Fraud, Brennan Ctr. for Justice (Apr. 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud.

[66] *Id.*

[67] The Heritage Found., *Election Fraud Cases*, https://www.heritage.org/voterfraud/search?state=AK (last visited Sept. 6, 2020).

Voters casting absentee ballots must provide proof of identification or other information to aid in the establishment of their identitied.[68] First-time voters who did not meet the identification requirements when registering to vote must provide either: (1) a copy of a driver's license, state identification card, current and valid photo identification, birth certificate, passport, or hunting or fishing license; or (2) a copy of a current utility bill, bank statement, paycheck, government check, or other government document, all of which must show the name and current address of the voter.[69] Voters must also certify, under penalty of perjury, a class B felony that carries up to a 10 years' imprisonment,[70] that the statements in the certification are true.[71] These absentee voter identification requirements and the threat of criminal penalties protect the state's interest in preventing voter fraud and warrant enjoining the Witness Requirement during a potentially deadly pandemic.

Under normal circumstances, Plaintiffs would have multiple options to vote and could reasonably avoid the burdens of the Witness Requirement by voting in person. However, COVID-19 presents unparalleled burdens to voters' health and rights that supersede traditional arguments in favor of the state's interests. Defendants' interests would still be adequately protected should the Court grant an injunction of the Witness Requirement for the duration of the COVID-19 pandemic.

3. *Plaintiffs raise serious and substantial questions going to the merits*

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68 AS 15.20.081(f).
69 *Id.*
70 AS 11.56.200(c), 12.55.125(d).
71 AS 15.20.081(d).

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of the case.

The final inquiry "is directed only to insuring that the issues raised are not frivolous or obviously without merit."[72] The moving party will meet this final bar so long as it demonstrates there are true factual and legal disputes at issue that are somewhat serious.[73] As discussed above at length, the claims in this case involve the fundamental right to vote of Plaintiffs' members and individual Plaintiffs. The claims, thus, are "sufficiently serious and substantial to allow an injunction to issue."[74] And they are far from frivolous or without merit, as Plaintiffs seek to exercise their basic constitutional guarantees without risking their health or jeopardizing the health of their communities during the pandemic.

Plaintiffs meet the balance of the hardships standard and will suffer immediate irreparable injury without an injunction.

C. If the Court determines that the "balance of hardships" standard does not apply, Plaintiffs prevail under the "probable success on the merits" standard.

1. *Plaintiffs are more likely than not to prevail on their claim that the Witness Requirement impermissibly burdens Alaskans' right to vote under Article 5, Section 1 of the Alaska Constitution.*

Article 5, Section 1 of Alaska's Constitution guarantees the right to vote to all adult United States citizens residing in Alaska. And it is well-established under Alaska state court precedent that the right to vote is "one of the fundamental prerogatives of

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72 *A.J. Indus.*, 470 P.2d at 541.
73 *Id.*
74 *Id.*

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citizenship" and courts are "reluctant to permit a wholesale disenfranchisement of qualified electors through no fault of their own."[75] When a state election law is alleged to cause a deprivation of this fundamental right, the court analyzes the constitutionality of the provision by weighing "the character and magnitude of the asserted injury to the rights" against the "precise interests put forward by the State as justification for the burden imposed by its rule."[76]

Normally laws that restrict access to the ballot are accorded sliding scale scrutiny under Alaska state law. The Supreme Court has outlined the following balancing test:

> Our approach involves four steps. When an election law is challenged the court must first determine whether the claimant has in fact asserted a constitutionally protected right. If so we must then assess "the character and magnitude of the asserted injury to the rights." Next we weigh "the precise interests put forward by the State as justifications for the burden imposed by its rule." Finally, we judge the fit between the challenged legislation and the state's interests in order to determine "the extent to which those interests make it necessary to burden the plaintiff's rights." This is a flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the state's interest must be closer.[77]

Within this framework, the court has created a presumption that ballot access cases trigger strict scrutiny.[78]

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[75] *Miller v. Treadwell*, 245 P.3d 867, 868–69 (Alaska 2010) (quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978)).

[76] *State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)).

[77] *Green Party*, 118 P.3d at 1061 (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)).

[78] *See Metcalfe*, 110 P.3d at 979 (citing *Vogler*, 651 P.2d at 3); *Green Party*, 118 P.3d at 1060 n.29 (clarifying that presumption of strict scrutiny in ballot access cases is a particularized application of the general balancing framework).

Here, given that the Witness Requirement prevents Plaintiffs' members and individual Plaintiffs from safely exercising their right to vote, the court should apply strict scrutiny—that the Requirement severely burdens Plaintiffs' right to vote and that the Requirement is not narrowly tailored to further a compelling state interest. But even if a lower standard is applied, the Requirement is unconstitutional because it places a substantial and impermissible constitutional burden on the right to vote and the state's important interest can be achieved through less restrictive alternatives. In *State v. Alaska Democratic Party*, the plaintiffs challenged the state party affiliation rule prohibiting anyone not registered with a particular party from running as a candidate in that party's primary election.[79] The Supreme Court found that the rule presented a substantial burden triggering heightened scrutiny under the Alaska Constitution and invalidated it.[80]

This global pandemic has already impacted the lives of thousands of Alaskans, including required social distancing of the entire population, travel restrictions, and strict-stay-at-home orders in several communities. Bearing this in mind, Alaska's Witness Requirement places a substantial and impermissible burden on Plaintiffs' fundamental right to vote in violation of Article 5, Section 1 of the Alaska Constitution. If not enjoined, the Witness Requirement will force Plaintiffs and other eligible voters, including those who are at increased risk of complications from COVID-19, to choose

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79 426 P.3d 901, 909 (Alaska 2018).
80 *Id.* at 909–10.

between risking their health to vote in person or coming into contact with a witness or notary, or forgoing their right to vote entirely.

Other courts considering challenges to state witness and notary requirements on absentee ballots during the COVID-19 pandemic have found that such requirements place impermissible constitutional burdens on the right to vote. In, *Thomas v. Andino*, a court ruled that South Carolina's requirement that a voter and a witness sign an absentee ballot substantially burdened the plaintiffs' right to vote in the primary election.[81] In *League of Women Voters of Va. v. Va. State Bd. of Elections*, a court extended a previous settlement that lifted Virginia's requirement that the voter and a witness sign an absentee ballot envelope to the upcoming general election because the requirement placed a significant burden on the right to vote.[82] In *Common Cause RI v. Gorbea*, a court found finding Rhode Island's "mail-ballot witness or notary requirement, as applied during the COVID-19 pandemic, is violative of the First and Fourteenth Amendments to the United States Constitution because it places an unconstitutional burden on the right to vote."[83]

In the midst of an ongoing public health crisis, there is no state interest in favor of enforcing the Witness Requirement that justifies the burden placed on Plaintiffs' constitutional right to vote. Alaska's interests in preventing voter fraud or administering safe and secure elections, even if there were any related to this requirement, are heavily outweighed by the risk to the safety and security of Alaskans.

2. *Plaintiffs are more likely than not to prevail on the claim that the*

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81 2020 WL 2617329, at *4 (D.S.C. May 25, 2020)
82 2020 WL 4927524, at *7 (W.D. Va. Aug. 21, 2020).
83 2020 WL 4365608, at *4 (D.R.I. July 30, 2020).

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Witness Requirement violates the guarantee of equal rights under Article 1, Section 1 of the Alaska Constitution.

Article 1, Section 1 of the Alaska Constitution guarantees that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." When a law that is alleged to violate the guarantee of equal rights, courts select a level of scrutiny on a sliding scale depending on the particular right or classification at issue as was the case in *Peloza v. Freas*:

> Alaska law analyzes alleged violations of the equal rights clause using a "sliding scale." When fundamental rights or constitutionally suspect classifications are involved, we employ heightened scrutiny. The rigor of the scrutiny determines what the government must show: As the level of scrutiny selected is higher on the [sliding] scale, we require that the asserted governmental interests be relatively more compelling and that the legislation's means-to-ends fit be correspondingly closer. On the other hand, if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated.[84]

In *Peloza*, the plaintiff challenged a three-year duration residency requirement to run for city council as a violation of Alaska's constitutional guarantee of equal rights given the importance of the plaintiffs' right to seek elective public office and the right of qualified voters to cast their votes effectively.[85] The Supreme Court noted that while federal equal protection analyses accorded only rational basis to a law like the one at issue in *Peloza*, under Alaska state law, such a requirement should be subjected to "rigorous scrutiny"—meaning, "the asserted governmental interests be relatively more

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84 *See Peloza v. Freas*, 871 P.2d 687, 690 (Alaska 1994).
85 *Id.*

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compelling and that the legislation's means-to-ends fit be correspondingly closer."[86] Applying this standard, the Court concluded "[t]hree years is an unacceptably long time to burden the right of local voters to make their own decisions."[87] As for the state's interests, the Court noted that the state's interest in ensuring that voters are familiar with candidates in local elections was not "sufficiently compelling" to outweigh the "significant burden" that the law placed on plaintiff.[88]

Thus, in Alaska courts will employ a higher level of scrutiny when the challenged law implicates a fundamental right or suspect classification, and a lower level of scrutiny when less important rights or less suspect classifications are at issue.[89] There is no dispute that Alaska courts have long recognized that the right to vote is a fundamental right under the Alaska Constitution and applied a heightened level of scrutiny to these cases.[90]

The Witness Requirement significantly, if not severely, burdens Plaintiffs' and Plaintiffs' members' right to vote during the COVID-19 pandemic because it forces them to choose between their health and their right to vote. It unequally allocates these burdens to eligible voters who are unable to secure a witness signature because they live alone, must self-isolate to avoid exposure to COVID-19, are subject to shelter-in-place orders, or all of the above. The Witness Requirement treats a class of voters such as Plaintiffs

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86 *Id.* at 691.
87 *Id.*
88 *Id.*
89 *See Alaska Pacific Ins. Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984).
90 *See, e.g.*, *Vogler*, 651 P.2d at 3.

(i.e., who are self-isolating, immunocompromised, and unable to locate an adult witness without exposing themselves to the virus) differently from those individuals who may easily access a qualified witness, whether because they live with another adult, they are not subject to stay-at-home orders, or they are not at high risk of contracting the virus.

Defendants' interest is not "sufficiently compelling" to require enforcing the Witness Requirement during the COVID-19 pandemic. Any purported interest can be achieved through less restrictive means, especially when the application of the Witness Requirement threatens to disenfranchise hundreds, if not thousands, of eligible voters or cause potentially devastating health outcomes. As discussed above, the State already has alternate mechanisms in place to prevent voter fraud: absentee voters must provide proof of identification or other information to aid in the establishment of the voter's identity at the time they apply for absentee ballots or when they sign voter certifications.[91]

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for a Preliminary Injunction to let Plaintiffs' members and Plaintiffs vote absentee by mail or by electronic transmission without having to comply with the Witness Requirement.

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[91] AS 15.20.081(f); 6 AAC 25.510.

Respectfully Submitted,

Dated: September 8, 2020

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Plaintiffs,	)	
v.	)	
KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,	)	Case No.: 3AN-20-07858 CI
Defendants.	)	

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND CROSS-MOTION TO DISMISS

I. INTRODUCTION

This Court should decline plaintiffs' demand for a substantive change to established statutory by-mail voting fraud-prevention measures on the eve of a highly contentious general election. The Division began preparing for a massive increase in by-mail absentee voting in May, including printing hundreds of thousands of absentee ballot envelopes that clearly state, in two places, the legal requirement that the ballot must be witnessed. The plaintiffs inexcusably and unreasonably failed to challenge that statutory witnessing requirement until well into September. The plaintiffs' claims are untimely under the doctrine of laches, and should be dismissed. Even if they were not,

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enjoining the Division from enforcing the statute risks irreparable harm—harm that extends beyond mere financial loss that could be indemnified by a bond. And the plaintiffs have not clearly shown they are likely to win on the merits. Therefore, they fail to meet the high threshold necessary for a preliminary injunction, this Court should deny their motion.

II. STATEMENT OF FACTS

The mission of the Alaska Division of Elections is to ensure public confidence in the electoral process by administering voter registration and elections with the highest level of professional standards, integrity, security, accuracy and fairness.[1] Administering elections in Alaska requires a system that operates fairly and uniformly from densely-populated urban areas to small, remote communities with limited services. A thorough understanding of the highly complex process of administering elections in Alaska, and the challenges associated with it, is essential to an informed resolution of this matter.

A. A general overview of elections and voting in Alaska.[2]

The Alaska Division of Elections administers three types of regular elections: primary elections, general elections, and regional educational attendance area (REAA)

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1 Alaska Division of Elections, https://elections.alaska.gov/.

2 The factual statements in this section are supported by the accompanying affidavit of Gail Fenumiai.

elections.[3] The Division does not administer municipal elections, or party presidential primary elections.[4]

Registered Alaska voters have four basic options for voting: absentee, early, special needs, and in-person.[5] No excuse is required to vote absentee.[6] Voters can vote absentee-in-person before an Absentee Voting Official beginning fifteen days before an election.[7] These voters do not need to apply in advance for an absentee ballot.[8] Absentee-in-person voting is widely available across the state, including in remote communities such as Arctic Village.[9] Voters may also vote early at at least seven locations in essentially the same process as in-person voting beginning fifteen days

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[3] *See* AS 15.30.010 *et seq.* (national elections), AS 15.35.010 *et seq.* (state elections); AS 14.08.071 (Regional Education Attendance Area elections). The Division also occasionally administers statewide special elections. *See* AS 15.40.140 *et seq.* (special elections).

[4] Municipal elections are governed by Title 29, Chapter 26 of the Alaska Statutes, and each municipality's local ordinances. Paragraph 52 of the plaintiffs' Complaint makes allegations regarding Alaska's Democratic Party presidential primary election, but this election is not administered by the Division and is not subject to Alaska statutes and regulations. It is conducted solely by the Democratic Party according to that organization's bylaws. *See* http://www.alaskademocrats.org/2020-presidential-primary.

[5] *See* AS 15.20.064 (early voting); AS 15.20.072 (special needs voting); AS 15.20.081 (absentee voting). Statutes governing in-person voting are found at Title 15, Chapter 15 of the Alaska Statutes.

[6] AS 15.20.081(a).

[7] AS 15.20.061.

[8] *Id.*

[9] A complete list of absentee-in-person voting locations that were available for the 2020 primary election can be found online at: https://www.elections.alaska.gov/Core/avolocationsp.php, and included Arctic Village and the majority of communities listed in Paragraphs 45, 46 and 47 of the Complaint.

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before the election.[10]

Voters who wish to vote absentee, other than by absentee-in-person voting, must apply in advance for a ballot.[11] Voters can submit their application online, by email, by fax or by mail. Voters can choose between receiving their ballot by mail or by electronic delivery. The voter must print his or her own ballot if the voter chooses to receive it by electronic delivery and return it by mail or by fax. All absentee ballots not voted in-person must be witnessed by an official or one adult, no matter whether delivered to the voter by mail or electronically.[12]

Voters who choose to receive their ballot by mail are mailed a ballot, a secrecy sleeve for the ballot, a return envelope for the ballot, and an instruction sheet.[13] These are sent to overseas and military voters 45 days before the election as required by federal law,[14] and to other voters starting approximately 25 days before the election.

The absentee ballot return envelopes are non-standard and must be ordered at least six weeks in advance. They are oversize and have a perforated cover flap to conceal voter information. The front of the mail-in ballot envelope looks like this:

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10 Each office has ballots for every house district available, so a resident of Arctic Village who happens to be in Anchorage in the fifteen days prior to the election could vote early at the Anchorage office.

11 AS 15.20.081.

12 AS 15.20.081(d); AS 15.20.066(b).

13 AS 15.20.030.

14 52 U.S.C.A. § 20302. *See also* AS 15.20.081(k). This year, the deadline to mail these ballots for the general election was September 19, 2020.

Return Address:

Official Return Ballot Envelope

Mail your ballot and have it postmarked by Election Day

To be opened only by the Absentee Review Board

E36F1 (Rev. 7/1/19)

U. S. Postal
FIM

First class postage required

Election USPS Logo Here

DIVISION OF ELECTIONS
REGION I ELECTIONS OFFICE
PO BOX 110018
JUNEAU AK 99811-0018

Intelligent Mail Barcode Here

The back of the envelope looks like this:

1. You MUST Sign AND Provide One Identifier

Voter Certificate, Signature and Identification

I declare that I am a citizen of the United states and that I have been a resident of Alaska for at least 30 days. I have not requested a ballot from any other state and am not voting in any other manner in this election. If I had this certificate attested by a witness, other than an authorized official, it was because no official empowered to administer an oath was reasonably available. I certify, under penalty of perjury, that the foregoing is true and accurate.

Voter Signature: _____

Voter Identifier: _____ Voter No. _____ AK Driver's License No. _____ Date of Birth _____ Last 4 of SSN

2. Your Signature MUST be Witnessed

Witness Affidavit

Have your signature witnessed by an authorized official or, if an authorized official is not reasonably available, by someone 18 years of age or older.

Signed in my presence:

This _____ day of _____ 20 _____, at _____. (City & State or Country)

Witness Signature: _____

If authorized official, official title: _____

Warning: False statements made by the voter or by the attesting witness on the certificate are punishable by law.

Review Board Use Only
Count Code: _____ Sequence No.: _____
No Count Code: _____ Initials: _____

E36B (Rev. 7/1/2019)

This information is covered by a flap with perforations at the top for the Division

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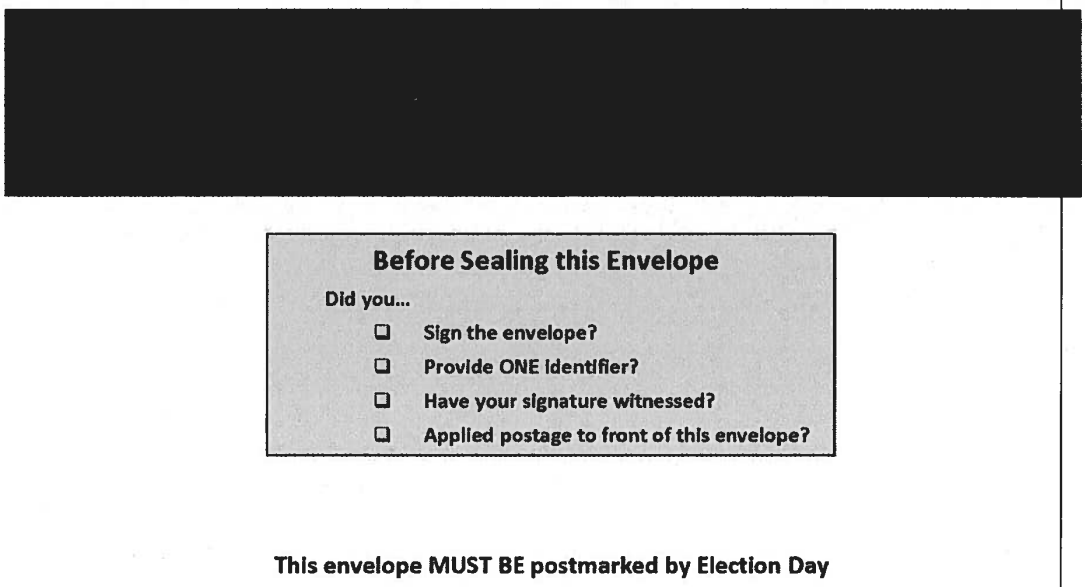
to tear away after the ballot is returned. The cover flap looks like this:



Voters may vote and return their absentee ballots as soon as received. Although the envelope is designed for mailing, it may be returned to the Division by any reasonable method on or before election day, including by hand delivery or placement in a secure ballot drop-box designated by the Division.[15] However, ballots will only be accepted after election day if received by mail and postmarked on or before election day.[16] If the post office fails to postmark the ballot, or the postmark is illegible, it will still be accepted as timely if the witness signature is dated on or before election day.[17] Absentee ballots will still be counted if they are received by mail up to ten days

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15 AS 15.20.081(e). *See also* Alaska Division of Elections, "By Mail Ballot Delivery" https://www.elections.alaska.gov/Core/votingbymail.php (listing secure drop box locations available during 2020 primary election).

16 AS 15.20.081(e).

17 6 AAC 25.560.

following the election.[18]

An additional method by which eligible Alaska voters may vote without going to a polling place is special needs voting. This is available for Alaskans who, due to age, illness or disability are unable to vote in person either at the polls or absentee-in-person.[19] These Alaskans may have a personal representative bring them a ballot picked up from the polling place, early voting location, or Absentee Voting Official.[20] The personal representative then witnesses the voter's vote and returns the ballot in a sealed envelope to the polling place, early voting location, or Absentee Voting Official.[21] No advance application is required for special needs voting.[22]

The Division preliminarily reviews and logs all absentee ballots on arrival.[23] No ballots are rejected or opened at this time. Beginning seven days before the election, the Absentee Ballot Review Board convenes to review received and logged absentee ballots for compliance.[24] They typically first check that the voter signed the envelope and provided an identifier. If the voter did not do one or either of these things, they mark the ballot as rejected for that reason. They then check for a witness signature. If the ballot is

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18 AS 15.20.081(e). General election ballots mailed overseas will be accepted up to fifteen days following the election. AS 15.20.081(h).

19 AS 15.20.072.

20 *Id.*

21 *Id.*

22 *Id.*

23 The factual statements in this paragraph are additionally supported by the accompanying affidavit of Julie Husmann.

24 *See* AS 15.20.190 (describing the make-up and duties of the review board).

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not witnessed, they mark it rejected for that reason. They do not go on to check any other aspect of the ballot. They do not check the voter's registration status or registration date, whether the voter's identifier matches the identifier in the voter's registration, whether the voter already voted by another method, whether the ballot envelope is actually empty, and so forth. Therefore, a ballot rejected for lack of a witness signature would not necessarily have been counted had it been witnessed, because it might have failed to meet a separate requirement. Thus, this method of counting may inflate the number of ballots rejected for lack of a witness signature as opposed to other reasons: if a ballot lacks a witness signature and the secrecy sleeve is empty, it will be marked rejected for lack of witness signature, not for an empty ballot. Voters whose absentee ballots have been rejected are notified after certification of the election.[25] The notification informs them of the reason for the rejection.[26]

B. A recent absentee voter fraud scandal in Alaska.

In March of this year, a prominent member of the Alaska House of Representatives and two of her associates were indicted on multiple counts of voter fraud based on incidents in 2014 and 2018.[27] These indictments arose out of a criminal

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25 AS 15.20.203(h), (i).

26 *Id.*

27 *See State v. Ledoux,* 3AN-20-02172CR; *State v. Simpson,* 3AN-20-02173CR; *State v. Vaught,* 3AN-20-02174CR. *See also* Anchorage Daily News, James Brooks, "Anchorage legislator and 2 associates charged with election misconduct" (March 14, 2020) (available online at https://www.adn.com/politics/2020/03/13/state-to-file-criminal-charges-against-anchorage-legislator-and-two-others-alleging-election-misdeeds/).

investigation instigated by the Division after it detected potential fraud related to absentee voting in that representative's district.[28]

In 2014, the Division first noticed irregularities in absentee ballot applications from that particular house district. Specifically, it appeared that numerous applications were written in the same handwriting. It is not necessarily illegal for one person to fill out numerous absentee ballot applications for others, provided that the applicant personally signs them, but it was highly unusual. Typically, in the Division's experience, voters filled out their own applications. However, there was insufficient evidence of fraud at that time for the Division to pursue the matter.

The Division noted no irregularities in absentee ballot applications from that house district in 2016. But in 2018, the Division again observed the unusual circumstance of many absentee ballot applications in the same handwriting from this district. The Division's voter database contains images of voter signatures, to which the Division was able to compare the signatures on those applications. They matched, but each signature began a uniform distance from the pre-printed colon. In the Division's experience, typically voter signatures begin at randomly different points along the signature line, so this uniformity also appeared abnormal. Additionally, the return addresses on the envelopes containing the applications were in the same handwriting as the applications. This was also unusual, as in the Division's experience voters typically

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[28] The factual statements in this section are supported by the accompanying affidavits of Carol Thompson and Julie Husmann.

write their own return addresses. They also all had the same stamp as though mailed in a batch.

The Division began following up with voters, and found that some phone numbers given were disconnected or not functioning. Some letters were returned undeliverable. Some voters that the Division was able to reach did not recall completing an application or seemed confused. When the Division received an absentee ballot application for a dead voter, it notified the Alaska State Troopers who began a criminal investigation. In the end, the Division received a total of seven absentee ballot applications for dead voters.

The Division, in conjunction with the Department of Law, conducted a thorough review of all absentee ballots received for that house district, and followed up with voters in questionable cases. Ballots confirmed to be fraudulent were not counted. A number of ballots were set aside due to validity concerns but that could not be verified as fraudulent. They were counted, but tallied separately and not comingled with other absentee ballots. The ballots themselves were turned over to the Troopers after the election.

The Division's investigation was broadly covered in the media in 2018, as were the 2020 indictments arising out of it.[29] The matter was revisited in the press last month

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[29] *See, e.g.,* Anchorage Daily News, Devin Kelly and Alex DeMarban, "Alaska Elections officials report voting 'irregularities' in east Anchorage house district primary" (August 28, 2018) (available online at https://www.adn.com/politics/2018/08/27/alaska-elections-officials-report-voting-irregularities-in-east-anchorage-house-district-primary/); Anchorage Daily News, Alex DeMarban, "Winner emerges in Anchorage House race, but GOP asserts felony-level

after the indicted representative lost the Republican primary to a challenger.[30]

C. COVID-19.

The facts regarding the COVID-19 pandemic are well-known to this Court and will not be repeated at length here. In March of 2020, the State of Alaska and the United States issued emergency declarations related to the spread of this novel and dangerous coronavirus, and mandates from the State and from various municipalities have restricted various activities in Alaska to differing extents at various times to slow the spread of the disease.[31] At present, the statewide orders relate primarily to inter-state travel and specific industries.[32] Local mandates vary widely and are subject to frequent change based on the ebbs and flows of the virus in each community.

Although it appears that anyone can suffer complications, hospitalization or

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vote fraud" (August 30, 2018) (available online at https://www.adn.com/politics/2018/08/28/ledoux-gains-lead-in-anchorage-house-race-marked-by-discovery-of-suspicious-ballots/); Alaska Public Media, Andrew Kitchenman, "Alaska Rep. Gabrielle LeDoux charged with voter misconduct" (March 13, 2020) (available online at https://www.alaskapublic.org/2020/03/13/alaska-rep-gabrielle-ledoux-charged-with-voter-misconduct/).

30 *See e.g.,* Alaska Public Media, Andrew Kitchenman, "Some sitting Republican lawmakers lose ground in primary, while others take leads" (August 25, 2020) (available online at https://www.alaskapublic.org/2020/08/25/some-sitting-republican-lawmakers-lose-ground-in-primary-while-others-take-leads).

31 The federal declaration, issued March 13, 2020, can be found here: https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/. The state Declaration, issued March 11, 2020, can be found here: https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Disaster-Packet.pdf.

32 Statewide mandates can be found here: https://covid19.alaska.gov/health-mandates/.

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death from COVID-19, older adults and those with certain underlying medical conditions face increased risk.[33] And while there is no scientific consensus on the question, current statistical data suggests that Alaska Natives may be at somewhat increased risk of hospitalization or death from the disease than individuals of other races.[34]

The methods by which the virus spreads are becoming increasingly understood. The primary mode of transmission appears to be by respiratory droplets that may be expelled as far as six feet from an infected person.[35] Cloth masks help limit the spread of droplets by an infected person.[36] It is also generally scientifically accepted that the virus is less likely to be transmitted outdoors or in well-ventilated spaces than indoors or

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[33] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "People at Increased Risk," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html.

[34] *See* Alaska Department of Health and Social Services Coronavirus Response, Data Hub Presentation, https://coronavirus-response-alaska-dhss.hub.arcgis.com/datasets/table-3-demographic-distribution-of-confirmed-cases/data (as of September 17, 2020, according to Alaska DHSS data, individuals confirmed to be of Alaska Native/American Indian race accounted for 17.3% of all confirmed cases, but 28% of all hospitalizations and 36.4% of all deaths. The data is continually updated). *See also* Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Health Equity Considerations and Racial and Ethnic Minority Groups," https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

[35] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "How COVID-19 spreads," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

[36] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Use of Masks to Help Slow the Spread of COVID-19," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html.

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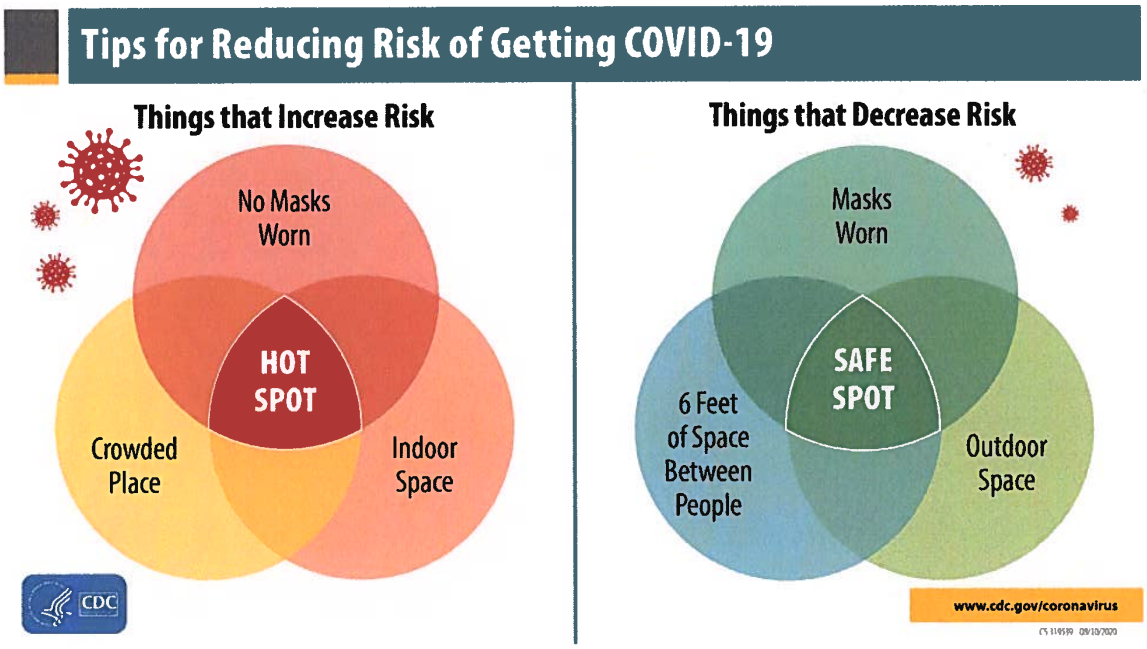
in poorly-ventilated spaces.[37] Also, shorter interactions are safer than longer ones.[38]

The United States Centers for Disease Control has created this helpful graphic summarizing the risks of transmission of COVID-19:[39]



Although less common, the virus may also be transmitted by touching a contaminated surface and then one's own face.[40] Therefore, the public health

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37 Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Deciding to go out," https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html.

38 Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Deciding to go out," https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html.

39 Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Deciding to go out," https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html.

40 Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "How COVID-19 spreads," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

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recommendations also include frequent handwashing or use of hand sanitizers when sharing objects with others or in high-traffic public areas.[41] These basic public health recommendations for infection prevention—handwashing, mask wearing, and maintaining six feet of distance from others—have been consistent and largely unchanged for months.[42]

The term "social distancing" refers to the recommendation to maintain six feet of distance between oneself and others.[43] It is one element of infection prevention, along with handwashing and mask wearing. This is not the same as "isolation" or "quarantine." "Isolation" and "quarantine" refer to maintaining a total lack of contact with other individuals, typically for up to fourteen days, either after a positive test result or after possible exposure to the virus.[44] Even for high-risk individuals, such as older adults and those with underlying medical conditions, the CDC recommendations are not

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[41] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "How to protect yourself and others," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[42] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Prevent getting sick," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/index.html.

[43] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Social distancing," https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

[44] "Isolation" refers to a total lack of contact with others for people who are ill and "quarantine" refers to a total lack of contact with others for people who have potentially been exposed to wait and see if they become ill. For example, a traveler who was potentially exposed during travel or while in another location may be required to "quarantine" for fourteen days after arrival in a new location. Centers for Disease Control and Prevention, "About quarantine and isolation," https://www.cdc.gov/quarantine/quarantineisolation.html

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for isolation or quarantine on a day-to-day basis. The recommendation for these individuals is "limit your interactions with other people as much as possible," and "take precautions to prevent getting COVID-19 when you do interact with others."[45]

During the 2020 primary election the Division went to great lengths to protect voters, poll workers, and Division employees from exposure to COVID-19, and the Division intends to repeat these efforts in the upcoming October REAA election and November general election.[46] The Division arranged for masks, gloves and hand sanitizer at every polling place; arranged booths, tables, and waiting areas to maintain six feet of distance between people wherever possible; and conducted distance-delivery training of poll workers, among other things.

D. The 2020 primary election in Alaska.

The Alaska primary election took place on August 18.[47] The Division issued 62,455 absentee ballots (not including absentee-in-person ballots) of which 43,545 were returned. This return rate, 69.72 percent, was comparable to the return rates seen in the 2018 and 2016 primaries, which were 69.26 percent and 60.36 percent respectively. Of

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45 Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "People with certain medical conditions," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Older adults," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

46 The factual statements in this paragraph are supported by the accompanying affidavit of Gail Fenumiai.

47 The factual statements in this section are supported by the accompanying affidavit of Gail Fenumiai, and the statistical information comes from Exhibits C, D and E to it.

those ballots returned, 1,333 were rejected. Of those 1,333 rejected ballots, 458 were rejected for lack of witnessing, or 1.05 percent of returned ballots. This is actually a lower percentage than the percentage of returned ballots rejected for lack of witnessing in the 2018 and 2016 primary elections, which was 2.12 percent and 2.15 percent respectively. It is more comparable to, but still lower than, the percentage of returned ballots rejected for lack of witnessing in the 2018 and 2016 general elections, which was 1.37 percent and 1.16 percent, respectively.

Other reasons that ballots were rejected were: the voter did not sign the ballot envelope (90 ballots), the voter did not provide an identifier (54 ballots), the ballot was postmarked after election day (422 ballots), the ballot was received too late by other methods (66 ballots), the voter had already voted by another method (92 ballots),[48] the identifier provided did not match the voter's record (34 ballots), the voter was not eligible for the ballot they requested due to party registration (31 ballots),[49] the voter did not apply for the ballot (26 ballots), the ballot sleeve was empty (21 ballots), the voter registered too late (15 ballots), the voter did not provide the affidavit required for an online ballot (9 ballots), the voter was not registered to vote (8 ballots), the ballot was received by mail after election day but not postmarked and the witness signature was not dated (4 ballots), the voter's registration was inactive at the time of voting (3 ballots). As discussed above, with the exception of the first two reasons, the Absentee

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48 The rejection code for this situation is "duplicate ballot."

49 This is unique to the primary election and ballots will not be rejected for this reason in the general election.

Ballot Review Board would likely not have checked for any other disqualifying circumstances if a ballot was not witnessed. So it is not certain that the 458 rejected ballots would have been counted but for the lack of a witness.

The Division has already notified absentee voters whose primary election ballots were rejected of the rejection and the reason for it. Therefore, any voter whose primary election ballot was rejected for lack of a witness signature is on notice of the requirement for the next time they vote absentee.

The Division went above-and-beyond to work with communities who, at the last minute, decided not to conduct in-person voting on primary election day due to COVID-19 concerns. Arctic Village was one.[50] The Division had recruited poll workers to conduct in-person voting in Arctic Village on election day and had sent election materials. The Division had also recruited an Absentee Voting Official to conduct absentee-in-person voting up to election day. Late in the day on August 17, the Division was informed that in-person voting could not take place in Arctic Village due to its COVID-19 shutdown. The Division was informed that two men, including the Second Chief, were making patrols through the village to ensure people were staying in their homes. The Division requested, and the Second Chief agreed, to go to the home of the Absentee Voting Official and get the absentee-in-person voting materials. The Division then provided a phone training to the Second Chief on conducting absentee-in-person

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50 The factual statements in this paragraph are additionally supported by the accompanying affidavit of Jeremy Johnson.

voting. The Second Chief agreed to go door-to-door to offer the opportunity to vote absentee-in-person to any voter who had not already voted.

Similar situations occurred in Cold Bay, Nunam Iqua and Kake, where the Division was unable to convince local officials and leaders to allow any public location to remain open for voting through election day.[51] In those locations, the Absentee Voting Official offered absentee-in-person voting by appointment or brought ballots to voters' homes. In all other locked-down locations, the Division was able to arrange for in-person voting to go forward as planned or for some public location to remain open through election day for absentee-in-person voting with an Absentee Voting Official. Thus, in all the communities where the Division had planned to conduct in-person or absentee-in-person voting, at least absentee-in-person voting was available on election day despite lockdowns. These arrangements required significant additional time and effort on the part of the Division, often at the last minute, to protect rural voters from disenfranchisement due to COVID-19 shutdowns implemented by their local or Tribal governments.

E. The 2020 REAA election in Alaska.

The 2020 REAA Election will take place on October 6, 2020.[52] The absentee ballots for that election are already being sent to voters, and the deadline to apply for an

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51 The factual statements in this paragraph are additionally supported by the accompanying affidavits of Angelique Horton and Lauri Wilson.

52 The factual statements in this section are taken from the Alaska Division of Elections website, "Election Dates and Hours," https://www.elections.alaska.gov/Core/electiondatesandhours.php.

absentee ballot by mail is September 26. Absentee-in-person voting begins today.

F. The 2020 general election in Alaska.

The 2020 general election will take place on November 3.[53] Most of the preparatory work for the absentee voting process in the general election has already taken place. The Division placed its first order for about 64,000 absentee ballot envelopes in April, its second order of 233,500 envelopes in early June, and a final order of 112,500 envelopes on August 5. Those are scheduled to arrive tomorrow, September 22. The total cost for these 410,000 envelopes was $105,792.60. The instructional cover sheets are currently being printed.

A significant amount of the training for absentee ballot review and logging has also already taken place. The Division hired and trained more than fifteen temporary employees to assist with absentee ballot logging during the primary election and expects to continue to employ most of them through the general election. They are not scheduled to receive a second training prior to the general election.

The Division has also already provided information about the absentee ballot witnessing requirement to voters, including on its website, social media, and in informal advice directly to voters. And, as noted above, the voters whose ballots were rejected in the primary election for lack of a witness signature have already been notified.

The Division began sending mail-in absentee ballots to military and overseas

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53 The factual statements in this section are supported by the accompanying affidavit of Gail Fenumiai.

voters, with the return envelope and instruction sheet explaining the witnessing requirement, last Friday, September 18.[54] The Division expects to begin sending in-state and domestic absentee ballots by October 9th at the latest, but as early as the week of September 28 if possible. Voters may, and are encouraged to, vote and return their ballots as soon as received. Division staff will begin logging the absentee ballots as soon as they are returned (although formal review by the review board will not begin until late October). The deadline to apply for an absentee ballot by mail is October 24.[55]

The plaintiffs formally notified the Division of their constitutional concerns about the absentee ballot witnessing requirement for the first time on August 31.[56] The Lieutenant Governor responded promptly on September 4.[57] The plaintiffs filed their complaint, with accompanying motion for preliminary injunction, on September 8.

Meanwhile, the news media is reporting a widespread climate of suspicion across the nation regarding the security of by-mail voting in the lead-up to the 2020 general

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54 Alaska Division of Elections website, "Election Dates and Hours," https://www.elections.alaska.gov/Core/electiondatesandhours.php.

55 Alaska Division of Elections website, "Election Dates and Hours," https://www.elections.alaska.gov/Core/electiondatesandhours.php.

56 *See* Exhibit E to Plaintiffs' Motion for Preliminary Injunction.

57 *See* Exhibit F to Plaintiffs' Motion for Preliminary Injunction.

election.[58]

III. RELEVANT LEGAL STANDARDS

The defendants move for dismissal on the basis of laches and, in the alternative, oppose the plaintiffs' motion for a preliminary injunction. Laches is a complete defense when a party delays unreasonably in seeking relief and the delay results in prejudice to the defendant.[59] It can apply to claims for injunctive relief like this one.[60]

Preliminary injunctions are extraordinary remedies that should be infrequently granted. The Alaska Supreme Court has called preliminary injunctions "harsh remedies" that are only used to "preserve the status quo" when necessary to prevent "the irreparable loss of rights before judgment."[61] A "[p]laintiff may obtain a preliminary injunction by meeting either the balance of hardships or the probable success on the merits standard."[62] The balance of hardships standard applies when the plaintiff

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58 *See e.g.* CNN.com, "Trump's false claims on mail-in voting do more to harm elections than threat of fraud, experts say," Bob Ortega and Scott Bronstein (September 3, 2020) https://www.cnn.com/2020/09/03/politics/election-threat-trump-mail-in-voting-claims-invs/index.html; Foxnews.com, "Dems 'ignoring' mail-in ballot voter fraud, 'burying their head in the sand': Katie Pavlich," Caleb Parke (September 3, 2020) https://www.foxnews.com/politics/mail-in-voting-dems-katie-pavlich; USAtoday.com, "Trump suggests that North Carolina voters should test mail-in system by trying to vote twice," Jeanine Santucci (September 2, 2020) https://www.usatoday.com/story/news/politics/elections/2020/09/02/trump-suggests-north-carolina-residents-try-vote-twice-test/5699548002/.

59 *Kollander v. Kollander*, 322 P.3d 897, 903 (Alaska 2014).

60 *See City & Borough of Juneau v. Breck*, 706 P.2d 313, 317 (Alaska 1985).

61 *Martin v. Coastal Vills. Region Fund*, 156 P.3d 1121, 1126 and n.4 (Alaska 2007) (quoting *United States v. Guess*, 390 F.Supp.2d 979, 984 (S.D. Cal. 2005)).

62 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

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establishes three factors: (1) the plaintiff is faced with irreparable harm; (2) the opposing party is adequately protected; and (3) the plaintiff raises "serious and substantial questions going to the merits of the case."[63] A plaintiff can meet this standard "only where the injury which will result from . . . the preliminary injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted."[64] When the opposing party's interests cannot be adequately protected in the face of an injunction, the plaintiff must satisfy a much higher burden of making a "clear showing of probable success on the merits."[65] In assessing the relative hardships to each party, Alaska courts "[a]ssume the plaintiff will ultimately prevail when assessing the irreparable harm to the plaintiff absent an injunction," and, conversely, "[a]ssume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction."[66]

In the elections context, the Alaska Supreme Court has held that there is "simply no way for the state's interests to be adequately protected" if a preliminary injunction will "prevent the state from administering an election pursuant to its own election

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63 *Id.* at 54.

64 *State v. Kluti Kaah Native Vill. of Cooper Center*, 831 P.2d 1270, 1273 (Alaska 1992) (quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991)).

65 *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (quoting *Kluti Kaah Native Vill.*, 831 P.2d at 1272).

66 *Alsworth*, 323 P.3d at 54.

laws."[67] In that situation, the "balance of the hardships" invariably weighs against the plaintiffs who must make a clear showing of probable success on the merits in order to obtain a preliminary injunction.[68]

IV. ARGUMENT

A. The plaintiffs' claims are barred by laches.

The defendants cross-move for dismissal of the plaintiffs' claims as untimely and barred by laches. Laches applies when a party delays unreasonably in seeking relief and the delay results in prejudice to the defendant.[69] "The essence of laches is not merely the lapse of time, but also a lack of diligence in seeking a remedy, or acquiescence in the alleged wrong and prejudice to the defendant."[70] In time-sensitive situations such as this one, delay of even a few months can warrant application of laches.[71]

All plaintiffs were aware of the basic circumstances of both the pandemic and Alaska's absentee ballot witnessing requirement months ago, when it might have been possible to re-print election materials, re-train temporary Division employees, and effectively educate the public about the changed requirement, as demanded in the

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67 *Metcalfe,* 110 P.3d at 978-79.

68 *Id.* Similarly, the Ninth Circuit has recognized that "election cases are different from ordinary injunction cases" because "[i]nterference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003).

69 *Kollander v. Kollander*, 322 P.3d 897, 903 (Alaska 2014).

70 *Id* at 903.

71 *See City & Borough of Juneau v. Breck*, 706 P.2d 313, 315, 317 (Alaska 1985).

plaintiffs' prayer for relief.[72] But the plaintiffs were not diligent in raising their constitutional objections at that time and acquiesced in the enforcement of the absentee ballot witnessing requirement in the primary election. And, as a practical matter, it is now too late for the Division to modify its election materials (especially the mail-in ballot envelopes which must be ordered at least six weeks in advance) to remove the witness requirement in time for either the REAA or general elections.[73] Thus, all elements of laches are met and this Court should dismiss this case.

The circumstances underlying plaintiffs' suit are neither new nor unforeseen. The Governor declared a state of emergency in Alaska due to the pandemic in March.[74] Arctic Village reports that it began imposing restrictions on community members as early as March 13, and imposed its first lockdown on May 16.[75] Plaintiff Elizabeth Jones reports beginning her ongoing efforts to avoid contact with others in late February,[76] and plaintiff Barbara Clark in March.[77] The Division began ramping up for increased absentee voting in May. The plaintiffs have no excuse for failing to raise this

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72 *See* Complaint ¶¶iii, iv.

73 The extent to which the plaintiffs request an injunction to apply to the upcoming REAA election is unclear. The plaintiffs' proposed order provided with their Motion for Preliminary Injunction requested that the injunction apply to "the November 3, 2020 general election and during future elections held during the COVID-19 pandemic."

74 The Declaration, signed March 11, 2020, is available online at https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-19-Disaster-Packet.pdf.

75 Affidavit of Tiffany Yatlin at ¶¶6, 8.

76 Affidavit of Elizabeth Jones at ¶6.

77 Affidavit of Barbara Clark at ¶5.

issue until well into September.

The statute at issue is also not new: Alaska has required absentee ballot witnessing for decades.[78] As a voting advocacy organization, the League of Women Voters of Alaska cannot claim to have been in ignorance of the requirement until now. Alaska is one of eleven states requiring absentee ballots to be witnessed and/or notarized.[79] Lawsuits were filed months ago in other states challenging the constitutionality of these requirements, including six by affiliates of plaintiff League of Women Voters of Alaska.[80] The League of Women Voters of Wisconsin sued to challenge that state's absentee ballot witnessing requirement in late March,[81] the League of Women Voters of Virginia sued in federal court over that state's requirement on April 17,[82] the League of Women Voters of Minnesota sued in federal court over that

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78 Prior to 2005, if no official witness was available, two adult witnesses were required. The law was changed in 2005 to allow for one lay witness. *See* 2005 Alaska Session Laws, 1st Special Session, Ch. 2 (H.B. 94).

79 *See* National Conference of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options," Table 14 "How States Verify Voted Absentee Ballots," https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

80 *See* Complaint ¶13 (alleging that plaintiff League of Women Voters of Alaska is an affiliate of the national League of Women Voters).

81 *Democratic Nat'l Committee v. Bostelmann,* — F.Supp.3d —, 2020 WL 1638374 at *1 (W.D.Wis. 2020) (listing League of Women Voters of Wisconsin as a plaintiff, dated April 2, 2020, and reciting that the case is three consolidated cases "all filed in the last two weeks").

82 *See League of Women Voters of Virginia v. Virginia Bd. of Elections,* — F.Supp.3d —, 2020 WL 4927524 at *3 (W.D. Va. 2020) (reciting that the League of Women Voters of Virginia sued on April 17).

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state's requirement on May 19,[83] the League of Women Voters North Carolina sued in federal court over that state's requirement on May 22,[84] the League of Women Voters of Louisiana sued in federal court over that state's requirement sometime in May,[85] and the League of Women Voters of Rhode Island sued over that state's requirement on July 23.[86] Other plaintiffs brought additional cases challenging absentee ballot witnessing requirements during the same time frame: April 22 (South Carolina),[87] May 1 (Alabama),[88] June 4 (Minnesota state court),[89] and July 10 (North Carolina state

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83 *See* League of Women Voters of Minnesota, "LWVMN Challenges Absentee Ballot Signature Witness Requirement" (May 19, 2020), https://www.lwvmn.org/league-news/2020/5/19/lwvmn-challenges-absentee-ballot-signature-witness-requirement.

84 *See Democracy North Carolina v. North Carolina State Bd. of Elections,* — F.Supp.3d —, 2020 WL 4484063 at *3 (M.D.N.C. 2020) (listing "The League of Women Voters of North Carolina" as a plaintiff and reciting "Plaintiffs filed their original Complaint on May 22, 2020").

85 *See Clark v. Edwards,* — F.Supp.3d —, 2020 WL 3415376 at *1 (M.D.La. 2020) (listing League of Women Voters of Louisiana as a plaintiffs and reciting that the case began as two actions that were consolidated June 3, implying that both actions were filed in May or earlier).

86 *See Common Cause Rhode Island v. Gorbea,* — F.Supp.3d —, 2020 WL 4365608 at *3 (D.R.I. 2020) (listing League of Women Voters of Rhode Island as a plaintiff and reciting "[o]n July 23, 2020, shortly after filing their Complaint, the plaintiffs moved for a preliminary injunction…").

87 *See Thomas v. Andino,* — F.Supp.3d —, 2020 WL 2617329 at *8 (D.S.C. 2020) (reciting "[o]n April 22, 2020, Thomas Plaintiffs filed their Complaint for Injunctive and Declaratory Relief").

88 *See People First of Alabama v. Merrill,* — F.Supp.3d —, 2020 WL 3207824 at *1 (N.D.Al. 2020) (reciting "the plaintiffs filed this lawsuit on May 1").

89 *See NAACP of Minnesota v. Simon,* Minnesota State Court, Second District, County of Ramsey, Case No. 62-CV-20-3625. A copy of the complaint is available online at https://www.aclu.org/legal-document/complaint-naacp-minnesota-dakotas-area-state-conference-v-simon.

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court).[90]

The League of Women Voters of Alaska's failure to raise this issue in Alaska between April and July can only be ascribed to lack of diligence or to acquiescence. It cannot credibly claim not to have been aware of this issue during this time period, when its sister organizations were actively pursuing lawsuits against other states challenging similar requirements in those states.

And plaintiff Arctic Village similarly failed to raise these concerns in a timely manner, despite being in some state of shutdown since March.[91] It could certainly have foreseen the situation of which it now complains. To a certain extent, Arctic Village's problem is of Arctic Village's own making; it could easily make a limited exception to its strict lockdown for purposes of absentee voting, and in fact did so to facilitate absentee-in-person voting on the day of the primary election.[92] Thus, its failure to object to the witnessing requirement in advance of the primary election demonstrates acquiescence, or at least lack of diligence in pursuing a remedy. Similarly, both individual plaintiffs found ways to vote and comply with the witnessing requirement in the primary election, rather than raising any constitutional objections at that time.

And the prejudice to the Division is clearly severe. All general and REAA election absentee voting materials are now printed consistent with the witnessing

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90 *See Chambers v. North Carolina,* North Carolina Superior Court, Wake County, Case No. 20 CVS 500124. A copy of the complaint is available online at https://www.aclu.org/legal-document/complaint-chambers-v-state-nc.

91 Affidavit of Tiffany Yatlin at ¶¶6, 8.

92 *See* Affidavit of Jeremy Johnson in support of this filing.

requirement, including the non-standard mail-in ballot envelopes. Some absentee ballots have already gone out for both the REAA and general elections, and more will go out over the next few weeks. Voters may begin voting them and returning them immediately.

In the six remaining weeks before November 3, the Division is already tasked with administering and certifying the REAA election and preparing for and administering the general election, including the additional arrangements required to minimize risk of infection associated with those elections and processing more absentee ballots than ever before. The plaintiffs' demands that it take on significant and challenging new training and public education tasks between now and November 3 is plainly unreasonable. Attempting to educate the public, in the face of absentee ballot materials that clearly state a witness signature is required, would at best be difficult and at worst be confusing and ineffective.

Furthermore, the Alaska voting public has already completed the 2020 primary election at which absentee ballot witnessing was required. The Division put out public information about the witnessing requirement. Voters whose primary election absentee ballots were rejected for lack of a witness signature have just recently been informed. Alaskan voters are not expecting a change of course in the middle of an ongoing election cycle. Any effort to change the rule at this late date, especially when the printed materials will include the witnessing requirement, has the potential to cause serious confusion and inconsistency of application. Some voters may not learn of the change and believe that witnessing is still required. Other voters may get a garbled version of

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the message, and believe that they do not need to fill out the envelope cover sheet at all, and their ballots will not be counted for lack of a voter signature and an identifier. Some voters may have their ballot witnessed and later learn the requirement was waived and be concerned that their ballot will not count *because* it was witnessed.

A situation that recently transpired in Wisconsin illustrates the risks of wrongful injunctions in the elections context. This past April, early in the pandemic, a Wisconsin federal district court enjoined that state's absentee ballot witnessing requirement after absentee voting for a primary election had already begun.[93] The following day, the Seventh Circuit stayed the injunction.[94] A new lawsuit has since been filed alleging that some voters sent in their absentee ballots unwitnessed in reliance on the district court's injunction that were then not counted because of the Seventh Circuit's stay.[95] Thus, inconsistent messaging and the potential for conflicting court orders while voting is underway risk disenfranchising the very voters plaintiffs are seeking to protect. Had the plaintiffs filed this lawsuit last spring, when other plaintiffs were filing similar lawsuits, there would have been sufficient time for this Court to meaningfully review and decide this case before the start of absentee voting.

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93 *Democratic Nat'l Committee v. Bostelmann,* — F.Supp.3d —, 2020 WL 1638374 at *1 (W.D.Wis. 2020) (dated April 2, 2020 and reciting "plaintiffs challenge a number of election-related, statutory requirements for the rapidly approaching April 7, 2020, election").

94 *Democratic Nat'l Committee v. Bostelmann*, Not Reported in Fed. Rptr., 2020 WL 3619499 (7th Cir. 2020) (dated April 3).

95 *See Swenson v. Bostelman*, W.D.Wis. Case No. 3:20-cv-00459, Complaint (May 18, 2020) at ¶¶10, 102, 103. A copy of the complaint is available online at https://www.wpr.org/sites/default/files/01_-_swenson_-_complaint.pdf.

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A delay of even a few months can trigger laches where the plaintiff was aware of the issue and stood by while the defendant moved forward. In *City and Borough of Juneau v. Breck*, the plaintiff had voiced objections to a City construction project at assembly meetings, but waited to sue until four months after the city had signed a contract and construction had begun.[96] The superior court granted a preliminary injunction, but the Alaska Supreme Court reversed, holding that the plaintiff's claims were barred by laches.[97] The plaintiff should have realized at the time the contract was signed that the City's decision was irreversible, and the delay caused significant prejudice to the City since it had already invested substantial funds into the project and construction was already partially complete.[98] The Court also took into consideration the prejudice to the City's taxpayers of the significant financial loss for the municipality.[99] This Court should similarly take into account the prejudice to the State's voters from the confusion that would be created by a last-minute change in a long-established, familiar absentee voting process.

Both the elements of unreasonable delay and resulting prejudice to the Division are present and this Court should dismiss this lawsuit as barred by laches.

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96 706 P.2d 313, 314-15 (Alaska 1985).

97 *Id.* at 314.

98 *Id.* at 315-316.

99 *Id.* at 316.

B. The plaintiffs have not shown they are entitled to a preliminary injunction based on a balance of the hardships.

None of the plaintiffs have alleged any particularized, irreparable harm that they stand to suffer from continued enforcement of Alaska's absentee ballot witnessing requirement in the upcoming general election. Arctic Village was able to accommodate voting during the primary election despite its lockdown, and the individual plaintiffs were able to vote in the primary without increasing their existing low risk profile. And the State stands to suffer numerous irreparable harms if the requirement is wrongfully enjoined, including damage to voter confidence in the validity of the 2020 general election results. This Court should hold that the plaintiffs are not entitled to a preliminary injunction based on a balance of the hardships.

1. Plaintiff Arctic Village Council is partially responsible for the harm it complains of.

Arctic Village, not the State, imposed the lockdown that it now claims inhibits voters in its community from obtaining witnesses for absentee ballots.[100] Although that lockdown may be in the best interests of the community, as alleged, it is not required or even recommended by State mandates. Nothing prevents Arctic Village from making a limited exception to its lockdown for witnessing absentee ballots under risk-minimizing

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[100] There is some inconsistency in Arctic Village's assertions regarding its lockdown. Its affiant, Tiffany Yatlin, alleges that that the post office is the only location at which residents may get a document notarized and that it is closed to the public. However, the affidavit itself was witnessed by the postmaster on September 3, tending to suggest that notarization continues to be available in the community at least by appointment.

conditions, thus solving the problem of which it complains. In fact, Arctic Village made an exception along these lines on primary election day when its lockdown enforcement patrollers agreed to offer door-to-door absentee-in-person voting. There is no reason that these same patrollers could not be permitted to witness mail-in absentee ballots while patrolling upon request.[101] No State action is preventing any voter in Arctic Village from securing a witness for their absentee ballot. On the contrary, the Division has been and is willing to work with and assist communities to facilitate voting during lockdowns.

2. The absentee ballot witnessing requirement does not increase the individual plaintiffs' existing low risk profile.

The two individual plaintiffs to this lawsuit have been regularly engaging in essential everyday activities involving interpersonal contact and taking appropriate risk-minimization efforts while doing so. Both individual plaintiffs describe coming into distanced, masked contact, often outdoors, with other individuals while doing various important errands.[102] Any of the individuals with whom they describe coming into contact—veterinarians, pharmacists, grocery delivery people, restaurant delivery people, etc.—could be asked to witness an absentee ballot while maintaining all the risk-minimization precautions that the plaintiffs are already taking.[103] Both plaintiffs

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101 Similarly, Arctic Village's affiant states that community members are distributing mail to residents, since the post office is closed to the public. Presumably these individuals could also witness absentee ballots on request while making their rounds. *See* Affidavit of Tiffany Yatlin at ¶10.

102 *See* Declaration of Elizabeth Jones at ¶7; Declaration of Barbara Clark at ¶¶5-7.

103 *See* Declaration of Elizabeth Jones at ¶7; Declaration of Barbara Clark at ¶5.

actually found ways to have their primary election absentee ballots witnessed while employing the recommended risk-minimization precautions.[104] Thus, the individual plaintiffs have not shown that having their 2020 general election absentee ballot witnessed will actually force them to take any risks not already inherent in their day-to-day lives.

In arguing to the contrary, plaintiffs somewhat overstate the actual public health recommendations from the CDC for high-risk individuals like themselves.[105] The CDC recommendations for the plaintiffs and other older adults or individuals with underlying medical conditions is not complete self-isolation. Rather, they are to "limit your interactions with other people as much as possible," and "take precautions to prevent getting COVID-19 when you do interact with others." [106] Thus, a high-risk voter can have an absentee ballot witnessed consistent with the CDC's public health recommendations.

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104 *See* Declaration of Elizabeth Jones at ¶¶15-16; Declaration of Barbara Clark at ¶11.

105 *See* Declaration of Elizabeth Jones at ¶6 ("I have been following public health recommendations around COVID-19 and self-isolating at home since the end of February"); Declaration of Barbara Clark at ¶5 "I have been following public health recommendations around COVID-19 meticulously and self-isolating at home since early March").

106 Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "People with certain medical conditions," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), "Older adults," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

3. Educating voters about the absentee ballot process is part of the core mission of the Alaska League of Women Voters and not an irreparable harm.

The Alaska League of Women Voters alleges that in the absence of an injunction it will have to spend time and resources educating the public about the absentee ballot witnessing requirement.[107] But for an organization whose core mission includes voter mobilization and education activities, this is not a cognizable injury.[108] The increased interest in absentee voting to which the League is responding is the result of the COVID-19 pandemic, not State action. Educating voters about the absentee ballot witnessing requirement, due to the increased interest in absentee voting caused by the pandemic, is well within the core mission of the League. It cannot be considered a harm caused by the lack of an injunction.

4. The data does not support the claim that absentee ballot witnessing will have a general effect of disenfranchising voters in the 2020 general election.

The data available to the Division from the 2020 primary election, conducted under pandemic conditions, does not support the plaintiffs' generalized allegations that

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107 Declaration of Judy Andree at ¶9. Additionally the League asserts the generalized interest of their members who may be at increased risk from COVID-19, but, like the individual plaintiffs discussed above, allege no particularized, irreparable harm that these members will suffer in the absence of an injunction. Declaration of Judy Andree at ¶¶7-8.

108 Declaration of Judy Andree at ¶¶3-4. *See also Clark v. Edwards,* — F.Supp.3d —, 2020 WL 3415376 at *13 (M.D.La. 2020) (finding organizational plaintiffs, including the League of Women Voters of Louisiana, lacked Article III standing because educating voters regarding the absentee ballot witnessing requirement fell within their core mission and did not constitute an injury).

the requirement disenfranchises voters due to the pandemic. The Division saw no increase in the percentage of absentee ballots rejected for lack of a witness signature from recent elections; in fact, the percentage of absentee ballots rejected for lack of witnessing in the 2020 primary was the lowest in the last five statewide elections. This demonstrates that, even in years with no pandemic, a certain number of absentee voters fail to follow the instructions on the ballot envelope[109] or otherwise fail to have their ballots witnessed for reasons unrelated to fear of disease. A certain amount of voter noncompliance is inherent in the absentee voting process, and there is no reason to believe that, but for the pandemic, the one percent of absentee voters whose ballots were rejected would have obtained a witness signature and had their ballots counted.

Because the plaintiffs have not presented evidence establishing that the witness requirement directly harms them and because the empirical data contradicts their speculation about the general impact of the requirement on Alaskans' ability to effectively cast absentee ballots, they have failed to establish sufficient harm to justify a preliminary injunction.

5. Last-minute invalidation of a statute intended to enhance election security will irreparably harm the State and all Alaskans.

When considering the harm to the State from an injunction, this Court must

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109 This is also demonstrated by the wide variety of other reasons that absentee ballots are rejected because the voter failed to follow the instructions, including the voter not signing his or her own ballot envelope, the voter voting twice in the same election, or the voter failing to place the ballot in the envelope.

assume that the State will prevail.[110] The harm to the State of a wrongful injunction against enforcement of a valid election fraud-prevention statute during one of the most complex and contentious elections in recent history would likely be irreparable, both due to the administrative burdens and with respect to public confidence in the validity of the election results. There is now insufficient time to reprint the absentee ballot envelopes, which clearly state that a witness is required.[111] The increased administrative burden to the Division of attempting to educate voters and employees of the last-minute change, in the face of absentee ballot materials that clearly state otherwise, would be severe. Particularly given that over the next six weeks the Division already has the responsibility of administering two elections during a pandemic.

In addition to the harm to the Division, this Court should consider the potential for harm to the voting public in general. An eleventh-hour injunction, issued too late to reprint the absentee ballot envelopes,[112] creates a terrible risk of voter confusion, inconsistency, and other potential sources of disenfranchisement. For example, the current absentee ballot envelopes have the witness date the vote, not the voter. Every

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110 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

111 As explained in the accompanying affidavit of Gail Fenumiai, the absentee ballot return envelopes require six weeks' preorder. The Division's most recent order of 112,500 envelopes was placed August 5 and is scheduled to arrive tomorrow on September 22. The general election is six weeks from tomorrow.

112 Even if the Division were able to find a vendor willing and able to print envelopes in less than six weeks, they would still go out so late as to severely limit the time for voters to vote and return their ballots. So even a rush reprinting order, which may not be available, would risk disenfranchising voters who need and planned on getting their absentee voting materials well in advance of the general election.

election, some absentee ballots arrive after election day without a legible postmark but are counted based on the date of the witness signature. If the witnessing requirement is waived, it is possible that absentee ballot envelopes will not get dated, resulting in the disenfranchisement of some voters based on the post office's failure to legibly postmark the ballot. Had the voters had the ballot witnessed and dated, the ballot would have counted. There may well be other unintended consequences of an injunction that are impossible to predict in advance. If this Court issues an injunction that is later reversed on appeal,[113] it could cause voter confusion and inconsistent results, and damage to the public's perception of the Division of Elections.

This is a particular concern given that the absentee ballot witnessing requirement is a fraud-prevention measure, and removing it at the last minute may tarnish the validity of the election results in the eyes of the general public. The 2020 general election already involves increased scrutiny and anxiety about the security and reliability of by-mail voting. Stripping away some part of the statutory security measures just before the election could do irreparable harm if it causes voters to doubt the legitimacy of the election result.

The Alaska Supreme Court has previously held that, where a preliminary injunction will "prevent the state from administering an election pursuant to its own election laws," there is "simply no way for the state's interests to be adequately

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[113] When assessing the harm to the defendant for purposes of the balance of hardships test, this Court must assume that the defendant will ultimately prevail. *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

protected."[114] Under those circumstances, even if the plaintiff stands to suffer irreparable harm without the injunction, the issuance of the injunction is "a zero-sum event, where one party will invariably see unmitigated harm to its interests."[115] In that situation, no injunction may issue under the "balance of the hardships" standards, and the plaintiff must make a clear showing of probable success on the merits.[116]

Federal courts have long recognized the profound stakes of interfering in the immediate lead-up to an election.[117] The United States Supreme Court recently stayed a federal district court order enjoining enforcement of Alabama's absentee ballot witnessing requirement.[118] And the Seventh Circuit recently stayed enforcement of a federal district court injunction against Wisconsin's absentee ballot witnessing

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114 *Metcalfe v. State, Div. of Elections*, 110 P.3d 976, 978-79 (Alaska 2005).

115 *Id.*

116 *Id.*

117 *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (vacating a Ninth Circuit injunction against the State of Arizona because of "the imminence of the election and the inadequate time to resolve the factual disputes"); *see also Crookston v. Johnson*, No. 16–2490, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the Purcell principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason").

118 *Merrill v. People First of Alabama*, — U.S. —, 2020 WL 3604049 (2020). Note that the preliminary injunction stayed by the Court was much narrower than the injunction requested in this one, and would only have waived the witnessing requirement for "absentee voters who determine it is impossible or unreasonable to safely satisfy that requirement in light of the COVID-19 pandemic, and who provide a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the Centers for Disease Control has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19." *See People First of Alabama v. Merrill*, — F.Supp.3d —, 2020 WL 3207824 at *29 (N.D. Ala. 2020).

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requirement.[119] Although the Supreme Court's stay was issued without discussion, the Seventh Circuit explained that "the district court did not give adequate consideration to the state's interests" when issuing its injunction.[120] The Circuit Court also quoted the United States Supreme Court case of *Purcell v. Gonzalez:* "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[121]

Thus, the State has amply shown that it will suffer irreparable harm if it is wrongfully enjoined from enforcing its absentee ballot witnessing requirement for the 2020 general election. No bond can protect against the kind of harm the State stands to suffer. Under these circumstances, this Court should hold that the plaintiffs are not entitled to a preliminary injunction based on a balance of the hardships.

C. The plaintiffs have not shown they are entitled to preliminary injunction based on probable success on the merits.

Alaska courts presume that statutes are constitutional, and the party challenging the statute bears the burden of showing otherwise.[122] Alaska has adopted the United States Supreme Court's *Anderson-Burdick* balancing test to determine the constitutionality of Alaska election laws under the Alaska Constitution. This is a four-step test, which the Alaska Supreme Court has described as follows:

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119 *Democratic Nat'l Committee v. Bostelmann*, Not Reported in Fed. Rptr., 2020 WL 3619499 (7th Cir. 2020).

120 *Id.* at *2.

121 *Id.* (quoting *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006)) (alterations in original).

122 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90-91 (Alaska 2016).

> When an election law is challenged the court must first determine whether the claimant has in fact asserted a constitutionally protected right. If so [the court] must then assess the character and magnitude of the asserted injury to the rights. Next, [the court must] weigh the precise interests put forward by the State as justifications for the burden imposed by its rule. Finally [the court must] judge the fit between the challenged legislation and the state's interests in order to determine the extent to which those interests make it necessary to burden the plaintiff's rights.[123]

The Court has explained that this is "a flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the state's interests must be closer."[124] However, the Court has also recognized that "government must play an active role in structuring elections" which "will invariably impose some burden upon individual voters."[125] Thus, the State "must be granted some leeway."[126]

There is no dispute that the Alaska Constitution requires the State legislature to provide for absentee voting by law.[127] Therefore, the plaintiffs have met the first factor by asserting a constitutionally-protected right in absentee voting generally. As to the second factor, the burden of having an absentee ballot witnessed is of no different character or magnitude than the burden of conducting any day-to-day activity in the

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123 *State, Div. of Elections v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005) (internal quotations omitted).

124 *Id.*

125 *Id.* at 1059.

126 *Id.*

127 Alaska Constitution, Title V, Section 3 "Methods of Voting—Election Contests," ("Methods of voting, including absentee voting, shall be prescribed by law").

current pandemic. Thus, the burden of the absentee ballot witnessing requirement is not unusual or severe, and this Court should apply the lowest level of scrutiny when assessing its constitutionality.[128] Furthermore, the State's interests in preventing fraud and preserving public confidence in the validity of absentee voting more than justify the burden associated with the requirement. This Court should find that the plaintiffs have not made a clear showing that they will probably overcome the presumption that the absentee ballot witnessing requirement is constitutional.

1. The absentee ballot witnessing requirement does not severely burden the right to vote.

The plaintiffs make a highly specific, as-applied challenge to the absentee ballot witnessing requirement based on COVID-19. They rely only on the burdens associated with absentee ballot witnessing during this pandemic, and ask only for an injunction against enforcement of the requirement during this pandemic. They do not argue that the burdens associated with the ballot witnessing requirement are unconstitutionally onerous at other times, or ask that the requirement be permanently enjoined.

But the burdens associated with the absentee ballot witnessing requirement

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[128] The plaintiffs correctly state that the Alaska Supreme Court has created a presumption that strict scrutiny will apply in "ballot access" cases, but this is not a "ballot access" case. Motion for Preliminary Injunction at page 25 (citing *State, Div. of Elections v. Metcalfe,* 110 P.3d 976, 979 (Alaska 2005)). The "ballot access" to which the Alaska Supreme Court referred in that case was a *candidate's* access to *appear* on the ballot, not a voter's access to voting. *See Metcalfe*, 110 P.3d at 979. There is no presumption of strict scrutiny in such cases, and it is well-understood that there will always be some burden associated with exercising one's right to vote. *See, e.g. State v. Green Party of Alaska*, 118 P.3d 1054, 1059 (Alaska 2005) ("election laws will invariably impose some burden upon individual voters").

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during this pandemic are just the general burdens on everyday life caused by COVID-19. This pandemic has changed daily life for all Alaskans. There are new burdens and risks associated with any number of activities of daily living. Alaskans must exercise caution when grocery shopping, banking, seeking medical care, working, attending school, recreating, or traveling. The burdens associated with having a ballot witnessed are of no different character or greater magnitude than the burdens already inherent to everyday life. And COVID-19 is the cause of those burdens, not the State.

Arctic Village's self-imposed lockdown may create additional burdens for its residents who live alone in getting their absentee ballots witnessed, but it is Arctic Village's choice to take these additional COVID-19 precautions beyond what is mandated by the state. It is Arctic Village's choice to impose a lockdown that is the source of this burden on Arctic Village's residents, not State law. And it is entirely within Arctic Village's own power to ease the burden on its residents by creating a limited exception to its strict lockdown for purposes of absentee voting.

And there is no statistical evidence that the absentee ballot witnessing requirement was more problematic for voters during the 2020 primary than in the two most recent election cycles. The percentage of absentee ballots not counted on this ground was less than at any prior election in the past four years.[129] And neither individual plaintiff was in fact prevented or deterred from voting absentee ballot in the

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[129] *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 199-200 (2008) (holding that alleged burdens on voting that were not supported by record evidence were insufficient to outweigh state's interest in *Anderson-Burdick* analysis).

primary election.

Because the burden on voters of absentee ballot witnessing is no different from the generalized burdens of life during this pandemic, this Court should find it warrants only the lowest level of scrutiny in the *Anderson-Burdick* balancing test. The absentee ballot witnessing requirement does not ask any more of Alaskans than any other important life activity like grocery shopping or seeking medical care. And there is no evidence that it actually inhibited absentee voting in the 2020 primary election, either by the named plaintiffs or the electorate as a whole.

2. The State's interests in preventing voter fraud and maintaining public confidence in the election are more than sufficient to uphold the constitutionality of the challenged statute.

The absentee ballot witnessing requirement serves two compelling State interests: preventing election fraud and instilling public confidence in the results. There is no question that prevention of voter fraud is a compelling state interest, as is the separate but related interest of maintaining public confidence in the integrity of elections.[130] The absentee ballot witnessing requirement serves both interests by deterring fraud, and by adding a level of formality and accountability to the absentee voting process.

The absentee ballot witnessing requirement aids in preventing fraud by

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130 *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) ("While that interest [safeguarding voter confidence] is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance").

mandating independent verification that the person who filled out the ballot also sealed it in the envelope and signed it. The expectation that a voter obtain notarization or an official witness, when available, also provides independent verification that the person who voted the ballot is who they claim to be. The Alaska Legislature views this requirement as a meaningful one: in 2005 the Alaska legislature reduced the non-official witness requirement from two witnesses to one, and removed the prior requirement that non-official witnesses be United States citizens, while adding new accountability for those witnesses.[131] This Court should not lightly disregard the legislature's view of the role this statute plays in Alaska's elections framework when it chose to retain this requirement.[132]

That a determined fraudster might simply forge a witness signature does not negate the requirement's broader fraud deterrent effect. And, as can be seen from the Division's recent detection of fraudulent absentee voter applications, Division employees are alert to the potential for fraud, and may notice irregularities in a

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131 *See* 2005 Alaska Laws 1st Sp. Sess. Ch. 2 (H.B. 94). Amending AS 15.20.066 (electronic delivery absentee ballots) and AS 15.20.081 (by-mail absentee ballots) to change number of non-official witnesses from two to one and remove requirement of U.S. citizenship, and amending AS 15.20.030 to add: "The [absentee ballot] envelope with the voter's certificate must include a notice that false statements made by the voter or by the attesting official or witness on the certificate are punishable by law").

132 *See State, Div. of Elections v. Metcalfe,* 110 P.3d 976, 980-81 (Alaska 2005) (discussing the importance of according deference to the legislature in matters of election policy).

fraudulently witnessed absentee ballot that could prompt a timely investigation.[133]

When considering the constitutionality of an election statute, Alaska courts consider the practices of other states relevant.[134] Absentee ballot witnessing is one of two primary models for absentee ballot verification among the states; the other is a signature-matching process.[135] Most states that do not require absentee ballots to be witnessed will not count an absentee ballot if the voters' signature does not substantially match the signature on file with the state.[136] Thus, although the plaintiffs correctly point out that Alaska is one of only eleven states with an absentee ballot witnessing requirement, invalidating Alaska's requirement will not simply place Alaska on the same footing with the remaining states. Alaska has no formal signature-matching

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133 The fact that the Division is not aware of any recent incidents of absentee voter fraud related to the witnessing requirement does not negate this interest. As the Alaska Supreme Court has explained, "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *State, Div. of Elections v. Metcalfe,* 110 P.3d 976, 981 (Alaska 2005) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)).

134 *See Metcalfe*, 110 P.3d at 980 ("We view this analysis—comparing Alaska's ballot-access requirements with the requirements of other states—as one reasonable way to determine whether less restrictive alternatives exist").

135 *See* National Association of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options," Table 14 "How States Verify Voted Absentee Ballots," https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx.

136 The Municipality of Anchorage also uses signature matching in its by-mail voting process. *See* Anchorage Municipal Code 28.70.030(C) ("The signature on the ballot declaration must be compared with the signature(s) in the voter's voter registration file using the standards in this subsection").

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process.[137] Although all Alaska voters must sign their absentee ballots, an X or any other mark indicating voter intent to affirm the sworn statement is sufficient to count the ballot.[138] Thus, Alaska's absentee ballot witnessing requirement is within the mainstream of other states' absentee ballot verification practices, the majority of which employ one of these two fraud-prevention measures.

In addition to fraud prevention, Alaska's absentee ballot witnessing requirement has independent value in safeguarding voter confidence. The witnessing requirement adds a measure of formality and accountability to the absentee voting process, which may enhance its legitimacy in the eyes of the public. And, regardless of the value of the witnessing requirement itself, any kind of last-minute, temporary exemption to election laws is likely to damage voter confidence in the integrity and consistency of the elections system as a whole. If the absentee ballot witnessing requirement is suspended at the last minute for just this election, voters may perceive the election system as weak, or malleable, or volatile. That such a change would be ordered amidst widespread

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137 The Division's voter database does preserve images of voter's signatures, which can be used as a fraud-detection aid when necessary, but the Division does not routinely check for voter signature match and has no authority to exclude an absentee ballot on this basis alone. *See* AS 15.20.203 (listing grounds for not counting absentee ballots). Nor are Division employees particularly trained in signature matching procedures. *See* Municipality of Anchorage, Elections, "Frequently Asked Questions" http://www.muni.org/Departments/Assembly/Clerk/Elections/Pages/FrequentlyAskedQuestions.aspx (explaining, with regards to its signature-matching process: "Election officials who adjudicate signatures are trained with techniques used to identify matches and forgeries. If two trained election officials agree that the signature doesn't match, the voter is contacted by mail and provided an opportunity to cure the discrepancy.").

138 6 AAC 25.550(b) ("The signature of the voter may be any written or printed form of the voter's name or initials, or any other mark intended as a signature").

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public skepticism about the security of elections in general, and by-mail voting in particular, only exacerbates that concern. Abandoning a statute intended to prevent absentee voter fraud has very real potential to undermine public confidence in the integrity of the 2020 general election.

Moreover, at all times the State has a legitimate "interest in the consistent administration of elections according to a considered statutory scheme."[139] Waiving the absentee ballot witnessing requirement for the 2020 general election undermines the consistency of the overall statutory scheme. For example, it has the potential to cause voter confusion in *future* elections when the requirement will again be enforced. Absentee voters in 2022 may not understand that the requirement was waived only during the COVID-19 pandemic, and have their absentee ballots disqualified for lack of a witness signature at the next election.

In support of their motion, the plaintiffs cite to trial court orders granting injunctions against enforcement of other states' absentee ballot witnessing requirements during the pandemic, but these citations are misleading. The plaintiffs fail to explain that the states did not defend their requirements in any of these cases. In two of the cases, the state entered into a consent judgment with the plaintiffs, and the decision cited was not granting a motion for preliminary injunction but rather an order approving

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139 *Metcalfe*, 110 P.3d at 979 n. 11.

a consent judgment.[140] And in the third case, the executive director of the state's elections commission publicly disavowed the requirement, and had supported its removal.[141] The court found that fact dispositive in its analysis of the state's interests.[142]

As discussed above, appellate courts have stayed the only two preliminary injunctions enjoining a state's absentee ballot witnessing requirement entered in adversarial cases.[143] And plaintiffs challenging absentee ballot witnessing requirements have failed to secure preliminary injunctions in other adversarial cases.[144] In North Carolina, a federal district court held that plaintiffs had failed to demonstrate probable success on the merits of their constitutional challenge to that state's absentee ballot

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140 *League of Women Voters of Virginia v. Virginia Bd. of Elections*, — F.Supp.3d —, 2020 WL 4927524 (W.D. Va. 2020); *Common Cause Rhode Island v. Gorbea*, — F.Supp.3d —, 2020 WL 4365608 (D.R.I. 2020).

141 *Thomas v. Andino*, — F.Supp.3d —, 2020 WL 2617329 at *20 (D.S.C. 2020).

142 *Id.* at *21.

143 *See Merrill v. People First of Alabama*, — U.S. —, 2020 WL 3604049 (2020); *Democratic Nat'l Committee v. Bostelmann*, Not Reported in Fed. Rptr., 2020 WL 3619499 (7th Cir. 2020).

144 *See Clark v. Edwards,* — F.Supp.3d —, 2020 WL 3415376 (M.D.La. 2020) (dismissing on lack of standing grounds); *Democracy North Carolina v. North Carolina State Bd. of Elections*, — F.Supp.3d —, 2020 WL 4484063 (M.D.N.C. 2020); *Chambers v. State,* North Carolina Superior Court, Wake County, Case Number: 20 CVS 500124 (Order on Injunctive Relief, September 3 2020) ("State Defendants would be required to replace or modify existing absentee ballot envelopes… Any modification or redaction of information contained on the existing envelopes would be a time-, labor-, and cost-intensive process. Indeed, such a process will create delays in mailing ballots … and would likely lead to voter confusion … [Therefore] the Court concludes the balance of the equities weighs in Defendants' favor.") A copy of the order is available online at https://www.acluofnorthcarolina.org/sites/default/files/field_documents/20200903162856_scan.pdf.

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witnessing requirement.[145] The court first determined that, with the appropriate precautions of social distancing, masking and handwashing, the risk of infection with COVID-19 from the brief interaction required for absentee ballot witnessing was so low that it did not create a significant burden on the voter.[146] The court then noted the state's recent experience with an incident of absentee voter fraud, which it found relevant even though that scheme did not directly involve the witnessing requirement.[147] The court found that the witnessing requirement served the state's interests "not only [in] deterring fraud at the outset but also in establishing certain minimal standards to allow for detection, investigation, and ultimately rejection of fraudulent ballots."[148] The court concluded:

> The court finds that even high-risk voters can comply with the One-Witness Requirement in a relatively low-risk way, as long as they plan ahead and abide by all relevant precautionary measures… [T]he burden on voters is modest at most. Turning to the State's interest… the deterrent effect of the One-Witness Requirement, in addition to North Carolina's recent history of voter fraud involving absentee ballots, are sufficiently weighty to justify the modest burden on voters.[149]

This Court should reach the same conclusion based on Alaska's similar circumstances.

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145 *Democracy North Carolina,* 2020 WL 4484063 at *36.

146 *Id.*

147 *Id.*

148 *Id.* at *35.

149 *Id.* at *36.

3. The plaintiffs' equal protection claim fails because the absentee ballot witnessing requirement applies to all voters equally.

The equal protection clause of the Alaska Constitution is not offended by laws that treat all citizens equally.[150] Because Alaska's absentee ballot witnessing requirement applies uniformly to all voters, the equal protection clause does not apply. The distinctions among voters of which the plaintiffs complain are the result of the vagaries of COVID-19 and the particular circumstances of voters' personal lives, not Alaska law.

This is highlighted by the ill-defined nature of the alleged categorization of voters described in the plaintiffs' motion for preliminary injunction.[151] The plaintiffs themselves struggle to identify exactly which voters they are talking about. Due to the myriad personal circumstances of voters, not all voters at high risk from COVID-19 are affected in the same way. Even for those who live alone, no doubt many have family members, friends, caregivers, or others in their lives whom they trust and are comfortable having contact with. Voters also exercise personal choice and have varying levels of risk assessment. Many may not be concerned about the brief contact associated with having an absentee ballot witnessed. It is also likely that many plan to vote absentee-in-person, early or by special needs ballot, and some may feel comfortable going to the polls given the Division's many COVID-19 prevention measures. Thus it is

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150 *See e.g. Manning v. State, Dep't of Fish & Game,* 420 P.3d 1270, 1279-80 (Alaska 2018) ("the [challenged regulation] applied equally to all Alaska citizens and thus did not implicate equal protection").

151 *See* Motion for Preliminary Injunction at pages 29-30.

impossible to clearly identify the class of voters the plaintiffs allege the law treats differently.

Voters always have, and always will, face circumstances in their personal lives that make it more or less difficult to vote. But those types of personal circumstances do not implicate equal protection. The equal protection clause only applies if the State treats people differently based on those personal circumstances. For example, election laws that distinguish based on length of residency trigger an equal protection analysis.[152] But uniformly applicable laws do not.[153]

The categories of voters identified by the plaintiffs are the result of the individual circumstances of those voters, not of the law. This Court should hold that the plaintiffs have not clearly shown probable success on the merits of their claim that the universally-applicable absentee ballot witnessing requirement violates the equal protection clause of the Alaska Constitution.

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152 *See e.g. Peloza v. Freas,* 871 P.2d 687 (Alaska 1994) (holding three-year residency requirement for candidates for city council violated equal protection); *Gilbert v. State,* 526 P.2d 1131 (Alaska 1974) (holding three-year residency requirement for candidates for state legislature did not violate equal protection).

153 *See Manning*, 420 P.3d at 1279-80. In *Manning*, like in this case, the plaintiff alleged that the uniformly-applicable law actually impacted people differently based on race, but that did not change the Court's analysis. In that case, uniformly-applicable hunting regulations were based on traditional Alaska Native hunting traditions, but hunters of any race could comply with them. *Id.* at 1280. The Court found this did not implicate the equal protection clause. *Id.* Similarly, statistical data suggesting that Alaska Natives may be at higher risk than individuals of other races from COVID-19 does not change the analysis.

V. CONCLUSION

Based on the foregoing, this Court should dismiss the plaintiffs' claims as untimely filed under the doctrine of laches, or, in the alternative, deny the plaintiffs' motion for a preliminary injunction.

DATED September 21, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By:

Lael Harrison
Alaska Bar No. 0811093
Margaret Paton Walsh
Alaska Bar No. 0411074
Assistant Attorneys General

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

COPY
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Clerk of the Trial Courts

ARCTIC VILLAGE COUNCIL *et al.*,

Plaintiffs,

v.

KEVIN MEYER *et al.*,

Defendants.

Case No. 3AN-20-07858 CI

APPLICATION FOR TEMPORARY RESTRAINING ORDER

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

Pursuant to Alaska Rule of Civil Procedure 65(b), Plaintiffs Arctic Village Council, League of Women Voters of Alaska, Elizabeth L. Jones, and Barbara Clark respectfully request that the Court grant a temporary restraining order ("TRO") restraining Defendants from mailing absentee ballots on October 2, 2020, and until the Court has resolved the merits of Plaintiffs' Motion for Preliminary Injunction, and requiring them to maintain the original, publicly posted date of October 9, 2020 for mailing absentee ballots. A TRO may be granted when "it clearly appears from specific facts . . . that immediate and irreparable injury, loss, or damage will result" without the issuance of a TRO.[1] Around close of business Friday, September 25, 2020, and without notice to the Court or to Plaintiffs, Defendants made key changes to their election schedule that will prevent this Court from entering meaningful relief. Accordingly, Plaintiffs request that the Court enter a TRO in order to preserve the Court's ability to hear this case and issue any meaningful and necessary relief.

[1] Alaska R. Civ. Pro. 65(b)(1).

Plaintiffs filed their case on September 8, 2020, accompanied with a Motion for Preliminary Injunction to ensure that Alaska's most vulnerable voters are able to safely vote absentee in the November general election. Specifically, and most relevant to this application, Plaintiffs requested injunctive relief "[o]rder[ing] Defendants to modify election materials, including mail-in ballots, to reflect the elimination of the Witness Requirements for the November 2020 general election . . . ."[2] Plaintiffs filed this suit almost two months before the election.

Plaintiffs also moved for expedited review of their Motion for Preliminary Injunction in order to provide the Court and Defendants as much time as possible to render a decision and to make adjustments to voting materials as may be ordered by this Court. Plaintiffs' proposed expedited schedule would have made this case ripe for decision on September 18, 2020, and, if oral argument were granted, ripe for decision by September 23, 2020. Defendants opposed Plaintiffs' proposed schedule and filed an opposition to the Motion for Preliminary Injunction on September 21, 2020. Defendants improperly combined a motion to dismiss with their opposition, filling a total of eighty-one pages, despite Plaintiffs' reply being due just four days later on September 25, 2020. At a status conference ordered by the Court on September 22, 2020, Defendants themselves suggested that oral argument be held on October 1, 2020.

During the pendency of this process, and indeed throughout 2020, the date for mailing absentee ballots was publicly listed as October 9—twenty-five days before the

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[2] Pls.' Compl. at 28, ¶ iv.

general election.

Without notice to this Court or to Plaintiffs, at the close of business on September 25, Defendants unilaterally moved the absentee ballot mailing date up by a week to October 2. *See* @ak_elections, Twitter.com (Sept. 25, 2020, at 4:45 p.m.), https://mobile.twitter.com/ak_elections/status/1309657672023552002. This is less than twenty-four hours after oral argument in this case, leaves absolutely no time for this Court to take the case under advisement and render a decision, and no time for this Court to enter any meaningful relief with regard to the absentee ballots at the heart of this case. It also leaves no time for Defendants to actually comply with any order the Court may issue and for Plaintiffs to appeal should the Court rule in Defendants' favor. Defendants' announcement is an unprecedented manipulation of the timeline and thwarting of the judicial process in order to evade relief in this case and attempt to tip the balance of hardships in their favor. A TRO is necessary to prevent this from happening. Only a TRO and preliminary injunction from this Court will prevent immediate and irreparable harm to Plaintiffs.

Had Defendants been clear with the Court and Plaintiffs that this event was planned, Plaintiffs would have opposed any lengthening of the timeline that occurred at the September 22 conference as a courtesy to Defendants, and would have opposed expedited consideration of the improperly filed motion to dismiss so that Plaintiffs could have focused their efforts to responding to just the arguments related to their motion for preliminary injunction. Had Plaintiffs known Defendants were poised to significantly alter the relevant timeline for this case, Plaintiffs also would have included this in the relief

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requested in their Complaint or at least brought this attention to the Court much earlier.

Defendants' improper actions have placed the Court and Plaintiffs in this untenable position. Plaintiffs and the voting public have relied on the October 9 mailing date for absentee ballots. Yet, by unilaterally altering that date at the last minute without notice to the Court, Plaintiffs, or the voting public so that the mailing is scheduled for less than one day after the oral argument, Defendants are manipulating the judicial process and attempting to deny Plaintiffs' requested relief of their own volition. Had Defendants acted with candor toward the Court and Plaintiffs or not unilaterally altered the ability of the Court to issue meaningful relief, a TRO would not be necessary. But Defendants' action necessitates this extraordinary remedy.

Undersigned counsel for Plaintiffs emailed counsel for Defendants on Sunday, September 27, 2020, providing them notice of Plaintiffs' intent to seek a TRO. In that email, undersigned counsel for Plaintiffs told counsel for Defendants that Plaintiffs would file this Application on Monday, September 28, 2020, at 8:30 a.m., unless Defendants agreed not to begin mailing absentee ballots on October 2 and instead await this Court's ruling on Plaintiffs' motion for preliminary injunction. . Counsel for Defendants responded that Defendants oppose this Application and remain on track to begin mailing absentee ballots requiring what Plaintiffs argue is an unconstitutional Witness Requirement in the next few days. Defense counsel's response reinforced Plaintiffs' understanding that Defendants do not intend to leave the Court any ability to provide meaningful relief if Plaintiffs prevail.

Plaintiffs respectfully request that the Court enter a TRO restraining Defendants

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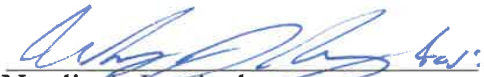
from mailing absentee ballots until the Court has resolved Plaintiffs' Motion for Preliminary Injunction. Should the Court not resolve Plaintiffs' Motion for Preliminary Injunction before October 9, Plaintiffs reserve the right to seek further emergent relief. This Application is supported by the attached Affidavit of Wesley James Furlong.

DATED this 28th day of September, 2020, at Anchorage, Alaska.



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2020, I mailed and emailed a true and correct copy of the foregoing to:

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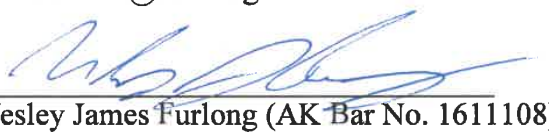

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ARCTIC VILLAGE COUNCIL; LEAGUE OF WOMEN VOTERS OF ALASKA; ELIZABETH L. JONES; and BARBARA CLARK,	)	
Plaintiffs,	)	
vs.	)	
KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,	)	
Defendants.	)	
	)	Case No. 3AN-20-07858 CI

ORDER DENYING
APPLICATION FOR TEMPORARY RESTRAINING ORDER
(CASE MOTION #5)

I. INTRODUCTION

Plaintiffs have filed an *Application for Temporary Restraining Order* (Case Motion #5) asking the court to grant a temporary restraining order ("TRO") restraining Defendants from mailing absentee ballots on October 2, 2020, and to maintain the October 9, 2020 mailing date previously communicated to the public, by which time Plaintiffs anticipate that the court will have resolved the merits of their *Motion for*

Preliminary Injunction.[1] Plaintiffs contend that the TRO is necessary to preserve the court's ability to hear this case and issue any meaningful and necessary relief.

In their *Motion for Preliminary Injunction,* Plaintiffs ask the court to declare application of the Witness Requirement (described below) unconstitutional during the pandemic because it would force individuals particularly vulnerable to COVID-19 to choose between risking exposure to COVID-19 through complying with the Witness Requirement or forgoing their right to vote. The purpose of Plaintiffs' *Application* is to preserve the possibility of modifying the absentee ballot packages to eliminate the Witness Requirement if the court grants Plaintiffs' *Motion for Preliminary Injunction.*

Defendants oppose the *Application* on a number of grounds, including: (1) Alaska law requires the Division of Elections to mail absentee ballots "as soon as they are ready for distribution," and absentee ballot packages are, or shortly will be, ready for mailing; (2) with the ongoing global pandemic, a highly anticipated election, and fear of delays in the mailing process, Defendants have planned for and been working towards mailing absentee ballot packages on October 2 to giving voters extra time to vote; (3) Plaintiffs will not suffer irreparable harm from sending absentee ballots out by October 2 because, if this court grants the requested injunction, the witness requirement will not be enforced regardless of whether the return envelope asks for it or not; (4) there is no time to reprint

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[1] The court has scheduled oral argument on Plaintiffs' *Motion for Preliminary Injunction* and Defendants' *Motion to Dismiss* for Thursday, October 1, 2020. Plaintiffs' *Application* assumes that the court will render a decision on these motions prior to October 9, but Plaintiffs make clear that, if the court does not issue a decision by that day, Plaintiffs would reserve the right to seek further relief from the mailing of absentee ballots.

the ballot envelopes if Plaintiffs' injunction is granted, and thus granting the injunction will serve only to postpone the mailing of absentee ballots and limit the time voters will have to vote and mail back their ballots; and (5) compressing the time to return the ballots could result in overwhelming the U.S. Postal Service's capacity to process the ballots, particularly in rural areas, which could result in postmarks after Election Day or ballots being received more than 10 days after Election Day, both of which would result in rejection of ballots.

As explained below, the court denies Plaintiffs' *Application* because, as a practical matter, it would not be reasonable to require the Division of Elections to modify the absentee ballot packets even if the court granted Plaintiffs' *Motion for Preliminary Injunction*. In addition, the court can still issue meaningful and necessary relief if it grants Plaintiffs' *Motion for Preliminary Injunction*.

II. BACKGROUND INFORMATION

Alaska law requires voters who vote absentee by mail or electronic means to either: (1) sign their ballot envelopes in the presence of a notary or other official authorized to administer oaths; or (2) sign their ballots in the presence of a witness 18 years or older and to obtain a signature from the witness ("Witness Requirement").[2] The witness affidavit box is located on the back of the return envelope; there is also a

[2] AS 15.20.081(d); AS 15.20.066(b)(2).

completion checklist on the return envelope's cover flap that includes the question of "Did you have your signature witnessed?"[3]

With its opposition to the *Application*, Defendants submitted a September 28, 2020 affidavit of Gail Fenumiai, Director of the Alaska Division of Elections. Director Fenumiai's affidavit explains the process of preparing absentee ballot packages, which consist of five items: (1) return ballot envelopes; (2) ballot; (3) secrecy sleeve; (4) instructions; and (5) an outer envelope for mailing the first four items. First, voters' addresses are printed on the return ballot envelope using a piece of equipment. Then, all five items are placed into the inserter bins of a mail inserter machine, which inserts the materials into the outer envelopes and seals them. The machine has limited number of inserter slots, and all of them are used when preparing the absentee ballots for mailing.

In a September 18, 2020 affidavit, Director Fenumiai explained that, due to the non-standard nature of the absentee ballot envelopes, printing orders must be placed at least six weeks in advance. According to the affidavit, the Division began preparing for an increase in absentee voting due to COVID-19 months ago, and it placed orders for absentee ballot envelopes in April, June, and August. As of September 18, the Division had already sent out for printing the instructional cover sheets to be mailed with the absentee ballots. As of the same date, the Division had processed about 70,000 absentee ballot applications. According to Director Fenumiai's September 28, 2020 affidavit, the Division has now processed over 95,000 absentee ballot applications.

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[3] Defendants included a sample of a return envelope with their *Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross-Motion to Dismiss*.

III. ANALYSIS

Plaintiffs ask this court to issue the TRO so that, if they are successful on their *Motion for Preliminary Injunction*, the court can order modifications to the absentee ballot package to reflect elimination of the Witness Requirement. They also suggest that, if the court does not grant the TRO, it will be unable to provide meaningful relief to them if the court agrees that the Witness Requirement should be eliminated during the COVID-19 pandemic. However, as explained below, it would not be practical to modify the absentee ballot packages at this stage of election preparations, and thus the Division of Elections should not be restrained from distributing the ballots to voters. In addition, the court believes it can provide meaningful relief apart from modifying the ballot packages if Plaintiffs prevail on their *Motion for Preliminary Injunction*.

Plaintiffs have made suggestions as to how the absentee ballot packages could be modified if the court grants their *Motion for Preliminary Injunction*. For example, Plaintiffs suggest placing a sticker over the portion of the return ballot requiring a witness signature.[4] To do this, the Division of Elections would need to order or produce tens of thousands of stickers, possibly with explanatory language, and then place a sticker on every ballot return envelope by hand. This solution is not viable because it would take time to procure/produce the stickers and to affix them to the envelopes, which would significantly delay mailing of absentee ballots and create problems associated with a later

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[4] Realistically, two stickers per envelope would be required: one to cover the portion where a witness would sign, and one to cover the portion of the checklist referring to the witness signature.

distribution.[5] Moreover, Ms. Fenumiai's affidavit is clear that staff capacity for such a task is lacking.

Plaintiffs alternatively propose that Defendants include an insertion with the absentee ballot explaining that the Witness Requirement is suspended for the November general election. While printing an insertion would presumably not be as difficult as obtaining/creating stickers, it would need to be hand-inserted into tens of thousands of absentee ballot packages because the machines used for assembling the absentee ballot packages cannot accommodate an additional insert. Another problem is that staff would need to unseal tens of thousands of outer envelopes (the insert machine automatically seals them) and re-seal them in some manner. Finally, even if an insertion explained that the Witness Requirement was suspended, the ballot return envelope would still have the witness signature box as well as the related question ("Did you have your signature witnessed?") on the completion checklist. This could easily generate confusion for absentee voters.

Given the above, even if the court ordered Defendants to refrain from sending absentee ballots prior to the court's decision on Plaintiffs' *Motion for Preliminary Injunction* and Plaintiffs ultimately prevailed, the court would not order modification of the absentee ballot packages. Rather, given the closeness of the election, the hurdles to modifying the absentee ballot packages, and the competing interest in mailing out the

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[5] These include less time to complete and return absentee ballots and increased stress on the postal system associated with more ballots being returned at the same time, which could arguably result in ballots not being postmarked by Election Day and ballots not being received until after the window for counting absentee ballots closes.

absentee ballot packages in a timely manner, the court would grant different relief, such as requiring Defendants to publicize that the Witness Requirement is eliminated for the November 2020 general election due to COVID-19 by posting announcements on appropriate websites, communicating it on television and radio, and posting information about the elimination on social media. The court could also order a separate mailing communicating the elimination of the Witness Requirement.[6]

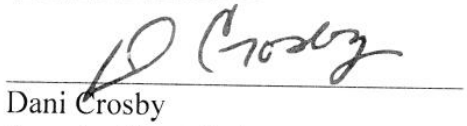
IV. CONCLUSION

In sum, due to the timing of this lawsuit (which is the subject of Defendants' *Motion to Dismiss* based on laches), the practical barriers to modifying the absentee ballot packages to effectively eliminate the Witness Requirement, and the importance of distributing absentee ballots as soon as possible, the court would not order modification of the absentee ballot packages as relief. Moreover, the court believes that it can fashion meaningful relief if Plaintiffs prevail on their *Motion for Preliminary Injunction*.

Plaintiffs' *Application for Temporary Restraining Order* is DENIED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 30 September 2020.



Dani Crosby
Superior Court Judge

[6] Of course, relief would necessarily include an order requiring the Division to count absentee ballots that lacked a witness signature, but complied with the law in all other respects.

I certify that on 9/30/2020 a copy of the above was mailed to each of the following at their address of record:

M. Rabinowitz
S. Kodidine
W. Furlong
N. Landreth
M. Newman
L. Harrison
M. Paton-Walsh

CCt
Judicial Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ARCTIC VILLAGE COUNCIL; LEAGUE OF WOMEN VOTERS OF ALASKA; ELIZABETH L. JONES; and BARBARA CLARK,	)	
Plaintiffs,	)	
vs.	)	
KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,	)	
Defendants.	)	
	)	Case No. 3AN-20-07858 CI

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (CASE MOTION #1) AND DENYING DEFENDANTS' MOTION TO DISMISS (CASE MOTION #3)

I. INTRODUCTION

There are two motions pending before this court: (1) Plaintiffs' *Motion for Preliminary Injunction;* and (2) Defendants' *Cross-Motion to Dismiss*. The court held oral argument on October 1, 2020.

As explained below, laches does not apply to defeat Plaintiffs' claims. With respect to their request for a preliminary injunction, Plaintiffs cannot meet the "balance of the hardships" test, but they have made a clear showing of probable success on the

merits. The court will issue a preliminary injunction eliminating the Witness Requirement for the 2020 General Election.

II. ISSUES PRESENTED

Alaska law requires voters who vote absentee by mail or electronic means to either: (1) sign their ballot envelopes in the presence of a notary or other official authorized to administer oaths; or (2) sign their ballot envelopes in the presence of a witness 18 years old or older and to obtain a signature from the witness ("Witness Requirement"). Plaintiffs ask the court to declare application of the Witness Requirement unconstitutional during the pandemic, arguing that Ms. Jones, Ms. Clark, members of the Arctic Village Council, and members of the League of Women Voters of Alaska are particularly vulnerable to COVID-19 and should not be forced to choose between risking exposure to COVID-19 through complying with the Witness Requirement or forgoing their right to vote.

For their part, Defendants contend that Plaintiffs waited too long to seek relief from the court and that the doctrine of laches requires the court to dismiss their complaint. But if the court declines to do so, Defendants argue that Plaintiffs cannot meet either of the two standards for issuance of a preliminary injunction.

III. COVID-19

In their filings, the parties provide background information on COVID-19. The court will not summarize all of this information, but for purposes of this decision, it is important to recognize that older individuals, immunocompromised individuals, and

members of racial minority groups are at a higher risk of contracting the disease and experiencing severe consequences. Statistics provided by Plaintiffs are illustrative of COVID-19's disproportionate impact on Alaska Natives: in Alaska, Indigenous people make up approximately 15.6% of the population but 43% of the deaths, at least as of September 7, 2020.[1]

IV. VOTING BY ABSENTEE BALLOT

Before voting in any elections, an individual must register to vote. In Alaska, an individual must be a citizen of the United States, be at least 18 years old within 90 days of completing a voter registration form, be a resident of Alaska, not be a convicted felon (unless unconditionally discharged), and not be registered to vote in any other state. An individual may register to vote in Alaska online, by paper, or in person.

Regardless of the method of registering, the voter must have a valid form of identification. To register online, an individual must have a valid Alaska driver's license or state ID card. If registering by paper, the Division of Elections will accept a copy of a current driver's license, state ID card, passport, or birth certificate. Any one of these forms of identification helps the Division in verifying the individual who is registering to vote.

There are several ways to vote in an election in Alaska, including absentee, early, special needs, and in-person. When voting absentee, voters must apply for a ballot by

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[1] Indigenous people have fared even worse in New Mexico (9% of the population but approximately 54% of the deaths) and Wyoming (2% of the population but 43% of the deaths). *See* Plaintiffs' *Motion for Preliminary Injunction* at 11.

submitting their application online, by email, by fax, or by mail. Voters can choose to receive their absentee ballot electronically or by mail. If received electronically, the voters must print out the absentee ballot and then return it by fax or mail once the voter has completed voting. Voters who choose to vote absentee by mail receive an absentee ballot package which includes a ballot, a secrecy sleeve for the ballot, a return envelope for the ballot, and an instruction sheet.

Overseas and military voters receive absentee ballots 45 days before an election, while other voters typically receive absentee ballots about 25 days before an election. Generally, absentee ballots, regardless of whether received electronically or by mail, must be witnessed by a notary, other official authorized to administer oaths, or an individual 18 years old or older.

When mailing absentee ballots, a voter may return the ballot to the Elections Division by any reasonable method. These include in-person delivery, placement in a secure ballot drop-box designated by the Division, or by placing the ballot in the mail. If mailing the ballot, the ballot must be postmarked on or before Election Day in order for the Division to accept it. Generally, the Division will only accept absentee ballots not meeting the postmark requirement if the witness signature is dated on or before Election Day. Absentee ballots are counted if they are received by mail up to ten days after the election date.

V. ANALYSIS

1. Laches Does Not Apply to Bar Plaintiffs' Complaint

In Case Motion #3, Defendants argue that laches applies in this case. To bar Plaintiffs' claim under the doctrine of laches, Defendants must show: (1) that the plaintiff has unreasonably delayed in bringing the action; and (2) that this unreasonable delay has caused undue harm or prejudice to the defendant.[2] The essence of the defense is not merely the lapse of time, but a lack of diligence in seeking relief.

As to unreasonable delay, Defendants argue that pandemic circumstances are neither new nor unforeseen, and that Plaintiffs should have recognized the impacts of COVID-19 on the Witness Requirement months ago and brought suit well before September 8, 2020. Defendants direct the court's attention to the COVID-19 timeline in Alaska (i.e., the Governor's declaration of an emergency, state health mandates, etc.); to Plaintiffs Jones's and Clark's efforts to avoid contact with others starting in late Feb/early March; and Arctic Village's various states of shutdown starting in March. According to Defendants, Plaintiffs were aware of the impacts of COVID-19 on the Witness Requirement months ago, when it might have been possible to re-print election materials, retrain temporary Division employees, and effectively educate the public about the changed requirement, if the court granted injunctive relief.

The court disagrees with Defendants. The pandemic has not been a static or predictable experience in Alaska or elsewhere. COVID-19 statistics have varied

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[2] *City & Borough of Juneau v. Breck*, 706 P.2d 313, 315 (Alaska 1985).

significantly since the Governor of Alaska declared a public health emergency on March 12, 2020. The number of COVID-19 cases and deaths rises and falls daily, not following any particular trajectory for any appreciable amount of time. With 20/20 hindsight, Plaintiffs would have filed suit earlier. But 20/20 hindsight is not required. The pandemic is a shifty beast, and Plaintiffs were not unreasonable to wait until early September to file suit. The court finds that Plaintiffs did not unreasonably delay in bringing their suit.

With respect to undue prejudice, Defendants contend that relief that would include modification or reprinting of absentee ballot packets would work undue harm or prejudice upon them. However, the court's September 30, 2020 order denying Plaintiffs' *Application for Temporary Restraining Order* made clear that the court would not require modification or reprinting of the absentee ballot packages.[3] Defendants further argue that retraining employees to disregard the lack of a witness signature and to continue processing absentee ballots without the witness signature would be significant and challenging. The court disagrees: the Division would simply inform employees processing ballots that no witness signature is required in the 2020 General Election, and

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[3] At oral argument on October 1, Defendants commented that, because the court denied Plaintiffs' *Application for Temporary Restraining Order*, the court necessarily found that Plaintiffs could not show probable success on the merits of their claims. The court disagrees. The *Application* did not seek the same relief as Plaintiffs' *Motion for Preliminary Injunction*. Rather, in their *Application*, Plaintiffs sought an order restraining distribution of absentee ballot packages so that, if the court granted their *Motion for Preliminary Injunction*, the packages could be modified to reflect elimination of the Witness Requirement. Because the court would not have ordered that type of relief in any event, the court denied the *Application*. In doing so, it was not reaching the merits of Plaintiffs' *Motion for Preliminary Injunction.*

direct them to disregard the lack of a witness signature. And, contrary to Defendants' position, the court believes a carefully targeted public education plan would alert the public to the elimination of the Witness Requirement for the 2020 General Election in a manner that would not confuse voters.[4]

Defendants also argue that disenfranchisement could result if the court granted Plaintiffs' *Motion for Preliminary Injunction*. Specifically, Defendants would seek review from the Alaska Supreme Court, and while the matter was pending, voters would return un-witnessed ballots. If the Alaska Supreme Court reversed this court, the un-witnessed ballots would be rejected, which would result in disenfranchisement of voters. However, past election cases suggest that the Alaska Supreme Court moves quickly in these types of cases, and it would likely render a decision in days, not weeks.

Naturally, if the court grants Plaintiffs' *Motion for Preliminary Injunction*, Defendants will have to take steps to communicate and implement the decision in a compressed timeframe. In that sense, there would be prejudice. But "no impact" is not the standard. Rather, Defendants must show *undue* harm or prejudice, and they have failed to do so.

In sum, Defendants have not met their burden to show that laches should be applied here.

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[4] Even if some voters did not learn that the Witness Requirement was eliminated, those voters would either make the personal decision to have their ballot envelopes witnessed or refrain from voting, which they would have done absent the court order anyway.

2. *Plaintiffs are Entitled to a Preliminary Injunction*

Alaska Civil Rule 65 governs preliminary injunctions. When analyzing whether to grant one, the court must first apply the "balance of hardships" standard. If Plaintiffs cannot meet that standard, the court considers whether there is a clear probability of success on the merits of Plaintiffs' claims.[5]

As explained below, Plaintiffs cannot meet the "balance of the hardships" standard. However, they have made a clear showing of probable success on the merits.

a. Balance of Hardships Standard

To obtain a preliminary injunction under the "balance of hardships" standard, Plaintiffs must show: (1) they will suffer certain and irreparable harm if the court does not issue the preliminary injunction; (2) the opposing party can be "adequately protected" if the injury is small compared to the moving party's injury; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case. The issue raised cannot be "frivolous or obviously without merit."[6]

Plaintiffs' claims are not frivolous or obviously without merit: they seek elimination of the Witness Requirement for the 2020 General Election so that they will not have to choose between risking exposure to COVID-19 and exercising their fundamental right to vote.

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[5] *See State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1272 (Alaska 1992); *Alsworth v. Seybert*, 323 P.2d 47,54 (Alaska 2014).

[6] *Id.* at 1273 (quoting *Messerli v. Dept. of Nat. Resources*, 768 P.2d 1112,1122 (Alaska 1989)).

As to harm, Plaintiffs Jones and Clark are elderly, live alone, and are immunocompromised. They are at a higher risk of contracting COVID-19 and experiencing severe consequences: if the Witness Requirement is not eliminated for the 2020 General Election, Plaintiffs Jones[7] and Clark will be forced to choose between voting and risking their health.[8] As to Plaintiff Arctic Village Council, the village has had a strict shelter-in-place order in place since members of the tribe contracted COVID-19 and brought the disease back to the village. Recalling the statistics above regarding the disproportionate impact of this pandemic on Alaska Natives, Plaintiff Arctic Village Council would face the untenable choice of lifting the shelter-in-place order to allow absentee voters living alone (approximately one-third of the village) to access an individual 18 years or older to witness their signature.[9] Finally, more than half of Plaintiff League of Women Voters in Alaska's members are senior citizens and many live

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[7] Plaintiff Clark had her primary ballot witnessed by her mail person. This is no longer possible because the United States Postal Service will no longer allow such witnessing by its employees.

[8] Defendants argue that Plaintiffs can take steps to protect their health by taking precautions against COVID-19 when obtaining a witness signature. This is true. However, such precautions are not a guarantee against contracting the disease. In addition, we do not know everything about the transmission of COVID-19 – for an elderly and immunocompromised individual, the unknown may generate additional anxiety in terms of obtaining a witness signature, even if precautions are taken.

[9] Defendants point to the steps the village took during the primary election to accommodate the Witness Requirement and suggest that Plaintiff Arctic Village Council can avoid any harm by simply doing the same thing again. For the primary election, the village temporarily lifted the lock-down order and the Second Chief of the village walked through the village to witness signatures for those who had not yet voted. But this view does not appreciate an individual's desire to avoid contact in the pandemic, nor does it recognize the importance of allowing the Council to decide how best to protect its community during this ever changing pandemic.

alone. Like Plaintiffs Jones and Clark, these members will be forced to choose between voting and risking their health.

Given the above, the court finds that Plaintiffs have shown that, if the Witness Requirement is not eliminated for the 2020 General Election, they will suffer certain and irreparable harm.

The "balance of the hardships" standard requires that Defendants be adequately protected. This means that the injury can be indemnified by a bond, or it is relatively slight in comparison to the injury which Plaintiffs will suffer if the injunction is not granted. For this prong, Defendants argue that, in *State, Div. of Elections v. Metcalfe*, the Alaska Supreme Court held there is simply no way for the state's interests to be adequately protected if a preliminary injunction will prevent it from administering an election pursuant to its own election laws.[10] Plaintiffs contend that Defendants are over-reading the case. The court agrees with Plaintiffs, but certainly the case confirms that the state's interest in administering an election pursuant to its own election laws is a very important one.

The court cannot say that the elimination of the Witness Requirement, even if only for the 2020 General Election, would be a slight injury. This is particularly true because, if the court eliminated the Witness Requirement, the Division will have to engage in some level of public education, alter its ballot review practices, and possibly even send

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[10] 110 P.3d 976, 979 (Alaska 2005).

out tens of thousands of new mailings to absentee voters, all while preparing for the General Election during a pandemic. This cannot be characterized as a "slight" injury.

Plaintiffs have not met the "balance of the hardship" standard.

b. Probable Success on the Merits

Because Plaintiffs cannot meet the "balance of the hardships" standard, they must make a clear showing of probable success on the merits. Plaintiffs' first claim is that, during the pandemic, the Witness Requirement impermissibly burdens Alaskans' right to vote under Article 5, Section 1 of the Alaska Constitution.

The Alaska Supreme Court has adopted a balancing test where election laws are challenged, involving four steps: (1) determine whether the claimant asserted a constitutionally protected right; (2) if so, assess the character and magnitude of the asserted injury to the right; (3) weigh the precise interests put forward by the State as justifications for the burden imposed by its rule; and (4) judge the fit between the challenged legislation and the state's interest in order to determine the extent to which those interests make it necessary to burden the plaintiff's rights.[11] The test is a flexible one: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the state's interest must be closer.[12]

Plaintiffs have asserted the constitutionally protected right to vote absentee. If the Witness Requirement is not eliminated, it will force Plaintiffs and other voters to choose

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11 *State v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005).

12 *Id.*

between risking their health by coming into contact with a witness or forgo their right to vote entirely.[13] This is a severe burden on Plaintiffs' fundamental right to vote.[14]

Defendants make a variety of arguments as to the precise interests that are served by the Witness Requirement, including protecting against voter fraud and preserving public confidence in the validity of absentee voting.

As to voter fraud, Defendants' briefing provides a lengthy example of such an instance, but the Witness Requirement played no role in detection of the fraud. When asked at oral argument whether the Witness Requirement had ever played a role in detecting fraud, counsel for Defendants could not identify any such instance in recent memory, and was not sure whether it had played a role in detection in the more distant past. Based on the record before it, the court cannot find that the Witness Requirement is an effective tool for detecting voter fraud. Moreover, according to the Heritage Foundation, voter fraud in Alaska is exceedingly rare, with only three reported cases, none of which involved ineligible voting.[15]

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[13] This topic is discussed *supra*.

[14] Plaintiffs want the court to apply strict scrutiny when analyzing the constitutionality of the Witness Requirement, which requires Defendants to show a compelling interest to justify infringement – strict scrutiny is utilized when the burden on a constitutionally protected right is severe. For their part, Defendants argue that the court should apply a heightened scrutiny test – application of this test would require the court to analyze whether the Witness Requirement imposes a substantial, as opposed to severe, burden on the right to vote. The court applies the strict scrutiny test in this order, but had the court applied a heightened scrutiny test, the court would have found that Defendants' interests do not justify infringement of Plaintiffs' right to vote because the Witness Requirement imposes a substantial burden on that right.

[15] *See* Plaintiffs' *Motion for Preliminary Injunction* at 22 (FN 67).

As for public confidence, the Witness Requirement may lend an air of formality to the absentee voting process, but other aspects of Alaska's election laws ensure the integrity of absentee voting, including the fact that voters are required to provide identification and sign absentee ballots under penalty of perjury, which carries a criminal penalty of up to ten years of incarceration.[16] The Witness Requirement does not even play a consistent role in verifying that the person who voted the ballot is who they claim to be. This is because a witness 18 years of age or older has no obligation to review the voter's identification, unlike a notary witness.

Defendants also argue that any last minute changes for the 2020 General Election will likely damage voter confidence in the integrity and consistency of the elections system as a whole. The court disagrees. Given the widespread effects of the pandemic on every aspect of daily life, voters would understand that, for this election only, it is important to protect individuals' rights to protect their health *and* to vote. Indeed, eliminating the Witness Requirement for this purpose could increase voter confidence in Alaska's elections system, showing that even during a pandemic, the state will maximize our citizens' opportunities to vote safely.

Given the above, Defendants' interests are not sufficiently compelling to justify burdening Plaintiffs' right to vote as safely as possible in the 2020 General Election. Plaintiffs have shown a clear likelihood of success on the merits of their claim that the

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[16] AS 12.55.125(d).

Witness Requirement impermissibly burdens Alaskans' right to vote under Article 5, Section 1 of the Alaska Constitution.

Because the court agrees with Plaintiffs that application of the Witness Requirement during the pandemic impermissibly burdens the right to vote, the court will not analyze Plaintiffs' claim under Article I, Section 1 of the Alaska Constitution, which guarantees equal rights, opportunities, and protection under the law to all persons.

VI. CONCLUSION

Based on the above, the court GRANTS Plaintiffs' *Motion for Preliminary Injunction* (Case Motion #1) and DENIES Defendants' *Motion to Dismiss* (Case Motion #3).

By 4:30 p.m. tomorrow (October 6, 2020), the parties shall submit a stipulated order detailing how the court's order shall be implemented by the Division (i.e., how to communicate elimination of the Witness Requirement, etc.). If they cannot agree, each party shall submit a proposed order.

The filing(s) should include: (1) proposed language to be displayed on the Division's website and any other appropriate state websites; (2) proposed language to be utilized in social media (Facebook, Twitter, etc.); (3) a description of how radio and television may be used to communicate the court's decision; (4) discussion of whether it is viable to send an informational mailing to absentee voters, including when such a mailing could be ready; and (5) any other topics the parties believe to be relevant to

implementation of the order. The court will thereafter issue an order specifying how to implement elimination of the Witness Requirement for the 2020 General Election.[17]

While this order grants Plaintiffs' *Motion for Preliminary Injunction*, an order eliminating the Witness Requirement for the 2020 General Election is not yet in effect. This is for two reasons: (1) the court is providing an opportunity for the parties to submit a proposed preliminary injunction order or, in the alternative, to give the court input as to the parameters of the injunction; and (2) if Defendants seek review from the Alaska Supreme Court, they may wish to request a stay of this order – by delaying entry of the preliminary injunction order, the court may avoid confusion that would result from issuing an order eliminating the Witness Requirement, then staying it while the matter is before the Alaska Supreme Court.[18]

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 5 October 2020.

Dani Crosby
Superior Court Judge

I certify that on 10/5/2020 a copy of the above was mailed to each of the following at their address of record:

W. Furlong
N. Landreth
M. Newman
L. Harrison
M. Paton-Walsh
S. Kodidine
M. Rabonowitz

Judicial Assistant

[17] If necessary, the court will hold a status hearing to discuss the filings before issuing its order.

[18] The court is not granting a stay in this order; rather, it recognizes that a motion requesting one may be filed quickly, and thus the court attempts to maintain the status quo to the extent practical.

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK, Plaintiffs, v. KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-20-_____

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DECLARATION OF ELIZABETH L. JONES

My name is Elizabeth L. Jones. I am 71 years old and competent to make this declaration. The facts in this declaration are based on my personal knowledge. If called upon as a witness, I would testify to these facts:

1. I am a U.S. citizen and have lived in Alaska since 2002. I currently live 14 miles from the town center of Fairbanks, Alaska in the 99709 zip code. I am a registered voter at my current address.

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2. I retired in 2012 after 40 years of teaching. I have two degrees in special education and I have taught many non-traditional learners and incarcerated youth. I have also been an assistant director of special education and a school principal. From 2012-2016, I worked a seasonal job at a resort gift shop in Fairbanks. I fully retired at age 67.

3. I understand that the general election is on November 3, 2020, and I wish to vote in that election. Voting and political participation are core parts of my values. The mantra in my family was always, "If you don't vote, you can't gripe." We are lucky in this country to have rights and with rights come responsibilities. I believe that voting is a responsibility and that my vote counts, and that everybody's vote counts.

4. That is why I have been voting for 50 years, since I could validly vote at 21 years of age (the voting age in 1970 was 21). You can count on one hand the number of elections I have missed and they are all primaries. I have voted in this district since 2010.

5. I voted in this year's primary election by absentee ballot on August 3. That was the first time I voted absentee. I did so due out of fear of contracting COVID-19 if I attempted to vote in-person. I am worried that even if poll workers wear masks and take additional

precautions, that other voters will not. There is currently no mask mandate in Fairbanks.

6. I live alone in a log cabin. I have been following public health recommendations around COVID-19 and self-isolating at home since the end of February. I have left my home only when necessary.

7. The in-person encounters I currently have with other people are limited to the following: (a) I buy my groceries online and then pick up curbside while wearing a mask. The curbside delivery person also wears a mask; (b) I have a dog and my veterinarian has curbside service. When I take my dog to the vet, I wear a mask and so do the veterinarian's support staff, and they come out to my car and get my dog. I do not enter the veterinarian's office; (c) I am on several prescriptions, but I only need to pick them up every three months. I pick these up via drive-up, curbside service. I wear a mask and the person who hands me my prescriptions is behind plexiglass and wears a mask and gloves; (d) I take my trash to the transfer station but many times no one else is present. When other people are present, I wait until they are finished and then unload my trash; (e) To get my mail, I go down to the bank of mailboxes located on the route where I live and wait until the area is clear of other people before collecting my mail.

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8. I have eliminated contact with other people, including those in my quilting social group, to every reasonable extent possible. I now keep in touch with other people via phone and internet only, including my daughter who lives in Oklahoma and my son who lives in Arizona.

9. I am practicing social distancing and otherwise self-isolating because I am truly concerned about contracting COVID-19. While I understand that anyone can contract COVID-19, experience health issues from it, and potentially die from it, I believe I am at particular risk for serious complications from COVID-19 because of my age and three underlying medical conditions.

10. I have high blood pressure and am obese. And because I grew up around smokers, I was diagnosed in 2006 as having the initial stages of chronic obstructive pulmonary disease or COPD.

11. I understand that my age and my underlying health conditions put me at an increased risk for severe illness from COVID-19.

12. I do not anticipate feeling safe leaving my home unnecessarily until a vaccine against COVID-19 is developed or a cure becomes available. I am also fearful that leaving my home will become more dangerous to me if social distancing regulations are relaxed or

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lifted before a vaccine or cure are available, because keeping distant from other members of the community while outside the home will only become harder.

13. I want to vote in the general election on November 3 but I am afraid to go to the polls because it would make it more likely that I could contract COVID-19. That is why I intend to vote by absentee ballot.

14. But, because I live alone, I do not have someone who could easily be a witness for an absentee ballot. Even if I could find someone like that, I do not wish to risk coming into contact with such a person because of the continuing transmission of COVID-19 and the serious health risks I will face if I develop the disease.

15. I reached out to the Division of Elections about voting absentee and my concerns about finding a witness and allowing them into my home. They told me I could have my mail person be my witness and that is what I did for the primary election.

16. On August 3, 2020, I drove down the mountain from my log cabin and waited three hours in the rain for the mail person to arrive. I had a mask on but she did not because she was not expecting anyone.

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We did our best to maintain six feet of distance while she witnessed me completing my ballot. The mail person then took my ballot.

17. I understand that asking my mail person to witness my ballot for the general election is no longer a possibility due to a new directive from the USPS. Without this option available, I may have to undertake an even more significant health risk in order to vote. That is why I hope the witness requirement will be removed. If it is not, I will be forced to make a devastating choice between my right to vote and my health.

18. My daughter developed COVID-19, had severe symptoms, and eventually recovered. I am afraid that I will develop the disease but may not be so lucky given my age and underlying health conditions. I may not survive.

I certify under penalty of perjury that the foregoing is true, and that a notary public or other official empowered to administer oaths is unavailable.

Executed on September 8, 2020

s/ Elizabeth L. Jones
Elizabeth L. Jones

**Original signature and Form TF-835 forthcoming*

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SUPERIOR COURT FOR THE STATE OF ALASKA
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ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK, Plaintiffs, v. KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-20-_____

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DECLARATION OF BARBARA CLARK

My name is Barbara Clark. I am 72 years old and competent to make this declaration. The facts in this declaration are based on my personal knowledge. If called upon as a witness, I would testify to these facts:

1. I am a U.S. citizen and currently live in Anchorage, Alaska in the 99504 zip code. I am a registered voter at my current address. I have

lived at this address for fourteen years and in Alaska for twenty-four years.

2. I have been a teacher for twenty years. I currently teach English at West High School, a public high school in Anchorage. I am teaching online due to COVID-19, as are all other teachers in the school district. We stopped in-person teaching at my school in early March due to COVID-19.

3. I understand that the general election is on November 3, 2020, and I wish to vote in that election. I call myself a "super voter." I vote in all major elections. Voting and political participation are core parts of my values. I believe that voting is a civic sacrament. It is the cornerstone of our democracy and core to being an American. I cannot imagine living in this country and not participating as a voter.

4. I voted in this year's primary election by absentee ballot. That was the first time I voted absentee. I did so due out of fear of contracting COVID-19 if I attempted to vote in-person.

5. I live alone. I have been following public health recommendations around COVID-19 meticulously and self-isolating at home since early March. I have had my groceries delivered to my home via Instacart and takeout food delivered to my home via Doordash. I have left my home to

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go to another indoor location only when necessary—in fact less than a dozen times in the last six months. For example, I left my home once for a medical appointment and once to take a COVID-19 test. I also leave my home weekly to take my car out to ensure its battery doesn't die. But I do not get out of my car when I drive it for this purpose.

6. I wear a mask whenever I leave my condominium unit, even when I go down to the bank of mailboxes to collect my mail or walk down the hallway I share with three other units.

7. I am practicing social distancing and otherwise self-isolating because I am truly concerned about contracting COVID-19. While I understand that anyone can contract COVID-19, experience health issues from it, and potentially die from it, I believe I am at particular risk for serious complications from COVID-19 because of my age and two underlying health conditions: I have high blood pressure and am obese.

8. I understand that my age and these underlying health conditions put me at an increased risk for severe illness from COVID-19.

9. I do not anticipate feeling safe leaving my home unnecessarily to be in a place where there are other people until a vaccine against COVID-19 is developed or a cure becomes available. I am also fearful

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that leaving my home will become more dangerous to me if social distancing regulations are relaxed or lifted before a vaccine or cure are available, because keeping distant from other members of the community while outside the home will only become harder.

10. I want to vote in the general election on November 3 but I am afraid to go to the polls because it would make it more likely that I could contract COVID-19. That is why I intend to vote by absentee ballot.

11. But, because I live alone, I do not have someone who could easily be a witness for an absentee ballot. For the primary election, I had to ask a neighbor to come to my door and witness me completing my ballot. We both wore masks and tried to maintain six feet of distance between us. We used a "chair method" where I completed the ballot, placed it on a chair, and stepped back, and then he picked up the ballot, signed it, and returned it to the chair.

12. Taking these steps to complete my absentee ballot made me very uncomfortable and felt like an unnecessary risk to both me and my neighbor.

13. I do not wish to risk another such contact because of the continuing transmission of COVID-19 and the serious health risks I

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will face if I develop the disease. That is why I hope the witness requirement will be removed. If it is not, I will be forced to make what I consider to be a devastating choice between my right to vote and my health.

I certify under penalty of perjury that the foregoing is true, and that a notary public or other official empowered to administer oaths is unavailable.

Executed on September 8, 2020

s/ Barbara Clark
Barbara Clark

**Original signature and Form TF-835 forthcoming*

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK, Plaintiffs, v. KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-20-_____

AFFIDAVIT OF TIFFANY YATLIN IN SUPPORT OF PRELIMINARY INJUNCTION

1. My name is Tiffany Yatlin and I am the tribal administrator for Arctic Village Council.

2. I am over the age of 18 and competent to testify to the information herein if called to do so. I have personal knowledge of the information contained in this statement.

3. Arctic Village Council is a federally recognized Indian tribal government whose governing body is recognized by the Secretary of the U.S. Department of the Interior as Arctic Village. The Arctic Village Council exercises powers of self-governance and jurisdiction over its Neets'ąii Gwich'in tribal members living within Arctic Village. The Council is responsible for the health, safety, and welfare of its members.

4. Arctic Village is situated on the southern boundary of the Arctic National Wildlife Refuge, along the east fork of the Chandalar River and about 100 miles north of Fort Yukon, Alaska.

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5. In response to the COVID-19 pandemic, the Arctic Village Council took immediate steps to protect the community from the spread of the virus. Arctic Village is accessible only by small, single engine airplanes and is located approximately 233 air miles from the nearest hospital facilities in Fairbanks, Alaska. Within Arctic Village, there is only one small clinic, staffed by one heath aide to serve the entire community of about 150 people.

6. On or about March 13, 2020, the Arctic Village Council published policies establishing strict social distancing guidelines for village residents, closing all tribal facilities to the public, and ordering tribal staff to begin working from home. On or about April 1, 2020, the Arctic Village Council closed the village to all outside visitors and restricted all air carrier passenger service into the community. With limited air mail and freight being delivered to the village, the Arctic Village Council has relied on tribal members to provide food to the community through subsistence hunting and fishing.

7. While many communities in Alaska are lifting their travel restrictions, the Arctic Village Council continues to work directly with the small regional air carriers to limit the number of outside passengers coming into the community. All travelers arriving in the village must take a COVID-19 test and be quarantined for at least 7 days, even after a negative test result.

8. Despite our best efforts to keep COVID-19 out of our small community, there have at least three documented cases of the virus in Arctic Village. In response to these positive test results, the Arctic Village Council ordered a community-wide shelter in place order on or about May 16, 2020. This order restricted all residents from gathering with any person outside of their household, and prohibited residents from congregating at community facilities such as: the tribal office, the community hall, the village store, and the post office. The Arctic Village Council hired tribal members to work as a community safety patrol to ensure the shelter in place order was being adhered to.

9. Due to positive cases of COVID-19 in our village, our in-person polling place was closed in the August primary. As such, no community member voted in person. As a result of the in-person polling places being closed voting by mail is the only option for our tribal members to vote.

10. However, we have severe limitations on our ability to use mail in voting in Arctic Village. The village only has one, small post office. Due to the village-wide lockdown, the post office has been closed to the public. The post office is also the only location in the community where tribal members may have something notarized by a notary public. We are having community members act as mail carriers to pick up and drop off mail at each resident's home.

11. There are at least 50 people in the community who do not live in a household with anyone else over 18 years of age. This means that in order to have their witness requirement fulfilled on their mail in ballots, a resident must break quarantine and leave their homes to have their ballots witnessed and notarized. Given all that is going on with this pandemic, having to comply with the witness requirement totally forecloses the ability of tribal members to vote by mail under these circumstances.

12. As such, the witness requirements on ballots pose a severe burden because tribal members are trying to isolate during lockdown. The Council has had to divert significant resources trying to educate people about how to vote now that they can't do so in person and trying to figure out what to tell people about vote by mail witness requirement.

13. The Council believes voting is a fundamental right and it is important for the people to vote because that's how they can exercise their right to participate in democracy and have the Tribe's voice and its Tribal members' voices heard. However, we are also trying to balance the health and safety of our community. COVID-19 has been especially hard hitting in Native communities, and even here in Arctic Village we have had community members have to be

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medevacked by air ambulance because of complications related to COVID-19. The risk is not going away, and there is no way our people can fully participate in the upcoming general election with the current restrictions on mail in ballots in place.

14. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED THIS 3rd day of September 2020.

Tiffany Yatlin

Cecilia Wield 9-3-20
Postmaster

SEP 3 2020

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

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ARCTIC VILLAGE COUNCIL *et al.*,

Plaintiffs,

v.

KEVIN MEYER *et al.*,

Defendants.

Case No. 3AN-20-07858 CI

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Every eligible Alaskan should be able to vote—even during a pandemic. But Defendants, despite acknowledging the unprecedented circumstances created by the COVID-19 global pandemic, are forcing Plaintiffs, and others like them, to choose between their health and their right to vote. Instead of accommodating voters to ensure that all who are eligible can vote, Defendants are insisting on enforcing the unconstitutionally burdensome Witness Requirement. That is the core of this case.

And the case is simple: during the pandemic, Plaintiffs should not be forced into personal contact with others, when public health officials are recommending that personal contact be limited. Defendants raise a host of objections to this commonsense objective, none of which have merit. Defendants first assert that Plaintiffs' relief would require them to reprint the general election absentee ballots, but the solution is far less complicated. Plaintiffs simply want Defendants to notify voters of the suspended Witness Requirement and count unwitnessed ballots.

Defendants also argue, in their Motion to Dismiss, that laches bars this action. [1] But the need for a swift remedy for the November general election only became clear after the mid-August primary—when Defendants' enforcement of the Witness Requirement during the accelerating pandemic caused actual voter disenfranchisement. Had Plaintiffs filed any sooner, Defendants would have argued that it was too early.

Ultimately, this case reduces to balancing the burden on voters of having to choose

[1] This is the only argument Defendants raise in their Motion to Dismiss. Any further briefing by Defendants is limited to the issue of laches.

between their health and their vote against Defendants' justifications for not easing those burdens. On the one hand, the injury occasioned by the burden is irreparable; on the other hand, the interests asserted by Defendants are minimal and can be met by other means.

Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss and grant an injunction allowing the most vulnerable Alaskans to vote in this election without risking their life or health.

ARGUMENT

I. Laches Does Not Bar This Action.

The Court should deny Defendants' Motion to Dismiss based on laches.[2] "Laches is an equitable defense available 'when a party delays asserting a claim for an unconscionable period.'"[3] The defendant must establish "two 'independent' elements before the equitable defense of laches will be applied."[4] The defendant must establish: "(1) that the plaintiff has unreasonably delayed in bringing the action, and (2) that this unreasonable delay has caused undue harm or prejudice to the defendant."[5] Determining

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[2] A complaint should not be dismissed for failure to state a claim upon which relief can be granted "*unless it appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253–54 (Alaska 2000) (emphasis in original, citation omitted). "Because complaints must be liberally construed, [such a motion] is viewed with disfavor and should rarely be granted." *Id.* To survive a motion to dismiss, a complaint need only allege "a set of facts consistent with and appropriate to some enforceable cause of action." *McGrew v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 106 P.3d 319, 322 (Alaska 2005). Moreover, a complaint may be dismissed because of an affirmative defense such as laches only when the defense clearly appears on the face of the pleading. *Martin v. Mears*, 602 P.2d 421, 427–28 (Alaska 1979).

[3] *Kollander v. Kollander*, 322 P.3d 897, 903 (2014) (quoting *Burke v. Maka*, 296 P.3d 976, 979 (2013)) (internal quotation marks omitted).

[4] *City & Borough of Juneau v. Breck*, 706 P.2d 313, 315 (1985) (quoting *Moore v. State*, 553 P.2d 8, 15 (Alaska 1976)).

[5] *Id.*

whether an action is barred by laches is a fact-and case-specific inquiry. As the Alaska Supreme Court has explained, "[t]he point in time at which plaintiffs must exercise their remedies in court or lose their right to assert their cause of action depends on the facts and equitable considerations in each case[.]"[6] These considerations include "the knowledge of the plaintiffs, the conduct of defendants, the interests to be vindicated, and the resulting prejudice."[7] The party asserting the defense of laches bears the burden of establishing both elements of the defense.[8]

A. Plaintiffs Did Not Unconscionably Delay in Asserting Their Claims.

"The essence of laches is not merely the lack of time, but also a lack of diligence in seeking a remedy, or acquiescence in the alleged wrong and prejudice to the defendants."[9] Simply measuring the passage of time is insufficient in determining whether a plaintiff unconscionably delayed asserting a claim. As the Alaska Supreme Court articulated in *Moore v. State*:

> [I]n determining when laches should be applied, our concern is not so much with when the alleged wrong occurred, as it is with when, in light of any resulting prejudice to defendants, *it became reasonable to expect plaintiffs to act upon the wrong.* It is from the latter point onward that the plaintiffs' time begins to run.[10]

In other words, "[t]he ultimate questions are whether and when a reasonable person would have been galvanized into legal action."[11]

Although the Witness Requirement is not new in Alaska, this case is not a facial

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6 *Moore*, 553 P.2d at 16.
7 *Id.*
8 *Kollander*, 322 P.3d at 903.
9 *Id.* (quoting *Schaub v. Schaub*, 305 P.3d 337 (2013)).
10 553 P.2d at 16 (emphasis added).
11 *Kohl v. Legoullon*, 936 P.2d 514, 517 (1997) (citing *Breck*, 706 P.2d at 316).

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challenge to that Requirement. It is an as-applied challenge, and the unprecedented circumstances that have necessitated this suit did not appear fully until late August. First, it was not until August, 17, 2020, the day before the primary, that Plaintiff Arctic Village Council learned that the pandemic made in person voting impossible and closed the polling place.[12] From that point on, the only way for Arctic Village Council's members to vote in the primary election was by absentee ballot. And, in order to fulfill the Witness Requirement for absentee ballots, Tribe members who did not live with another resident at least eighteen-years-old would have needed to break quarantine to secure a witness. Other communities across the state experienced similar problems.[13] In Nunam Iqua, for example, the community was in lockdown because of COVID-19 cases and could offer only in-person absentee voting by appointment for the 2020 primary.[14] According to Defendants, only ten people voted through this method, in a community of over two hundred people.[15]

The true extent of the disenfranchisement caused by the enforcement of the Witness Requirement during the pandemic did not become fully apparent until the end of August, when the State acknowledged that 456 ballots were rejected due to "improper or insufficient witnessing."[16] Even now, it remains unclear how many people simply did not vote because they had to comply with the Witness Requirement and because of their

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12 Aff. of Yatlin ¶ 9.
13 *See* Aff. of Horton ¶¶ 2–3.
14 *Id.* ¶ 3.
15 *Id.*
16 James Brooks, *More Than 1,200 Absentee Ballots Were Rejected in Alaska's Primary. Civil Rights Groups are Asking for A Fix.*, Anchorage Daily News (Sep. 3, 2020), https://www.adn.com/politics/2020/09/02/more-than-1200-absentee-ballots-were-rejected-in-the-primary-civil-rights-groups-are-asking-for-a-fix/.

concerns about COVID-19. It is clear, however, that the Witness Requirement is burdening voters and preventing votes from being counted.[17]

The reason that the full extent of the potential for disenfranchisement was not evident until August is that the dangers of the resurgent pandemic were not evident until then. By their terms, Governor Dunleavy's first stay-at-home order and limits on intrastate travel were to be reevaluated by April 11.[18] The initial suspension of certain court proceedings in March was only through April 3.[19] Had Plaintiffs filed suit then, Defendants would have argued that the suit was premature. By mid-May, there were only thirty-five active cases in Alaska, and it looked as if Alaska had dodged a bullet.[20] Summer camps and schools reopened and, as late as July 9, the Anchorage School District anticipated classes would begin in person two days a week on August 20 and move to full-time, in-person classes shortly thereafter.[21] The Alaska Supreme Court did not extend its suspension

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[17] Many elections are decided by fewer than 456 votes. In the 2020 primary, Senate B was decided by 14 votes, House 1 by 8, House 2 by 39, House 23 by 4 and House 35 by 73. Alaska Div. of Elections, *2020 Primary Election: Election Summary Report: August 18, 2020: Official Results* (Aug. 31, 2020), https://www.elections.alaska.gov/results/20PRIM/data/sovc/ElectionSummaryReportRPT20.pdf.

[18] Office of Governor Mike Dunleavy, *Governor Issues COVID-19 Health Mandates on Social Distancing, Limiting Intrastate Travel* (Mar. 27, 2020), https://gov.alaska.gov/newsroom/2020/03/27/governor-issues-covid-19-health-mandates-on-social-distancing-limiting-intrastate-travel-2/.

[19] Alaska Supreme Court, *Special Order of the Chief Justice, Order No. 8131* (Mar. 19, 2020), https://public.courts.alaska.gov/web/covid19/docs/socj-2020-8131.pdf.

[20] *COVID-19 Cases by Onset Date*, AK COVID-19 Cases Dashboard, https://experience.arcgis.com/experience/6a5932d709ef4ab1b868188a4c757b4f (last visited Sept. 23, 2020).

[21] Emily Goodykoontz, *Anchorage School District Will Likely Start With In-Person Classes Just 2 Days A Week but Soon Change to 5 Days*, Anchorage Daily News (July 10, 2020), https://www.adn.com/alaska-news/education/2020/07/09/anchorage-school-district-will-likely-start-with-in-person-classes-just-2-days-a-week-but-soon-change-to-5-

of jury trials until August 6.[22]

And it was not until August that the United States Postal Service ("USPS") publicized a policy change that prohibited its employees from serving as witnesses for absentee ballots.[23] As Defendant Fenumiai noted in a letter to the USPS: "Rural Alaska relies heavily on post officials as they are often [] the only option for a [ballot] witness."[24] While Plaintiff Elizabeth Jones was able to have her ballot signed by a mail carrier in the primary, the new USPS policy strips her of that option for the general election.

Defendants admit that they did not begin planning for increased absentee voting due to the pandemic until well into the summer. Defendant Fenumiai states that the Division of Elections ("Division") ordered only 64,500 absentee ballot envelopes in March, less than half those cast in the 2016 and 2018 primary and general elections.[25] It was not until June and August that Defendants ordered 233,500 and 112,500 absentee ballot envelopes, respectively.[26] This is still nearly 56,000 less than the total votes cast in the 2018 primary

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days/.

[22] Alaska Supreme Court, *Special Order of the Chief Justice, Order No. 8183* (Aug. 6, 2020), https://public.courts.alaska.gov/web/covid19/docs/socj-2020-8183.pdf.

[23] *See* James Brooks, *In Rule Change, Postal Service Forbids Employees From Signing Absentee Ballots as Witnesses*, Anchorage Daily News (Aug. 19, 2020), https://www.adn.com/politics/2020/08/18/in-rule-change-postal-service-forbids-employees-from-signing-absentee-ballots-as-witnesses/.

[24] *Id.*

[25] Aff. of Fenumiai ¶ 14; Alaska Div. of Elections, *Primary and General Election: Absentee and Questioned Ballots Statistics*, https://www.elections.alaska.gov/doc/info/statstable.php (last visited Sept. 23, 2020) (click "11/06/2018 General" and 8/21/2018 Primary" to see 2018 absentee voting statistics); Alaska Div. of Elections, *Primary and General Election: Absentee and Questioned Ballots Statistics*, https://www.elections.alaska.gov/doc/info/statstable.php (last visited Sept. 23, 2020) (click "11/08/2016 General" and 8/16/2016 Primary" to see 2016 absentee voting statistics).

[26] Aff. of Fenumiai ¶ 14.

and general elections (400,736),[27] and 64,000 less than the total votes cast in the 2016 primary and general elections (410,088).[28] Defendants' actions were understandable, as, unlike the experience with COVID-19 in the Lower 48, it looked as if Alaska's would be different.[29] In Alaska, thanks to an early lock-down and natural isolation, cases were

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[27] Alaska Div. of Elections, *2018 General Election: November 6, 2018: Official Results* 1 (Nov. 26, 2018), https://www.elections.alaska.gov/results/18GENR/data/results18.pdf; Alaska Div. of Elections, *2018 Primary Election: Election Summary Report: August 21, 2018: Official Results* 1 (Sept. 4, 2018), https://www.elections.alaska.gov/results/18PRIM/data/results10.pdf.

[28] Alaska Div. of Elections, *2016 General Election: November 8, 2016: Official Results* 1 (Nov. 30, 2016), https://www.elections.alaska.gov/results/16GENR/data/results.pdf; Alaska Div. of Elections, *2016 Primary Election: Election Summary Report: August 16, 2016: Official Results* 1 (Sept. 6, 2016), https://www.elections.alaska.gov/results/16PRIM/data/Results.pdf.

[29] In this regard, Defendants' pointing to COVID-19 related suits filed by other state chapters of the League of Women Voters is decidedly misplaced. When the League of Women Voters ("LWV") of Virginia—a state with 11.5 times the population of Alaska—sued on April 17, Virginia reported 602 new cases that day alone, for a total of 7,491 since the outbreak began. Brian Reese, *Virginia April 17 COVID-19 Update: More Than 600 New Cases Friday, Highest Per Day Increase So Far, 23 New Deaths*, WAVY (Apr. 17, 2020), https://www.wavy.com/news/health/coronavirus/virginia-april-17-covid-19-update-more-than-600-new-cases-friday-highest-per-day-increase-so-far-23-new-deaths/. That same day, Alaska reported nine new cases, for a total of 309. Zaz Hollander & Morgan Krakow, *Both Nome and Kodiak's Sole COVID-19 Cases Involve Employees at GCI Stores*, Anchorage Daily News (Apr. 18, 2020), https://www.adn.com/alaska-news/2020/04/17/both-nome-and-kodiaks-sole-covid-19-cases-involve-employees-at-gci-stores/. When the LWV of North Carolina filed its case on May 22, North Carolina had 758 new cases and 21,618 total confirmed cases. *NC May 22 Covid-19 Update: 2nd Highest Daily Increase Ahead of 'Modest" Phase 2; Gov. Cooper Holds Briefing with Task Force,* WAVY (May 22, 2020), https://www.wavy.com/news/health/coronavirus/nc-may-22-covid-19-update-north-carolina-reports-second-highest-daily-case-increase-ahead-of-modest-phase-2-reopening/ (last visited Sept. 23 2020). That day, Alaska reported two new cases for a total of 404 confirmed cases. Cheyenne Matthews, *Two New COVID-19 Cases, No New Recovered Cases Friday*, Alaska's News Source (May 22, 2020), https://www.alaskasnewssource.com/content/news/Two-new-COVID-19-cases-no-new-recovered-cases-Friday-570713311.html. When the LWV of Rhode Island filed on July 23, Rhode Island had just passed 1,000 deaths and was already well into the decline of its first wave. Shaun Towne & Logan Wilber, *COVID-19 Death Toll Tops 1,000 in RI; 76 New Cases Reported*, WPRI (July 23, 2020), https://www.wpri.com/health/coronavirus/july-23-ri-coronavirus-update/. As of that day, only nineteen Alaskans had died. Zaz Hollander &

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initially fewer and did not begin to grow exponentially until June.[30] As a recent news story explained: "Alaska's isolation and its travel policies have controlled spread better than in most other states, but six months in, it's clear that COVID-19 has swum the moat."[31] If Defendants did not fully appreciate the potential effect of the pandemic on voting until August, then Plaintiffs cannot be charged with that knowledge.

Astonishingly, Defendants assert that the obstacles to Plaintiffs' voting is a "problem . . . of Arctic Village's own making"[32] because the Council imposed a complete shelter-in-place regimen after social-distancing did not prevent outbreaks in the Village.[33] It is unfortunate that Defendants believe that a viable alternative to losing the right to vote is for Plaintiffs to risk their health and lives, and the health of their families and communities. Defendants' blame-the-victim theory cannot support a finding that Plaintiffs "unconscionably" delayed filing this action.

B. Defendants Are Not Unduly Prejudiced.

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Annie Berman, *A Shift in Alaska Seafood Plant Virus Outbreaks Means They May Be Harder to Contain,* Anchorage Daily NEws (July 27, 2020), https://www.adn.com/alaska-news/2020/07/23/a-shift-in-whos-involved-in-alaska-seafood-industry-outbreaks-means-virus-may-be-harder-to-contain/.

[30] *See supra* note 20.

[31] Ian Dickson, *Timeline: Looking Back at Six Months of COVID-19 in Alaska*, KTOO (Sep. 12, 2020), https://www.ktoo.org/2020/09/12/covid-19-retrospective/.

[32] Defs.' Opp'n to Mot. for Prelim. Inj. & Cross-Mot. to Dismiss (hereinafter "Opp.") at 27.

[33] Compl. ¶¶ 12, 47. Many other tribes have taken similar precautions. *See, e.g.*, Krysti Shallenberger, *Some Lower Yukon Villages are Going on Lockdown to Stop Spread of COVID-19*, KYUK (July 23, 2020), https://www.ktoo.org/2020/07/23/some-lower-yukon-villages-are-going-on-lockdown-to-stop-spread-of-covid-19/; Anna Rose MacArthur, *4 Y-K Delta Villages Lock Down to Protect Communities from Coronavirus*, KYUK (Aug. 25, 2020), https://www.kyuk.org/post/4-y-k-delta-villages-lock-down-protect-communities-coronavirus.

For laches to bar a claim, the Court must find not only that plaintiffs unconscionably delayed asserting their claims, but also "that this unreasonable delay has caused undue harm or prejudice to the defendant."[34] In determining whether a defendant has suffered undo prejudice, the Court must "weigh the importance of the public interest in question[]. . . as a part of the overall process of balancing the equities of a particular case to determine whether plaintiffs are guilty of inequitable delay."[35] Here, Plaintiffs' purported delay in bringing this action will not cause Defendants undue prejudice. Even if it did, any prejudice is clearly outweighed by the public interest in protecting Plaintiffs' fundamental right to vote and ensuring that the public can vote safely in the general election.

Defendants' argument that they would suffer undue prejudice from the timing of Plaintiffs' claims is rooted in a fundamental mischaracterization of Plaintiffs' claims and requested relief. Defendants assert that Plaintiffs request Defendants re-print *all* absentee ballots before the mailing deadline. This is inaccurate. Plaintiffs' goal is for everyone to be able to vote without having to risk their own, their families', their friends', and their neighbors' lives. There are simple, practical ways to address the burden imposed by the Witness Requirement. That is why Plaintiffs request only two basic remedies.

First, Plaintiffs ask that Defendants count all absentee ballots received that lack a witness signature. This requires almost no effort on Defendants' part except informing those persons canvassing ballots to include non-witnessed ballots among those counted in

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34 *Breck*, 706 P.2d at 315 (quoting *Moore*, 553 P.2d at 15).
35 *Moore*, 553 P.2d at 19 (internal citations omitted).

this election. And this work does not begin until at least 7 days before election day. Second, Plaintiffs request that Defendants either place a sticker over the witness signature printing on the ballot informing the voter it is no longer required,[36] or insert a sheet inside the envelope informing voters that they do not need to provide a witness signature for this election only. Defendants have done this on several occasions, for example when they forgot to include a ballot statement in the official election pamphlet in 2014.[37]

Moreover, in determining whether laches bars a claim, the Court must consider not only prejudice to Defendants, but also "the interests to be vindicated."[38] Here, any prejudice to Defendants is heavily outweighed by the public interest in protecting Plaintiffs'—and all Alaskans'— fundamental right to vote and ensuring that the public can vote safely in the general election, a right guaranteed by the Alaska Constitution.[39]

II. Plaintiffs' Are Entitled to a Preliminary Injunction Because the Balance of Hardships Tips Clearly in Their Favor.

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[36] *See* Stipulation & Partial Consent Decree, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct., 2d Judicial Dist. Aug. 3, 2020), https://www.aclu-mn.org/sites/default/files/field_documents/62-cv-20-3149_stipulation_and_consent_decree_0.pdf.

[37] Pat Forgey, *Voter Pamphlet Omission May Have Affected Earliest-Mailed Ballots*, Anchorage Daily News (Oct. 17, 2014), http://www.adn.com/politics/article/voter-pamphlet-issue-may-have-affected-1900-ballots/2014/10/17. Indeed, just this month, Defendants sent absentee ballots to military and overseas voters that listed the wrong Democratic candidate for House District 28. James Brooks, *Some Absentee Ballots List the Wrong Candidate in an Anchorage House Race*, Anchorage Daily News (Sept. 21, 2020), https://www.adn.com/politics/alaska-legislature/2020/09/21/some-absentee-ballots-list-the-wrong-democratic-candidate-in-an-anchorage-house-race/.

[38] *Moore*, 553 P.2d at 16.

[39] Alaska Const. art. V., § 1; *accord Thomas v. Croft*, 614 P.2d 795, 798 (Alaska 1980) (recognizing "the strong public policy favoring" vindicating fair elections); *McCormick v. Smith*, 799 P.2d 287, 288 (Alaska 1990) (internal citation omitted) (determining that the plaintiff was a public interest litigant, the Court concluded that "Smith sought to maintain the procedural integrity of the election process. . . . To be sure, the benefit to the public had she prevailed would seem slight. It would nevertheless seem sufficient.").

A. The Balance of Hardships Does Not Invariably Tip Against Plaintiffs in the Elections Context.

In *State, Div. of Elections v. Metcalfe*, the Alaska Supreme Court reiterated that "[t]he showing required to obtain a preliminary injunction depends on the nature of the threatened injury."[40] Where the threatened injury to plaintiffs is irreparable and the opposing party is adequately protected, Alaska courts balance the hardships; otherwise, Plaintiffs must make a "clear showing of probable success on the merits."[41] Because the State's interests are adequately protected, the balance of the hardships test is applicable.

Defendants would have this Court over-read *Metcalfe* to hold that every challenge implicating an election law requires the "clear showing" standard.[42] Although, as set forth below, Plaintiffs easily meet that standard too, Defendants misconstrue *Metcalfe*. *Metcalfe* was a facial challenge to a statute regulating ballot access. Because the State's interest in requiring a political group to first demonstrate some political support before compelling the State to recognize it as a political party and bestow upon it the benefits concomitant with that recognition . . . "cannot be guaranteed by a bond" and was not "slight" when compared with the plaintiff's interests, the Alaska Supreme Court ruled that the balance of the hardships test was not applicable.[43]

Here, to the contrary, Plaintiffs are not challenging application of the State's Witness Requirement in all respects, but only in the context of the November 2020 election during the pandemic. Moreover, while in *Metcalfe,* there was no way to protect the State's

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40 110 P.3d 976, 978 (Alaska 2005).
41 *Id.*
42 Opp. at 37–38.
43 *Metcalfe*, 110 P.3d at 979.

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interests once the plaintiff was put on the ballot, here, as set forth below, there are many other ways that the State's interests are safeguarded. When weighed against Plaintiffs' fundamental right to vote, the balance here clearly tips in Plaintiffs' favor and in favor of a preliminary injunction.

1. Plaintiffs Face Certain and Irreparable Harm.

The risk of serious, lasting illness or death is an irreparable harm.[44] The right to vote is fundamental[45] and the loss of that right in a single election is an irreparable harm.[46] Unless this Court enjoins Defendants from enforcing the Witness Requirement, Plaintiffs will face a choice between these two immediate and irreparable harms: risk their life and health or forego their fundamental right to vote. In *League of Women Voters of Virginia v. Virginia State Board of Elections*, which led to the suspension of Virginia's witness requirement for the presidential primary, a federal court in Virginia explained that the U.S. Constitution "does not permit a state to force such a choice on its electorate."[47] Neither should the Alaska Constitution, which is no less protective.

During this extraordinary time in which the pandemic has necessitated social

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[44] *Thakker v. Doll*, 451 F.Supp.3d 358, 365 (M.D. Pa. Mar. 31, 2020) (noting that there "can be no injury more irreparable" than the "very real risk of serious, lasting illness or death.").

[45] *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) ("*Vogler I*"); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

[46] *See, e.g.*, *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020) ("The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm."); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (noting that "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law").

[47] 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) (citing *Harper*, 383 U.S. at 670).

distancing, lock-downs, and self-quarantines, the Witness Requirement imposes a substantial burden on Plaintiffs' right to vote. Courts across the country have recognized as much.[48] For those who are at risk of developing serious or life-threatening complications from COVID-19, "every potential exposure is a risk—even when taking appropriate precautions, such as wearing a face mask, frequently washing one's hands, and complying with social distancing guidelines."[49] Obtaining a witness signature risks potential exposure.

i. The Witness Requirement Risks Plaintiffs' Health.

As detailed in Plaintiffs' earlier briefing, COVID-19 has had an especially disproportionate impact on Alaska Natives.[50] The COVID-19 pandemic necessitated swift and direct action from Arctic Village Council. Given the community's small population and its limited access to health care, Arctic Village Council took every precaution necessary to stem the spread of COVID-19. As explained in earlier briefing, the Witness Requirement imposes a substantial burden on Arctic Village Council's members, given the

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[48] *See, e.g.*, *id.* ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times. In our current era of social distancing-where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household-the burden is substantial for a substantial and discrete class of Virginia's electorate."); *Thomas v. Andino*, 2020 WL 2617329, at *19 (D.S.C. May 25, 2020) (finding "burdens inflicted by the Witness Requirement, which are at least of sufficient magnitude to warrant the injunction" given the COVID-19 pandemic and Plaintiffs' particularized risk factors for contracting COVID-19, including age and underlying medical conditions); *Middleton v. Andino*, 2020 WL 5591590, at *1 (D.S.C. Sept. 18, 2020) (pending *en banc* review) (enjoining enforcement of South Carolina's witness signature requirement in the November 2020 general election enjoining enforcement of South Carolina's witness signature requirement in the November 2020 general election recognizing due to the risks of COVID-19).

[49] *League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 4927524, at *9 (W.D. Va. Aug. 21, 2020).

[50] *See* Mem. in Support of Mot. for Prelim. Inj. ("Mem.") at 10–12.

efforts it implemented to protect the health and safety in the community.[51]

Although one tribal leader was able to offer door-to-door in-person voting during the primary election, the possibility that COVID-19 spread could decimate this tribal community cautions the Council against making another exception to its lockdown. Every person-to-person exposure poses a risk to the vulnerable community members of this remote village—which lies 233 air miles from the nearest hospital facilities in Fairbanks.[52] Moreover, this one-day exception from the lock-down used in the primary election could not possibly address the concerns of those members of the community who are immunocompromised or have underlying medical conditions and simply do not wish to be forced to encounter another person unnecessarily.

Furthermore, while individual Plaintiffs Elizabeth Jones and Barbara Clark have come into distanced, masked contact, often outdoors, with other individuals, and were able to vote in the primary, they undertook these efforts at great risk to themselves. Elizabeth Jones was only able to vote because her mail carrier witnessed her ballot, an option no longer available to her due to new USPS policy. As the court found in *League of Women Voters of Virginia*, "every potential exposure is a risk[]" to those like Ms. Jones and Ms. Clark who have underlying medical conditions "[]even when taking appropriate precautions, such as wearing a face mask, frequently washing one's hands, and complying with social distancing guidelines."[53] Some risks, like shopping for groceries, are necessary,

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51 *See* Mem. at 18–19; Aff. of Yatlin ¶¶ 6–11.

52 *League of Women Voters of Va.*, 2020 WL 4927524, at *9 ("[E]very potential exposure is a risk—even when taking appropriate precautions[.]").

53 *Id.*

"but the burden one might be forced to accept to feed oneself differs in kind from the burden that the First and Fourteenth Amendments tolerate on the right to vote."[54] Even using all of the precautions available, "many would be dissuaded from exercising their vote both because of the risk of illness and the efforts involved in mitigating that risk—especially those who are elderly, immunocompromised, or otherwise at grave risk from the virus."[55] Indeed, Defendant Meyer's chief of staff, Josh Applebee, recognized that "high-risk" voters such as those who are "65 and older must be particularly careful to avoid exposure to COVID-19," and that these "voters may therefore wish to avoid going to the polls, standing in close proximity, and using touch screens or handling ballots."[56]

Although Defendants heeded the advice of "public health officials"[57] to mail a "paper absentee ballot application form" to all "voters 65 and older,"[58] and thus enable these "high-risk" voters to "avoid exposure to COVID-19,"[59] Defendants would have these same elderly and immunocompromised individuals undertake extraordinary risks to have their absentee ballots witnessed. Defendants cite CDC guidelines to bolster this remarkable proposition; yet, those guidelines, as Defendants point out, begin with the admonition to "limit your interactions with other people as much as possible."[60] Because one must assume some risk to carry on with one's life simply does not justify the assumption of

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54 *Id.*
55 *Id.*
56 Decl. of Applebee ¶ 7, *Disability Law Ctr. of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020) (Dkt. No. 25).
57 *Id.*
58 *Id.* ¶ 6.
59 *Id.* ¶ 7.
60 Opp. at 33.

greater, *additional risk* to avail oneself of one's fundamental constitutional rights.

ii. The Witness Requirement Risks Plaintiffs' Votes.

More than 400 absentee ballots were rejected in the primary due to failures to comply with the Witness Requirement.[61] Defendants cannot dispute that the number of absentee ballots will increase substantially for the November election. In fact, as of September 25, and with another month left to meet the absentee paper ballot request deadline, sixteen percent of registered voters, a "record high," had signed up to vote absentee.[62] That amounts to over 94,000 voters[63] already needing to procure witnesses.

Even if the rate of rejections of ballots for failure to comply with the Witness Requirement remains stable, the number of such rejections promises to be in the thousands. The rate of rejections for this reason are likely, however, to be higher than normal because more voters will be voting absentee for the first time, and many of them are likely to refrain from obtaining a witness because of fear of personal contact during the pandemic.

B. Defendants Will Be Adequately Protected If the Court Grants an Injunction.

Defendants will be adequately protected if an injunction is granted because they have failed to show that they will suffer any appreciable harm if the Witness Requirement is not enforced for this one election. Nowhere have Defendants asserted that the

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61 Brooks, *supra* note 16.

62 James Brooks, *8 Alaskans are the First To Vote in the State's General Election,* Anchorage Daily News (Sept. 25, 2020), https://www.adn.com/politics/2020/09/25/eight-alaskans-are-the-first-to-vote-in-the-states-general-election/;

63 Alaska Div. of Elections, *Number of Registered Voters by Party Within Precinct* (Sept. 3, 2020), https://www.elections.alaska.gov/statistics/2020/SEP/VOTERS%20BY%20PARTY%20AND%20PRECINCT.htm.

Requirement is of any *actual* value in detecting fraud. Defendants have not described any way in which it evaluates the legitimacy of a witness's signature, nor have Defendants asserted that the Division has excluded ballots or refused to count votes based on fraudulent or questionable witness signatures.

On the other hand, Defendants have described methods they have in place and employ to combat and prevent fraud. The Division may, for example, ensure that a voter's identifier matches the voter's record, and reject the ballot if it does not.[64] The Division may determine whether a voter has already voted by another method and reject their absentee ballot if it determines they have.[65] The Division may also determine whether a voter was ineligible for a ballot, registered to vote too late, or failed to register at all, and reject ballots for any of those reasons as well.[66] In light of all of these practical safeguards, and in the absence of any evidence that Defendants actually rely on the Witness Requirement to detect or combat fraud, Defendants cannot show that it safeguards the integrity of the election, or that election integrity will be compromised by a preliminary injunction.

Defendants also claim that the additional administrative burden of temporarily lifting the Witness Requirement would constitute irreparable harm. This significantly overstates the steps the Division would need to take if enjoined. First, Plaintiffs have requested that the Court order Defendants to "modify election materials, including mail-in ballots, to reflect the elimination of the Witness Requirements[.]"[67] This does not require

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64 Opp. at 16.
65 *Id.*
66 *Id.*
67 Compl. at 28, ¶ iv.

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the reprinting of ballot envelopes as Defendants suggest.[68] Instead, the Division could modify the envelopes already printed by placing a sticker over the box for a "Witness Affidavit,"[69] explaining no witness signature is required, and instructing the voter to date the envelope. Similarly, the Division could use a sticker to modify the "cover flap" of the ballot envelope by, instead of asking "Did you . . . Have your signature witnessed?," reminding the voter to include a date under their signature.

Alternatively, or in conjunction with the use of modifying stickers, the Division could include printed notices mailed with absentee ballots that inform voters that their ballots will be counted even without witness signatures. The notice could make clear that dating the ballot envelope would be a satisfactory alternative to having a witness sign.

These modest steps would take minimal effort to implement and would require little training. Far from the "severe" consequences Defendants predict,[70] the Division could simply announce, on its website and elsewhere (on television, radio, and social media), that the Witness Requirement has been suspended due to COVID-19. Such a simple statement is unlikely to lead to any confusion, since it lessens, rather than increases, any potential burden on the voter. And any confusion that leads to a voter unnecessarily procuring a witness signature will not result in voter disenfranchisement. Furthermore, it would require simple instructions to Division staff to count absentee ballots without regard to the witness requirement since this too represents one *less* step in the ballot counting process. Therefore,

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68 Opp. at 36.

69 *Id.* at 5; *see* Minn. Stipulation & Partial Consent Decree, *supra* note 41 (ordering the defendants to inform all state officials to count otherwise validly cast absentee ballots that do not have witness signatures).

70 *Id.* at 36–37.

because the harm imposed on Plaintiffs by the Witness Requirement is irreparable and Defendants' interests are adequately protected, the Court should issue a preliminary injunction allowing voters to vote absentee by mail or electronic transmission in November's general election without having to comply with the Witness Requirement.

III. Plaintiffs Have Established Probable Success on the Merits of Their Claims.

The Court can evaluate Plaintiffs' claims under the "clear showing of probable success on the merits" standard, if it finds that Plaintiffs have not met the "balance of hardships" standard.[71] Applying the "probable success on the merits" standard requires the Court to evaluate the underlying legal claims of the case and determine that the moving party is "more likely than not" to prevail.[72] Plaintiffs have shown that here.

A. Plaintiffs Have Established Clear Probable Success on the Merits of Their Right to Vote Claim.

The Alaska Supreme Court has articulated a test that when evaluating the burdens on constitutionally-protected rights: "[A]s the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the state's interests must be closer." [73] Here, Defendants concede the Alaska Constitution requires the State to provide for absentee voting by law and that Plaintiffs have a constitutionally protected right to absentee voting under the Alaska Constitution.[74] Under these circumstances, the Alaska Supreme Court

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71 *Metcalfe*, 110 P.3d at 978.

72 *Id.*

73 *See State, Div. of Elections v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005)

74 Opp. at 40; *see* Alaska Const., art. V, § 3.

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would apply strict scrutiny and require the State to show a compelling interest to justify infringement.[75]

Nevertheless, Defendants argue that strict scrutiny should not apply to this case, claiming that *Metcalfe*'s application of strict scrutiny should be limited to ballot access cases.[76] The express language in *Metcalfe* argues otherwise. In explaining why strict scrutiny applied in that case, the court stated: "At least two fundamental rights are implicated—the right to vote and the right to associate freely in pursuit of political beliefs."[77] Similarly, the Court in *Green Party* considered whether restrictions on who could vote in a party primary violated the fundamental right to vote.[78] Defendants' assertion that strict scrutiny only applies in ballot access cases is simply incorrect.[79]

Even if the Court found that these cases do not apply strict scrutiny beyond the ballot access realm, Alaska's Constitution accords broad protections to fundamental rights reaching beyond the rights protected under the U.S. Constitution.[80] At a minimum, they

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[75] *Metcalfe*, 110 P.3d at 979; *Vogler I*, 651 P.2d at 3 (1982); *Vogler v. Miller*, 660 P.2d 1192, 1194 (1983) ("*Vogler II*").

[76] Opp. at 41.

[77] *Metcalfe*, 110 P.3d at 979.

[78] *Green Party*, 118 P.3d at 1061.

[79] *Metcalfe*, 110 P.3d at 979 ("[W]e have recognized that restrictions on ballot access interfere with the rights of candidates *and* voters."); *see e.g.*, *Green Party*, 118 P.3d at 1060 n.29 (clarifying that presumption of strict scrutiny in ballot access cases is a particularized application of the general balancing framework); *Vogler I*, 651 P.2d at 2 ("Restrictions on ballot access impinge not only on the rights of the potential candidates, but on those of the voters as well."); *Vogler II*, 660 P.2d at 1195 ("The precise question thus presented is whether the 10% definitional requirement contained in AS 15.60.010(20) impinges on the rights to vote and associate freely to the least degree possible consistent with the achievement of any compelling state goals.").

[80] *Green Party*, 118 P.3d at 1060–61 ("To be sure, the United States Constitution as interpreted by the Supreme Court sets "national minimal constitutional standards" with which Alaska election laws must comply. But we have often held that Alaska's constitution

suggest that the interest the state must show to justify the burdens on the right to vote in this case approach the "more compelling" part of the balancing scale. More to the point, given that Plaintiffs are being forced to choose between their votes and their lives, Defendants have no legitimate interest that outweighs those burdens. Thus, even if the Court applied heightened scrutiny—that the Witness Requirement imposes a substantial, as opposed to severe, burden on Plaintiffs' and Plaintiffs' members' right to vote—the state's interests do not justify such an infringement.

1. The Witness Requirement Severely Burdens the Right to Vote.

Defendants' argument that they themselves did not create the pandemic is of course not the issue here.[81] Nor is it relevant that voters might have to have personal contact to get life-sustaining food or health care.[82] Whether it be a natural disaster like an earthquake or a pandemic, Defendants are responsible for administering elections in a fair, equitable manner and ensuring that its election administration does not disenfranchise voters.

In *Democratic Nat'l Committee v. Bostlemann*, a federal court in Wisconsin found, just days ago, that the pandemic presented such unique circumstances as to enjoin enforcement of a state statute that prevents electronic delivery of absentee ballots to civilian voters.[83] The court concluded that "the evidence is nearly overwhelming that the pandemic does present a unique need for relief in light of: (1) the experience during the Spring

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is more protective of rights and liberties than is the United States Constitution . . . . We therefore stress that the results we derive under the Alaska Constitution need not correspond with those the Supreme Court might reach under the federal constitution.").

81 Opp. at 42.

82 *Id.* at 50–51.

83 2020 WL 5627186, at *4 (W.D. Wis. Sept. 21, 2020).

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election, (2) much greater projected numbers of absentee ballot requests and votes in November, and (3) ongoing concerns about the USPS's ability to process the delivery of absentee ballot applications and ballots timely."[84] Other courts have held the same, requiring states lift statutory requirements that place substantial burdens on the fundamental right to vote during the pandemic.[85] These courts have also applied a lesser standard than strict scrutiny and found that the burden on the right to vote was substantial enough such that no state interests could justify potentially disenfranchising voters.

As discussed above, that Plaintiff Arctic Village Council was compelled to institute a lock-down does not make the burden less severe, as Defendants would have it.[86] Nor is it relevant, let alone seemly, for Defendants to lay the blame for the burden on Plaintiffs' "personal characteristics," such as age, race, or underlying conditions.[87]

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84 *Id.* at *23.

85 *See, e.g.*, *League of Women Voters of Va.*, 2020 WL 2158249, at *8 ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times."); *Garbett v. Herbert*, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020) ("On balance, considering the current pandemic and the totality of the State's emergency measures to combat it, Utah's ballot access framework as applied this year imposed a severe burden . . . ."); *Thomas*, 2020 WL 2617329, at *20 (witness requirements for absentee ballot significantly burdened the plaintiffs' right to vote); *Frederick v. Lawson*, 2020 WL 4882696, at *16 (S.D. Ind. Aug. 20, 2020) (state's rejection of absentee ballots for signature-matching without notice and opportunity to cure placed significant burden on the right to vote, especially during a pandemic); *Harding v. Edwards*, 2020 WL 5543769, at *4, *18 (M.D. La. Sept. 16, 2020) (ordering state to expand who can vote absentee and early voting period during COVID-19 pandemic); *Texas v. Hollins*, 2020 WL 5584127, at *4 (Tex. App. Dist. Sept. 18, 2020) (affirming county's decision to mail all registered voters absentee ballot applications during pandemic).

86 Opp. at 27.

87 *Middleton*, 2020 WL 5591590 at *35 (D.S.C. Sept. 19, 2020) (pending en banc review) (enjoining enforcement of South Carolina's witness signature requirement in the November 2020 general election recognizing, in particular, "that adherence to the Witness Requirement in November would only increase the risk of contracting COVID-19 for members of the public with underlying medical conditions, the disabled, and racial and ethnic minorities"). *Thomas*, 2020 WL 2617329 at *19 (D.S.C. May 25, 2020) (enjoining

Finally, Defendants create a heretofore unknown requirement that Plaintiffs must provide "statistical" evidence of the disenfranchisement. Opp. at 42. Even the inapposite case they rely upon, *Crawford v. Marion County Election Board*,[88] requires no such thing. *Crawford* was a *facial* challenge to a statute, seeking to strike down the voter ID law challenged in that case in all its applications. To prove their case, plaintiffs had produced statistical evidence, but failed to introduce evidence of any individuals who were unable to vote because of the law. The Court found the plaintiffs' proofs were lacking under the circumstances.[89] No general rule as to the necessity of statistical evidence was announced in that case as to facial challenges, let alone to "as-applied" challenges such as this case.

Here, Plaintiffs are not seeking invalidation of the Witness Requirement in all its applications, but only for this election, and only because of the pandemic. Even if "statistics" were needed to support their case, Plaintiffs have shown that 456 voters were disenfranchised because of the witness requirement in this year's primary election,[90] and it is beyond dispute that more will be disenfranchised in November if the Witness Requirement is not preliminarily enjoined.

And *Crawford*, of course, is not a case brought under the Alaska Constitution. It is

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enforcement of South Carolina's witness signature requirement in the 2020 primary election and noting, "In terms of other burdens, the individual Thomas Plaintiffs, have individual characteristics or conditions that are regarded by the CDC as placing them, at a higher risk for contracting COVID-19, including being over 65 years of age, having underlying medical conditions (including scleroderma, interstitial lung disease, hypertension, gout, history of breast cancer, emphysema, infection), being disabled, and/or being African-American.").

88 553 U.S. 181, 199 (2008).

89 *Id.* at 185.

90 Brooks, *supra* note 16.

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a federal case brought under the United States Constitution. As noted above, Alaska's safeguards of voting rights are more protective than those under federal law.

1. The State Has No Countervailing Interests That Outweigh the Severe Burden on Voters.

Defendants attempt to justify the burdens on voters with two state interests: preventing voter fraud and public confidence in the election results.[91] Whether subject to strict scrutiny or lesser scrutiny under the balancing test, neither outweighs the burdens imposed on Plaintiffs' constitutional right to vote.

Defendants argue that the Witness Requirement prevents fraud because it serves as the only independent verification mechanism to ensure the person completing the absentee ballot is the person they claim to be. This is difficult to believe, because, as noted above, the only thing the witness requirement does is show that some person is reputed to have witnessed the signature – without requiring that the voter's identity is known to the witness, or any attempt by the State to verify who the witness is, and indeed whether the witness actually exists. Moreover, Alaska has other much more effective validation mechanisms: voters are required to provide identification and sign absentee ballots under penalty of perjury, which carries a criminal penalty of up to ten years of incarceration.[92]

Furthermore, while protecting against fraud is a legitimate interest, it is a minor one, given the virtual complete absence of voter fraud in Alaska.[93] The court in *Thomas*

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91 Opp. at 45–49.

92 AS 12.55.125(d).

93 Defendants cite to an instance of irregularities in absentee ballot applications in one house district in 2014, 2016, and 2018. Opp. at 8–10. The Division allegedly noticed these irregularities by comparing signatures and finding that they appeared to the same

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concluded that while voter integrity is a compelling interest, the state must provide "evidence that such an interest made it necessary to burden voters' rights."[94] Defendants have not shown how the Witness Requirement serves to prevent fraud, or why it is necessary to burden Plaintiffs' fundamental right to vote during a pandemic.[95]

Defendants next argue that the Witness Requirement is paramount to safeguarding voter confidence because any last minute, temporary changes would compromise the integrity of the system.[96] But here the changes are simple: inform voters they do not need

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handwriting and began at a uniform distance from the pre-printed colon on the signature line. *Id.* at 9. Based on these comparisons, the Division was able to follow-up with the applicants and ultimately track their absentee ballots. *Id.* The Division did not count the ballots confirmed as fraudulent. *Id.* Defendants claim that these incidents illustrate the need for the Witness Requirement. But they fail to explain how the Witness Requirement was used to prevent fraud in these instances—Defendants provide ample evidence of how effective its signature comparisons were in detecting fraud. Defendants also argue that Alaska's Witness Requirement is a proxy for the State's lack of uniform standards around signature matching. *Id.* at 45. But again, Defendants do not explain how the Witness Requirement, as practically applied, is a proxy for signature matching given that they concede that a "determined fraudster might simply forge a witness signature." *Id.* at 44.

[94] *Thomas*, 2020 WL 2617329, at *20 (quoting *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020)) (affirming injunction against Kansas's documentary proof of citizenship requirement for voter registration).

[95] As the Court noted in *Green Party*, "while the state may anticipate likely problems in the electoral process, it cannot justify imposing significant constitutional burdens merely by asserting interests that are compelling only in the abstract. . . . [T]he bare assertion of an abstract interest is insufficient to support restricting constitutionally protected rights." 118 P.3d at 1066–68. Defendants heavily rely on *Democracy North Carolina v. North Carolina State Board of Elections*, 2020 WL 448406 (M.D.N.C. Aug. 4, 2020), to support their arguments. Opp. at 48, n.144. That case is distinguishable because it was brought under the federal constitutional standard, different from the standard applied by Alaska courts considering the Alaska constitution. It is also distinguishable because the "[t]he court . . . f[ound] Defendants' stated interest in preventing voter fraud [was] stronger than the government's in *Andino* for one substantial reason: North Carolina experienced a serious case of voter fraud involving absentee ballots in the 2016 General Election." *Democracy N.C.*, 2020 WL 4484063, at *36. Specifically, the court noted an instance where the state had received 1,265 duplicative voted ballots.

[96] Opp. at 46–47.

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witnesses on their absentee ballot, and do not reject ballots that lack a witness signature.

Defendants also argue that a temporary suspension of the Requirement and future enforcement has the potential to cause voter confusion. However, if Defendants fulfill their duty to appropriately educate voters ahead of each election, this problem should be easily mitigated. At worst, some voters might not get the message, and may be able to get a witness signature and vote, or may cast a ballot without a witness signature and will have their vote counted.

Further, this is not the first instance in which the State has had to make last minute changes to election-related materials, so voters should be able to adapt.[97]

Contrary to Defendants' argument, [98] Plaintiffs' reliance on cases where states entered into consent judgments or conceded to lifting their Witness Requirements is highly relevant.[99] The defendants in those cases recognized the laws' burden on voters during the pandemic, and agreed to a temporary remedy, such as the one being sought here, to mitigate the potential harm. But the supporting case law is not limited to voluntary cessation of the unconstitutional requirement. In *Middleton v. Andino,* after the district court preliminarily enjoined the state's witness requirement as probably unconstitutional, and after that order was stayed by a panel of the Fourth Circuit, the Fourth Circuit reinstated the injunction and ordered the case be heard en banc.[100]

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97 Brooks, *supra* note 37; Forgey, *supra* note 37.

98 Opp. at 47.

99 *League of Women Voters of Va*, 2020 WL 4927524 at *3; *Common Cause R.I. v. Gorbea*, 2020 WL 4365608, at *3 (D.R.I. July 30, 2020), *judgment entered* 2020 WL 4460914 (D.R.I. July 30, 2020).

100 *See, e.g.*, *Middleton*, 2020 WL 5591590, at *35 (D.S.C. Sept. 19, 2020).

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B. Plaintiffs Have Clearly Proved the Probable Success on the Merits of Their Equal Protection Clause claim.

Article 1, Section 1 of the Alaska Constitution guarantees that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[101] When there is an alleged violation of equal rights, Alaska courts analyze the issue on a sliding scale with the most fundamental rights (*e.g.*, right to vote) receiving strict scrutiny—and requiring the state to show that the law serves a compelling governmental interest and is narrowly tailored to serve that interest.[102]

Defendants argue that the equal protection clause does not apply in this instance because the law is facially neutral and Plaintiffs' inability to comply has to do with their own personal circumstances.[103] But Defendants ignore that a facially neutral law can result

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[101] *See Vogler II*, 660 P.2d at 1193 (stating that if the right to vote or the right to associate is implicated, all other rights are illusory). Defendants also rely on the legislative history in favor of upholding the witness requirement. Opp. at 44–45. Defendants assert that the legislature viewed the Witness Requirement as a meaningful one because, in the absence of uniform signature matching, the Witness Requirement provides independent verification that the absentee voter is who he or she claims to be. *Id.* at 44. But this ignores the alternate mechanisms that Alaska has in place to verify the identities of absentee voters. The Division can ensure that a voter's identifier matches the voter's record, and reject the ballot if it determines a mismatch or the Division can determine whether a voter has already voted by another method and reject the voter's absentee ballot if it determines that the voter has or the Division can also determine whether a voter was ineligible for a ballot, registered to vote too late, or failed to register at all, and reject ballots for any of those reasons. Relying on the legislative history also ignores the nature of Plaintiffs' as-applied claim during a pandemic. The legislature did not enact the Witness Requirement during a global pandemic, nor could it have contemplated the burdens Alaskans would face for having to comply with the Witness Requirement.

[102] *See Peloza v. Freas*, 871 P.2d 687, 691 (Alaska 1994) (holding that an issue of residency was enough to trigger equal protection analysis as it could unconstitutionally burden the right of voters and a potential candidate given the "right of qualified voters to cast their votes effectively"); *Alaska Pac. Assur. Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984).

[103] Opp. at 51.

in disparate impact.[104] That is the case here. The Witness Requirement burdens certain classes of voters more than it does others. Plaintiffs who are above sixty-five-years-old, must isolate, have underlying health conditions, or are part of racial groups at a higher risk of experiencing death from COVID-19 face severe burdens when it comes to exercising their right to vote.[105] For individuals who live alone in these communities who are either high risk and self-isolating or under shelter-in-place orders, finding someone to act as a witness risks exposure to COVID-19. As Plaintiffs have stated in their declarations, having to locate a witness and sign their ballots in the witness's presence prevents them from voting at all.

The Witness Requirement's disparate treatment of voters who are more affected by the pandemic triggers strict scrutiny, necessitating that the state articulate a "sufficiently compelling" interest.[106] As explained above at length, Defendants' asserted interests do not meet an even lesser standard, let alone strict scrutiny.

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[104] Defendants cite to *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 536 (Alaska 2015) (citing *Alaska Fish & Wildlife Conservation Fund v. State, Dep't of Fish & Game, Bd. of Fisheries*, 289 P.3d 903, 910 (Alaska 2012)). *Manning* held that disparate regulations on users would trigger an equal protection issue, but that the issue of what a person could hunt did not substantially change the right to subsistence hunting as it only changed the uses, not the rights of the users. This is different from this case as the COVID-19 pandemic has changed what communities are safely able to do. Thus, those living alone, senior citizens, and people under shelter-in-place orders have been substantially limited in how they can safely use their right to vote and has created an unequal application of the Witness Requirement. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005) (holding that laws that have disparate treatment of similarly situated individuals cans violate the Equal Protection Clause of the Alaska Constitution).

[105] *See Common Cause R.I. v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (holding that the witness requirement would not be upheld during the pandemic because some communities facing a higher risk of complications from COVID-19 like senior voters faced a higher burden in finding witnesses and that even if they could find one, there is no guarantee that person could verify who the person was or even that they could find a second witness at the same time).

[106] *Peloza*, 871 P.2d at 691.

CONCLUSION

For these reasons, Plaintiffs request that the Court deny Defendants' motion to dismiss and grant Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 28th day of September, 2020, in Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2020, I mailed and emailed a true and correct copy of the foregoing to:

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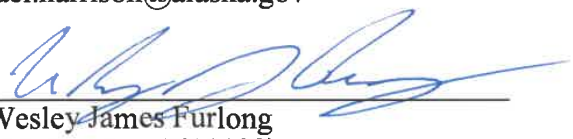

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK, Plaintiffs, v. KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS, Defendants.	)	Case No.: 3AN-20-07858 CI

AFFIDAVIT OF JEREMY JOHNSON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Jeremy Johnson, declare under penalty of perjury that the following is true and correct:

1. I am the Election Supervisor of the Fairbanks office of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. One of my job duties is to coordinate with poll workers, Absentee Voting Officials, and local and tribal governments in Region III regarding voting in their communities.

2. On the morning of August 17, 2020, the day before the primary election, my staff were making telephone calls to precinct chairs reminding them of the election the next day. At 12:30 pm, my trainer emailed informing me that the chair in Arctic Village was not answering her phone. My staff then called the Absentee Voting Official for Arctic Village who informed us that the chair's father, with whom the chair shares a house, was COVID-19 positive and in quarantine. The Absentee Voting Official was also in quarantine but was going to call around and try to find workers for election day. She asked if the Division of Elections could fly someone to Arctic Village to conduct the election. Shortly before 5:00 pm I was informed that the entire community was in lockdown and residents were not able to leave their homes, so Election Day voting could not take place.

3. I was told that two men, including the Second Chief, were making patrols through the village to ensure people were staying in their homes. Therefore, I asked, and the Second Chief agreed, to go to the home of the Absentee Voting Official and get the absentee-in-person voting materials.

4. On the morning of August 18, my staff provided phone training to the Second Chief on conducting absentee-in-person voting. He agreed to go door-to-door on his patrols to offer the opportunity to vote absentee-in-person to any voter who had not already voted.

5. Arctic Village was one of a handful of locations in Region III where the Division had to work with communities in some form of lockdown to make special provisions for voting in the primary election. For example, a few small communities

along the Richardson Highway had placed barricades to prevent outsiders from entering, but those communities either agreed to remove the barricades on election day to allow for voting, or we were able to establish a new polling place outside the barricade.

Jeremy Johnson

SUBSCRIBED AND SWORN to before me this 18 day of Sept., 2020.

Notary Public in and for Alaska
My commission expires: w/office

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

ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Plaintiffs,	)	
v.	)	
KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and ALASKA DIVISION OF ELECTIONS,	)	Case No.: 3AN-20-07858 CI
Defendants.	)	

AFFIDAVIT OF CAROL THOMPSON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Carol Thompson, declare under penalty of perjury that the following is true and correct:

1. I am the Division Operations Manager of the Anchorage office of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. I have been a Division Operations Manager since November 2007. One of my job duties is to review absentee ballot applications when received by the Division and determine whether they comply with state law and whether the voter is eligible to vote in the election.

2. In 2014, I and my staff first noticed irregularities in absentee ballot applications from House District 15. Specifically, it appeared that numerous applications were written in the same handwriting. This was unusual, as we typically see applications in the voter's own handwriting, although not necessarily illegal. Although it was unusual, there was not enough evidence of fraud at that time to warrant opening an investigation.

3. My staff and I noted no irregularities in absentee ballot applications from House District 15 in 2016.

4. In 2018 we again observed the unusual circumstance of many absentee ballot applications in the same handwriting from House District 15. When we compared the signatures on those applications to the applicants' signatures in our voter database, they matched, but each signature began a uniform distance from the pre-printed colon. In our experience, typically voter signatures begin at randomly different points along the signature line, so this also appeared abnormal.

5. Additionally, we noticed that the return addresses on the envelopes containing the applications were in the same handwriting as the applications. This was also unusual, as in our experience voters typically write their own return addresses. They also all had the same stamp as though mailed in a batch.

6. My staff and I then began following up with these voters, and found that some phone numbers given were disconnected or not functioning. Some letters were returned undeliverable. Some voters that we were able to reach did not recall completing an application or were confused. When we received an absentee ballot

application for a voter we could confirm was dead, we notified the Alaska State Troopers. Eventually we received a total of seven applications for voters we could confirm were dead.

7. I also made sure others in the Division were aware of the issue, including Julie Husmann who was responsible for reviewing received absentee ballots as part of the Absentee Ballot Review Board.

Carol Thompson

Carol Thompson

SUBSCRIBED AND SWORN to before me this 18th day of September, 2020.

Doreen R Barber

Notary Public in and for Alaska
My commission expires: w/office

Official Seal
State of Alaska
Notary Public
Doreen R. Barber

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IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, in his official capacity as the Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and the ALASKA DIVISION OF ELECTIONS,	)	Supreme Court No.: S-_____
Petitioners,	)	
v.	)	
ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,	)	
Respondents.	)	

Trial Court Case No.: **3AN-20-07858 CI**

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CERTIFICATE OF SERVICE

I certify that on October 6, 2020 a true and correct copy of **Docketing Statement B, Emergency Motion for Expedited Decision on the State's Petition for Review (Appellate Rule 504), Written Statement of Facts in Support of Emergency Motion for Expedited Action, Affidavit of Counsel, Order (Emergency Motion), Motion to Accept Over Length Petition for Review, Order (Motion to Accept Overlength Petition), Petition for Review, Appendices A – S,** and this **Certificate of Service** were served by electronic mail to the following:

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