**IN THE SUPREME COURT OF THE STATE OF ALASKA**

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| KEVIN MEYER, in his official capacity as the Lieutenant Governor of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections; and the ALASKA DIVISION OF ELECTIONS,<br><br>*Petitioners*,<br><br>v.<br><br>ARCTIC VILLAGE COUNCIL, LEAGUE OF WOMEN VOTERS OF ALASKA, ELIZABETH L. JONES, and BARBARA CLARK,<br><br>*Respondents*. | Supreme Court No. S-17902 |

Trial Court Case No.: 3AN-20-07858 CI
Judge Dani Crosby

**RESPONSE TO PETITION FOR REVIEW**

## TABLE OF CONTENTS

**TABLE OF AUTHORITIES** ..... ii

**RESPONDENTS' EXHIBITS AND APPENDICES** ..... v

**INTRODUCTION** ..... 7

**STATEMENT OF FACTS** ..... 8

- **I. The Witness Requirement** ..... 8
- **II. COVID-19 in Alaska and Impact on Respondents** ..... 10

**ARGUMENT** ..... 15

- **I. Standard of Review** ..... 15
- **II. The Superior Court Did Not Err in Ruling That Laches Does Not Bar This Action.** ..... 15
  - **A. The Superior Court Did Not Err in Rejecting Petitioners' Defense of Laches.** ..... 16
  - **B. Petitioners Are Not Unduly Prejudiced.** ..... 19
- **III. The Superior Court Did Not Abuse Its Discretion in Ruling that Respondents Have Established a Probability of Success on the Merits of Their Right to Vote Claim.** ..... 23
  - **A. The Witness Requirement Either Severely or Substantially Burdens the Right to Vote During the Pandemic.** ..... 24
  - **B. Enforcement of the Witness Requirement During the COVID-19 Pandemic Is Not Justified by State Interests.** ..... 29
- **IV. The Superior Court Erred as a Matter of Law in Finding that Respondents Did Not Prevail on the Balance of the Hardships.** ..... 33

**CONCLUSION** ..... 37

## TABLE OF AUTHORITIES

### Cases

*Alsworth v. Seybert*, 323 P.3d 47 (Alaska 2014) ..... 14
*Anderson v. Dep't of Administration, Div. of Motor Vehicles*, 440 P.3d 217 (Alaska 2019) ..... 14
*Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020)..... 25
*Breese v. Smith*, 501 P.2d 159 (Alaska 1972)..... 30
*Burke v. Maka*, 296 P.3d 976 (2013)..... 14
*Carr v. Thomas*, 586 P.2d 622 (Alaska 1978) ..... 22
*City & Borough of Juneau v. Breck*, 706 P.2d 313 (1985)..... 14, 15
*City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452 (Alaska 2006)..... 13
*Club SinRock, LLC v. Municipality of Anchorage, Office of the Mun. Clerk*, 445 P.3d 1031 (Alaska 2019) ..... 30
*Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020) ..... 25
*Disability Law Ctr. of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020)..... 13
*Fla. Democratic Party v. Detzner*, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016)..... 34
Frederick v. Lawson, 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020) ..... 26
*Garbett v. Herbert*, 2020 WL 2064101 (D. Utah Apr. 29, 2020)..... 26
*Harding v. Edwards*, 2020 WL 5543769 (M.D. La. Sept. 16, 2020) ..... 26
*Hershcopf v. Lomenzo*, 350 F. Supp. 156 (S.D.N.Y. 2017) ..... 15
*Kollander v. Kollander*, 322 P.3d 897 (2014) ..... 14, 15
*Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo. App. 2004) ..... 15
*League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014)..... 35
*League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 4927524 (W.D. Va. Aug. 21, 2020)..... 17, 26
*Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010)..... 22
*Moore v. State*, 553 P.2d 8 (1976).....14, 15, 18
*Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575 (S.D.W.Va. 2000) . 15
*Obama for America v. Husted,* 697 F.3d 423 (6th Cir. 2012) ..... 34
*People First of Alabama v. Merril*, 2020 WL 3207824 (N.D. Ala. 2020)..... 17, 19
*Roberts v. State*, 458 P.2d 340 (Alaska 1969) ..... 30
State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270 (Alaska 1992) ..... 33
*State, Div. of Elections v.Green Party of Alaska*, 118 P.3d 1054 (Alaska 2005)..22, 25, 28
*Texas Alliance for Retired Americans v. Hughs*, 2020 WL 5747088 (S.D. Tex. Sept. 25, 2020)..... 16
*Texas v. Hollins*, 2020 WL 5584127 (Tex. Co.A. 14th Judicial Dist. Sept. 18, 2020)..... 26
*Thomas v. Andino*, 2020 WL 2617329 (D.S.C. May 20, 2020) ..... 17, 26

*Torrey v. Hamilton*, 872 P.2d 186 (Alaska 1994) ..... 32
*United States v. Georgia*, 892 F. Supp. 2d 1367 (N.D. Ga. 2012) ..... 34
*Vogler v. Miller*, 651 P.2d 1 (Alaska 1982) ..... 35
*Williams v. Rhodes*, 393 U.S. 23 (1968) ..... 35

**Statutes**

6 AAC 25.510 ..... 8
AS 12.55.125 ..... 29
AS 15.20.066 ..... 8
AS 15.20.081 ..... 7

**Internet Sources**

*3AN-20-07858CI Arctic Village Council vs. Meyer, Kevin*, YouTube.com (Oct. 1, 2020), https://www.youtube.com/watch?v=feIs10R1O3Y ..... 21, 24, 29
Alaska Div. of Elections, *2020 Primary Election: Election Summary Report: August 18, 2020: Official Results* (Aug. 31, 2020) ..... 27
Alaska Supreme Court, *Special Order of the Chief Justice, Order No. 8131* (Mar. 19, 2020) ..... 10
Cheyenne Matthews, *Libertarian Party candidate's affiliation is now listed on sample Alaska ballot as lawsuit is filed*, MSN (Sep. 26, 2020) ..... 19
*Coronavirus Disease 2019: Health Equity Considerations & Racial & Ethnic Minority Groups*, Ctrs. for Disease Control & Prevention (July 24, 2020) ..... 11
James Brooks & Aubrey Wieber, *A late change to the 2020 General Election ballot sparks outcry from Alaska Democrats*, Anchorage Daily News (Sep. 14, 2020) ..... 18
James Brooks & Audrey Wieber, *After criticism from Democrats, Alaska Division of Elections says ballot design change is not politically motivated*, Anchorage Daily News (Sep. 15, 2020) ..... 19
James Brooks, *In Rule Change, Postal Service Forbids Employees From Signing Absentee Ballots as Witnesses*, Anchorage Daily News (Aug. 19, 2020) ..... 13
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) ..... 9
James Brooks, *Some absentee ballots list the wrong candidate in an Anchorage House race*, Anchorage Daily News (Sep. 21, 2020) ..... 19
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) ..... 11
Office of Governor Mike Dunleavy, *Governor Issues COVID-19 Health Mandates on Social Distancing, Limiting Intrastate Travel* (Mar. 27, 2020) ..... 9
Office of Governor Mike Dunleavy, *State of Alaska Declaration of Public Health Disaster Emergency* (Mar. 11, 2020) ..... 9

Pat Forgey, *Voter Pamphlet omission may have affected earliest mailed ballots*, Anchorage Daily News (Oct. 17, 2014) ..... 31
*Racial Data Dashboard*, The COVID Tracking Project (Sept. 7, 2020) ..... 11
Sean Maguire, *Ballots for 4 districts to be reprinted, showing candidate affiliations*, MSN (Sep. 28, 2020) ..... 19
Zaz Hollander, *Fort Yukon and Copper River Communities Avoided Coronavirus for Months. Now Cases Are Rising in Both*, Anchorage Daily News (July 21, 2020) ..... 10

**Constitutional Provisions**

Alaska Const. Art. I, Section 1 ..... 22

## RESPONDENTS' EXHIBITS AND APPENDICES

1. Exhibit A – COVID-19 Graph
2. Appendix 1 - Affidavit of Angelique Horton
3. Appendix 2 - Respondents' Proposed Preliminary Injunction Order
4. Appendix 3 - Petitioners' Proposed Preliminary Injunction Order

## INTRODUCTION

This lawsuit is about vindicating the fundamental right to vote of all Alaskans in a general election that will be held in unprecedented circumstances: under the pall of a worldwide pandemic that has already claimed over a million lives and has compelled fundamental changes in the way we interact with each other. Petitioners (or the "State"), despite acknowledging the unpredictable and ever-changing nature of the COVID-19 pandemic and the high volume of absentee ballot requests as a result, refuse to permit Alaskans to vote safely in the upcoming election. They continue to enforce the onerous and burdensome Witness Requirement that requires absentee voters to procure an individual authorized to administer oaths or a person above the age of 18 years to witness their signature on their absentee ballot.

Arguing that "longstanding" election laws cannot be suspended no matter what, Petitioners seem satisfied to force Alaskans to choose between their health and their right to vote. Arguing, without a scintilla of support, that voters will "distrust" the election if the Witness Requirement is lifted, they raise the discredited hobgoblin of voter fraud, without providing any connection between that virtually non-existent phenomenon and the specific requirement in issue. And, vainly attempting to paint a picture of voter confusion if the relief granted Respondents is sustained, they defy common sense. Contrary to Petitioners' fears, if the Witness Requirement is lifted, at worst, some voters might proceed to obtain a witness for their absentee ballots, but thousands more will be freed from this unfair burden.

Further, that Petitioners' claims of administrative burden are unfounded is seen in the terms of the agreed-upon order submitted in response to the superior court's October 5 directive to effectuate its decision to grant the preliminary injunction.[1] There, Petitioners confirm that they will be ready to notify and educate the public immediately upon the issuance of this Court's decision denying the petition for review.[2]

And that is precisely what this Court should do. The Superior Court correctly decided to issue the injunction. Laches does not bar this suit, because Respondents initiated this action within a reasonable time of it becoming apparent that the pandemic necessitated elimination of the Witness Requirement. Respondents have clearly demonstrated a probability of showing that the burden on Alaskans of the Witness Requirement during a pandemic is substantial, and that, in comparison, the State's interests are minimal. Indeed, it was not necessary for the Superior Court to hold Respondents to a probability of success on the merits, because they had also proved that the balance of the hardships weigh decisively in their favor.

## STATEMENT OF FACTS

### I. The Witness Requirement

In Alaska, any qualified voter can vote absentee without an excuse.[3] After a local election office receives an absentee ballot application, the Director must send the voter an

[1] Appx. 2 (Respondents' Proposed Prelim. Inj. Order); Appx. 3 (Petitioners' Proposed Prelim. Inj. Order).
[2] *Id.*
[3] AS 15.20.081(a).

absentee ballot and other absentee voting materials by the most expeditious mail service and as soon as the materials are ready for distribution.[4] 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.[5]

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.[6] 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.[7] 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.[8]

While Alaska has demonstrated its ability to temporarily modify the state election laws to account for the unique burdens imposed on voters by the pandemic, the State has

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[4] AS 15.20.081(c).
[5] *Id*.
[6] AS 15.20.081(d) and AS 15.20.066(b)(2).
[7] AS 15.20.081(f); 6 AAC 25.510.
[8] AS 15.20.081(f).

not suspended the Witness Requirement. In the August 18 primary election, 456 ballots were rejected because of "improper or insufficient witnessing."[9] On August 31, 2020, Respondents advised Petitioners Fenumiai and Meyer 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.[10] On September 4, 2020, Petitioner 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).[11]

## II. COVID-19 in Alaska and Impact on Respondents

The Superior Court aptly observed: "the pandemic is a shifty beast."[12] Although Governor Michael Dunleavy declared a public health emergency on March 11, 2020 advising all state executive departments to coordinate COVID-19 emergency responses,[13] Alaska's experience of the pandemic exploded in late July and August.[14]

Alaska was initially successful in preventing widespread outbreak but that experience has significantly shifted. Governor Dunleavy's first stay-at-home order and

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[9] 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/.
[10] Appx. F (letter to Kevin Meyer and Gail Fenumiai).
[11] Appx. G (response Kevin Meyer and Gail Fenumiai).
[12] Appx. M at 6 (Sup. Ct. Order, Oct. 5, 2020).
[13] 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.
[14] Exhibit A (graph depicting "COVID-19 cases involving Alaska residents").

limits on intrastate travel were to be reevaluated by April 11.[15] The initial suspension of certain court proceedings in March was only through April 3.[16] By mid-May, there were only thirty-five active cases in Alaska, and it looked as if Alaska had dodged a bullet.[17] 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.[18] The Alaska Supreme Court did not extend its suspension of jury trials until August 6.[19] For months, rural Alaska villages looked as if they might also escape the worst effects of the pandemic.[20]

But on August, 17, 2020, the day before the primary election, Arctic Village Council learned that the pandemic made in-person voting impossible and closed its only polling place.[21] In order to fulfill the Witness Requirement for absentee ballots, Tribe

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[15] 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/.
[16] 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.
[17] *COVID-19 Cases by Onset Date*, AK COVID-19 Cases Dashboard, https://experience.arcgis.com/experience/6a5932d709ef4ab1b868188a4c757b4f (last visited Sept. 23, 2020).
[18] 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-days/.
[19] 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.
[20] 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/.
[21] Appx. P (Yatlin Aff. ¶ 9). Note also the first peak associated with this date in the chart above.

members who did not live with another resident at least 18 year or older would have had to break quarantine to secure a witness.[22] Other communities across the state experienced similar problems.[23] 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.[24] According to the State, only ten people voted through this method—in a community of over 200 people.[25] 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.

COVID-19 has disproportionately killed Native Americans and Alaska Natives. In Alaska, Indigenous people make up approximately 15.6% of the population but 43% of COVID-related deaths.[26] In Arizona, Native Americans make up 4% of the population and 12% of deaths.[27] In New Mexico, they account for only 9% of the population but nearly 54% of deaths.[28] 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 is attributed to ongoing discrimination in testing and access to treatment.[29] To

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[22] Appx. P (Yatlin Aff. ¶¶ 6, 9, 12–13).
[23] *See* Appx. 2 (Horton Aff. ¶¶ 2–3).
[24] *Id.* at ¶ 3.
[25] *Id.*
[26] *Racial Data Dashboard*, The COVID Tracking Project (Sept. 7, 2020), https://covidtracking.com/race/dashboard.
[27] *Id.*
[28] *Id.*
[29] *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*

protect the health of vulnerable Tribe members, Arctic Village closed down its polling place for the primary election and have not said that they can have polling places in the upcoming election.[30]

COVID-19 also disproportionately impacts those who are immunocompromised and above 65 years of age. Many of the League of Women Voters of Alaska members are older and have comorbidities that make them susceptible to COVID-19. Both individual Respondents are over 65, live alone, and are immunocompromised, with high blood pressure, obesity, and chronic obstructive pulmonary disease (COPD).[31] They do not have an adult to witness their signing and sign their absentee ballots. 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, and thus individual Respondents are part of a significant proportion of the Alaska population that lives alone. The Witness Requirement, thus, stands to disenfranchise a significant percentage of Alaska's population, including Respondents Elizabeth Jones and Barbara Clark. Both made efforts to vote in the primary—Elizabeth Jones was able to vote only because her mail carrier witnessed her ballot,[32] an option no longer available to her due to new United States Postal Service policy that prohibits its employees from serving as witnesses for absentee

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*Black Families*, N.Y. Times (May 20, 2020), https://www.nytimes.com/2020/05/10/us/coronavirus-african-americans-bias.html.
[30] Appx. P (Yatlin Aff. ¶ 9).
[31] Appx. N (Jones Aff. ¶¶ 10–11); Appx. O (Clark Aff. ¶ 7).
[32] Appendix O (Jones Aff. ¶¶ 15–17).

ballots.[33] As Petitioner 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."[34]

Recognizing the risks to these voters, Petitioners decided in late July to send absentee ballots to registered voters over 65 without a prior request.[35] Petitioner 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."[36] At that time, Petitioners heeded the advice of "public health officials"[37] to mail a "paper absentee ballot application form" to all "voters 65 and older,"[38] and thus enable these "high-risk" voters to "avoid exposure to COVID-19."[39]

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[33] *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/.
[34] *Id.*
[35] *Disability Law Ctr. of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020) (Dkt. No. 25).
[36] 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).
[37] *Id*.
[38] *Id*. at ¶ 6.
[39] *Id*. at ¶ 7.

## ARGUMENT

### I. Standard of Review

A trial court's decision on a preliminary injunction is reviewed for "abuse of discretion."[40] The Supreme Court will find an abuse of discretion "only when we are left with a definite and firm conviction, after reviewing the whole record, that the trial court erred in its ruling."[41] A trial court's legal determinations underlying a preliminary injunction are reviewed de novo.[42] While the question of whether an equitable defense of laches applies is a question of law reviewed de novo, the facts underlying unreasonable delay and undue prejudice are reviewed for clear error and "the trial court has broad discretion to sustain or deny a defense based on laches."[43]

### II. The Superior Court Did Not Err in Ruling That Laches Does Not Bar This Action.

Respondents' claims are not time-barred by laches. "Laches is an equitable defense available 'when a party delays asserting a claim for an *unconscionable* period.'"[44] In order for a court to dismiss a claim based on laches the defendant *must* establish "two 'independent' elements":[45] "(1) that the plaintiff has unreasonably delayed

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[40] *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 455 (Alaska 2006). (internal quotations omitted); *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).
[41] *City of Kenai*, 129 P.3d at 455.
[42] *Id.*
[43] *Anderson v. Dep't of Administration, Div. of Motor Vehicles*, 440 P.3d 217, 219–20 (Alaska 2019).
[44] *Kollander v. Kollander*, 322 P.3d 897, 903 (2014) (quoting *Burke v. Maka*, 296 P.3d 976, 979 (2013)) (internal quotation marks omitted).
[45] *City & Borough of Juneau v. Breck*, 706 P.2d 313, 315 (1985) (quoting *Moore v. State*, 553 P.2d 8, 15 (1976)).

in bringing the action, and (2) that this unreasonable delay caused undue harm or prejudice to the defendant."[46] The defendant bears the burden on establishing both elements of the defense.[47] As a threshold issue, the court must determine "whether the doctrine of laches, as an equitable defense, may apply to the claim before the court."[48]

### A. The Superior Court Did Not Err in Rejecting Petitioners' Defense of Laches.

This Court will not overturn a trial court's determination on laches "[absent] a definite and firm conviction that a mistake has been committed."[49]

The Superior Court rightly concluded that Petitioners failed to prove that Respondents lacked a probability of success on this issue. First, the superior court applied the correct standard, i.e., that unreasonable delay is measured not "merely [as] 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."[50] This fact-specific inquiry turns on "when it became reasonable to expect plaintiffs to act upon the wrong" not "when the alleged wrong

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[46] *Id*.
[47] *Kollander*, 322 P.3d at 903.
[48] *Id*. at 902. It is questionable whether laches can be raised as a defense against a claim asserting the fundamental right to vote. *See, e.g.*, *Hershcopf v. Lomenzo*, 350 F. Supp. 156, 159 (S.D.N.Y. 2017) ("We need not stress the importance and right of franchise. It was urged upon the hearing of this motion that plaintiffs should be denied relief because of laches in presenting this action. I hold that the right to vote is too fundamental in the democratic process to be denied upon any such plea."); *Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 n.2 (S.D.W.Va. 2000); *Landwersiek v. Dunivan*, 147 S.W.3d 141, 148–49 (Mo. App. 2004). This Court has never applied laches to such a claim. At a minimum, these cases suggest that courts should exercise caution in applying laches in this context.
[49] *Breck*, 706 P.2d at 315.
[50] *Kollander*, 322 P.3d at 903 (citation omitted).

occurred."[51] Second, the Superior Court's findings of fact supporting its ruling on laches were not clear error.

Prior to late-August, it was not apparent to Respondents that they would be unable to exercise their fundamental right to vote during the COVID-19 pandemic because of the Witness Requirement. As the Superior Court acknowledged, it became reasonable for Respondents to sue after the 2020 primary election because laches is not applied with "20/20 hindsight."[52]

Up until August 17, 2020, the Tribe—and Petitioners for that matter—were planning on in-person voting in Arctic Village.[53] This plan changed, overnight, when a positive COVID-19 case in Arctic Village made it impossible for the Tribe to safely administer in-person voting.[54] Respondents Jones and Clark voted absentee for the first time in the primary election taking extreme risks to locate witnesses. Respondent Jones relied on her mail carrier, which is no longer an option.[55]

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[51] *Moore*, 553 P.2d at 16.

[52] Appx. M at 6 (Sup. Ct. Order, Oct. 5, 2020) ("But 20/20 hindsight is not required.").

[53] That Respondents began taking precautions against the coronavirus in March is irrelevant in determining whether laches time-bars their claims. Respondents could not have predicted in March how the pandemic would unfold in Alaska over the next nine months. *Texas Alliance for Retired Americans v. Hughs*, 2020 WL 5747088 (S.D. Tex. Sept. 25, 2020) (rejecting state's laches defense in a case challenging the constitutionality of enforcing a law during the pandemic on the grounds that "[i]t is only natural that Plaintiffs would bring a new challenge after witnessing the difficulties of administering an election in the midst of a pandemic, learning how the disease could affect the health of voters, and recognizing the extent to which the pandemic has exposed and exacerbated pre-existing socioeconomic inequalities.")

[54] Appx. P (Yatlin Aff. ¶ 9).

[55] Respondent Jones had her absentee ballot envelope witnessed by her mail carrier for the primary election, she had to risk her health. This option is no longer available because in mid-August USPS instituted a new policy prohibiting its employees from serving as witnesses for absentee ballots. Fenumiai noted in a letter to the USPS, "Rural Alaska

Petitioners' argument that Respondents were "aware" of the pandemic and that sister chapters of Respondent League of Women Voters of Alaska in other states may have filed actions at earlier times is irrelevant.[56] As the superior court noted, "the pandemic has not been a static or predictable experience in Alaska or elsewhere [and] COVID-19 statistics have varied significantly."[57] Further, Petitioners' citations to "similar lawsuits in other states in the spring and summer" are unpersuasive, inapposite, and easily distinguishable.[58] The progression of the COVID-19 pandemic in Alaska has

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relies heavily on post officials as they are often [] the only option for a[n] [absentee ballot] witness." Respondents could not have anticipated this USPS policy change in March.

[56] Pet. for Review at 10.

[57] Appx. M at 6 (Sup. Ct. Order, Oct. 5, 2020).

[58] Pet. for Review at 11, n.33–34. Even assuming *arguendo* that the pandemic followed the same course of progression in Alaska – which the Superior Court noted it did not – Petitioners' cases are inapplicable, and indeed Petitioners mischaracterize many of the cases in attempt to prove their point. Petitioners cite to *Thomas v. Andino*, 2020 WL 2617329 (D.S.C. May 20, 2020), where the plaintiff filed their lawsuit in April 2020, but omit the fact that *Thomas* was a lawsuit challenging requirements for the *June 9, 2020 primary election*, not the November 3, 2020 election; the timing in that case is quite similar to the timing of this suit. The same is true for *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, 2020 WL 4927524, at *3 (W.D. Va. Aug. 21, 2020), Petitioners note that the suit was filed on April 17, 2020 but not that it was challenging requirements for the June 23, 2020 primary elections, the second amended complaint for the November election was not filed until July 17, 2020. Petitioners' citations to a May lawsuit by the League of Women Voters in Minnesota also ignore the fact that the lawsuit was challenging requirements for Minnesota's August 11, 2020 primary, which had absentee voting beginning on June 26. "LWVMN Challenges Absentee Ballot Signature Witness Requirement" (May 19, 2020), https://www.lwvmn.org/leaguenews/2020/5/19/lwvmn-challenges-absentee-ballot-signature-witness-requirement. Petitioners also cite to *People First of Alabama v. Merrill*, 2020 WL 3207824, at *1 (N.D. Ala. Sept. 30, 2020), filed on May 1, 2020. The *People First* plaintiffs amended their complaint in July and still won relief from the district court. *NAACP of Minnesota v. Simon* was resolved with a consent decree with the state, and is wholly irrelevant to a laches analysis. Stipulation and Partial Consent Decree, *NAACP of Minnesota v. Simon*, Minnesota State Court, Second District, County of Ramsey, Case

been fundamentally different than in every other state. By the end of May, there were only thirty-five active COVID-19 cases in Alaska. In May or June, Respondents could not have understood the full extent of the disenfranchisement caused by the Witness Requirement during the COVID-19 pandemic because it was only until the end of August that the Anchorage Daily News reported that the Division rejected 456 ballots due to "improper or insufficient witnessing."[59]

### B. Petitioners Are Not Unduly Prejudiced.

The State failed to demonstrate undue prejudice—the second element of laches. In determining whether a defendant has been unduly prejudiced, courts must "weigh the importance of the public interest in question[]. . . as part of the overall process in balancing the equities of a particular case to determine whether plaintiffs are guilty of inequitable delay."[60]

The State asserts a slew of arguments including that eliminating the Witness Requirement proves too burdensome during a "critical pre-election period" when the Division has limited staff.[61] But since this lawsuit was filed, the State has made at least

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No. 62-CV-20-3625, (https://www.aclu-mn.org/sites/default/files/field_documents/62-cv-20-3149_stipulation_and_consent_decree_0.pdf). Similarly, Petitioners cite to *Chambers v. North Carolina*, which is inapposite as the plaintiffs sought more burdensome relief, such as modifying absentee ballots a permanent injunction for future elections. Complaint, *Chambers v. North Carolina*, North Carolina Superior Court, Wake County, Case No. 20 CVS 500124. (https://www.aclu.org/legal-document/complaint-chambers-v-state-nc).

[59] Brooks *supra* note 9.

[60] *Moore*, 553 P.2d at 19. The "equitable considerations of each case[] include[e] . . . the interests to be vindicated[] and the resulting prejudice." *Id*. at 16.

[61] Pet. for Review at 14.

four significant changes to the election system. On September 14, after first declaring that it was too late to do so, the Division announced that it had changed the ballots for the general election to remove the Independent and Non-Partisan designations of candidates.[62] On September 21, after the Division had already sent out overseas ballots, it was notified that it had listed the wrong candidate for House District 35 and had to resend new ballots overseas.[63] On September 25, the Division quickly mobilized to reprint the ballots in the House district to correct the omission of party designation of a candidate.[64] Starting September 25, the Division decided to reprint 81,000 ballots for three other House districts (11, 12, 16, and 38) to include the party affiliation of petition candidates.[65] The Division's ability to undertake changes quickly and adapt in response to its own errors or outcomes in lawsuits which sought even more radical affirmative relief than the case at bar, belies its concerns about administrative burdens.

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[62] James Brooks & Aubrey Wieber, *A late change to the 2020 General Election ballot sparks outcry from Alaska Democrats*, Anchorage Daily News (Sep. 14, 2020), https://www.adn.com/politics/2020/09/14/a-late-change-to-the-2020-general-election-ballot-sparks-outcry-from-alaska-democrats/#6323; James Brooks & Audrey Wieber, *After criticism from Democrats, Alaska Division of Elections says ballot design change is not politically motivated*, Anchorage Daily News (Sep. 15, 2020), https://www.adn.com/politics/2020/09/15/after-criticism-from-democrats-alaska-division-of-elections-says-ballot-design-change-is-not-politically-motivated/.

[63] James Brooks, *Some absentee ballots list the wrong candidate in an Anchorage House race*, Anchorage Daily News (Sep. 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/.

[64] Cheyenne Matthews, *Libertarian Party candidate's affiliation is now listed on sample Alaska ballot as lawsuit is filed*, MSN (Sep. 26, 2020), https://www.msn.com/en-us/news/politics/libertarian-party-candidate-e2-80-99s-affiliation-now-listed-on-sample-alaska-ballot-as-lawsuit-is-filed/ar-BB19raXW.

[65] Sean Maguire, *Ballots for 4 districts to be reprinted, showing candidate affiliations*, MSN (Sep. 28, 2020), https://www.msn.com/en-us/news/politics/house-district-16-ballot-to-be-reprinted-showing-libertarian-candidate-s-affiliation/ar-BB19vYmF.

Petitioners next contend that voters will be confused by "garbled" messages—where the ballot envelope states that a witness signature is required but the messaging from the Division says that it is not. Any garbled message would reflect on the Division's inability to effectively educate voters about the changes, not the change itself.[66] The Division has committed to an aggressive public outreach campaign should this Court uphold the superior court's injunction, promising to disseminate the following message on its website and in social media posts: "Recently, a court decided that voters do not need to have their by mail ballot witnessed. This is only for the November 2020 general election. Voters must still sign and provide an identifier on the back of the envelope. It is recommended for voters to date their signature." More to the point, as the superior court noted, at worst this would mean that some voters may procure a witness for their signatures anyway or choose not to vote. But these voters will be in no worse position than they would be if the injunction were not issued, and thousands more would be in a better—and safer—position.[67]

Petitioners next contend that the elimination of the Witness Requirement, a provision they assert protects against voter fraud, will undermine the public's trust in the integrity of the election.[68] There is simply no evidence in the record to support this. And as the Superior Court noted, removing needless barriers to voting "could increase voter

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[66] *People First of Ala. v. Merrill*, 2020 WL 5814455, at *44 (N.D. Ala. Sept. 30, 2020) ("Thus, to the extent that . . . the hypothetical voter [is] misinformed about local voting rules, the onus of such misinformation is on the individual counties and the Secretary of State, who is tasked with educating the public about how to vote.") (pending appeal).
[67] Appx. M at 7, n.4 (Sup. Ct. Order, Oct. 5, 2020).
[68] Pet. for Review at 13–14.

confidence in Alaska's elections system, showing that even during a pandemic, the state will maximize our citizens' opportunities to vote safely."[69]

Although Petitioners claim that the Witness Requirement prevents fraud, at the hearing on the preliminary injunction, they were unable to cite a single example where the Witness Requirement has been used to detect fraud.[70] The Superior Court therefore did not err in concluding that the State could not justify enforcing the Witness Requirement as a fraud prevention measure where instances of fraud were rare to begin with and there was no evidence that it "play[ed] a consistent role in verifying the person who voted for an absentee ballot."[71]

Finally, Petitioners complain that eliminating the Witness Requirement and educating voters about the change would be administratively burdensome.[72] But the Superior Court rightly rejected this argument. The relief ordered simply requires Petitioners simply to count unwitnessed, but otherwise compliant, ballots, and to notify voters of the lifting of the Witness Requirement by the most effective and cost-efficient means. Petitioners have already agreed to those means, undercutting any argument that such notice and education are not feasible.

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[69] Appx. M at 14 (Sup. Ct. Order, Oct. 5, 2020).
[70] In response to the court's question on whether the Witness Requirement has ever been a part of detecting fraud, Counsel responded "I—of course I can't say whether it ever has or has not been. Um—I think in recent memory it has not. *3AN-20-07858CI Arctic Village Council vs. Meyer, Kevin* at 1:25:49 to 1:26:03, YouTube.com (Oct. 1, 2020), https://www.youtube.com/watch?v=feIs10R1O3Y (archived audio recording of superior court's motions hearing).
[71] Appx. M at 13 (Sup. Ct. Order, Oct. 5, 2020).
[72] Pet. for Review at 14.

### III. The Superior Court Did Not Abuse Its Discretion in Ruling that Respondents Have Established a Probability of Success on the Merits of Their Right to Vote Claim.

This 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, there is no dispute that Respondents have "asserted the constitutionally protected right to vote absentee."[74] Restrictions on the right to vote are accorded strict scrutiny—as the superior court noted, "[i]f the Witness Requirement is not eliminated, it will force Plaintiffs and other voters to choose between risking their health by coming into contact with a witness or forgo their right to vote entirely. This is a severe burden on Plaintiffs' fundamental right to vote."[75] In contrast, the State has failed to assert a compelling interest that outweighs this severe burden on the right to vote.[76]

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[73] *See State, Div. of Elections v.Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005).

[74] Appx. M at 11 (Sup. Ct. Order, Oct. 5, 2020). 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 citizenship" and courts are "reluctant to permit a wholesale disenfranchisement of qualified electors through no fault of their own." *Miller v. Treadwell*, 245 P.3d 867, 868–69 (Alaska 2010) (quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978)).

[75] Appx. M at 12 (Sup. Ct. Order, Oct. 5, 2020).

[76] The superior court found for Respondents on the basis of their claim that the Witness Requirement impermissibly burdens the right to vote and thus did not reach the probable success of the merits of the claim under Article I, Section 1 of the Alaska Constitution guaranteeing equal rights, opportunities, and protection under the law to all persons. Appx. M at 14 (Sup. Ct. Order, Oct. 5, 2020).

However, as the Superior Court noted, even if the burden on the right to vote is viewed as something less than "severe," i.e., "substantial," and strict scrutiny does not apply, the interests asserted by Petitioners fail the lesser "heightened scrutiny" test.[77]

### A. The Witness Requirement Either Severely or Substantially Burdens the Right to Vote During the Pandemic.

The crux of Petitioners' argument is that the burden imposed by the Witness Requirement is "minimal" because, according to them, complying with the Requirement is merely "inconvenient" and can be done safely with precautions.[78] But this argument rests on a fundamental misconception of both what havoc the pandemic has wrought on or lives and on what this case is about.

Sure, people may be compelled to leave their homes to buy food or seek medical attention during the pandemic. Such relatively minor excursions are forced by necessity, and it does expose people to risks they would otherwise wish to avoid. But this case is about how, during the pandemic, Alaskans do not have to be forced to take risks they would otherwise avoid in order to exercise their cherished right to vote, and about the fact that Petitioners have it within their power to reduce those risks to Alaskans, but unjustifiably refuse to do so.

And Petitioners know this. During oral argument, they conceded that Respondents had a strong claim on the merits and that this case essentially revolves around laches.[79]

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[77] PI Order at 12, n. 14.
[78] Pet. for Review at 17-18.
[79] Oral Arg. at 1:09:20-1:09:45 (October 1, 2020), https://www.youtube.com/watch?v=feIs10R1O3Y.

When asked about the disproportionate impacts of COVID-19 on Native communities, the elderly, and the immunocompromised during oral argument, the State was not able to provide evidence to the contrary nor was it able to deny that these populations are especially susceptible to the virus. The superior court took note of these alarming facts in its order—noting in particular that 25% of Alaskans live alone and would have a difficult time procuring a witness without unnecessarily exposing themselves.[80] These findings of fact were not clearly erroneous. Nor was the superior court's dismissal of Petitioners' argument that the fact that some Arctic Villagers voted in the August primary was evidence that the Witness Requirement was not burdensome. Being forced to subject oneself to risk once in order to exercise the right to vote, does not mean that it is constitutionally permissible to be subjected a second time – particularly as the risk has increased.[81]

Petitioners propose a series of alternative means by which Alaskan voters might obtain a witness signature without coming into close contact with another individual. Not only do each of these have their flaws,[82] but the science of the pandemic is changing

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[80] Petitioners note themselves that the CDC advises individuals to "limit [ ] interactions with other people as much as possible." Pet. for Review at 17.

[81] Further, as the Superior Court explained, Petitioners' "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." Appx. M at 9, n.9 (Sup. Ct. Order, Oct. 5, 2020).

[82] Pet. for Review at 17. For example, meeting witnesses outside is hardly a choice as the weather is getting increasingly colder in Alaska. Further, this would increase the burden on elderly, immunocompromised, and otherwise at-risk individuals. Oral Arg, 1:16:18 (October 1, 2020), https://www.youtube.com/watch?v=feIs10R1O3Y. Moreover, there is absolutely no scientific proof that the virus cannot be transmitted outdoors. Other "cures," such as voters being separated from their witnesses through a window. Pet. for

every day, and the efficaciousness of these proposed precautions is necessarily speculative.[83] As the Superior Court noted, "…such precautions are not a guarantee against contracting the disease…[and] 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."[84] The Superior Court's findings in this regard, were not in error.

Petitioners' reliance on the recent U.S. Supreme Court decision staying the lower court's injunction against South Carolina's Witness Requirement is unpersuasive and inapposite.[85] First, the Supreme Court's Order was provided without any opinion or reasoning, so is neither persuasive nor dispositive on these facts. The Court's three sentence order is not an opinion. Second, the reasoning contained in the concurrence is persuasive, and clearly states that "this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election."[86] This case is in Alaska state court, and Alaska law accords broad protections to fundamental rights reaching beyond the rights protected under the U.S. Constitution.[87]

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Review at 17–18, does not account for the fact that voters and witnesses will both need to handle the envelope, and the virus can be transmitted through surface contact.

[83] For example, just two days ago the CDC updated their guidance to acknowledge that COVID-19 can sometimes be spread by airborne transmission. Ctrs. for Disease Control and Prevention, *How COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (Oct. 5, 2020).

[84] Appx. M at 9, n.8 (Sup. Ct. Order, Oct. 5, 2020).

[85] Order on Application for Stay, *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020).

[86] *Id.* (J. Kavanaugh, concurring).

[87] *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

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.[88] 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 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."[89] In *Bostleman*, the state offered even greater accommodations than Defendants have here, offering to allow Wisconsin's witness requirement to be met virtually over video chat platforms such as Skype or Zoom, whereas Defendants have not budged on the physical presence requirement of the Witness Requirement.

Other courts have held the same, requiring that states lift statutory requirements that place substantial burdens on the fundamental right to vote during the pandemic.[90] These

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constitution 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.").

[88] *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 5627186, at *4 (W.D. Wis. Sept. 21, 2020).

[89] *Id*. at 23.

[90] *See, e.g., League of Women Voters of Va.*, 2020 WL 2158249, at *1, *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

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.[91]

Finally, the State argues that the burden is not evident because the percentage of absentee ballots rejected for lack of witness signature in the primary was lower than the percentage in prior elections.[92] It is undisputed that 456 voters were disenfranchised because of the Witness Requirement in this year's primary election,[93] and given that the number of voters who will vote by absentee ballots will increase substantially in November, it is highly probable that the number of those disenfranchised if the Witness Requirement is not lifted will increase proportionally.[94]

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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. Co.A. 14th Judicial Dist. Sept. 18, 2020) (affirming county's decision to mail all registered voters absentee ballot applications during pandemic).

[91] *Middleton*, 2020 WL 5591590 at *35 (D.S.C. Sept. 19, 2020) (reversed by the U.S. Supreme Court) (finding "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) (noting that "[i]n 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."). *Middleton's* factual findings of the risks and burdens of South Carolina's Witness Requirement should still be persuasive, as the health risks are similar in this case, and the factual findings remain relevant to this Court's inquiry.

[92] Pet. for Review at 18–19.

[93] Brooks, *supra* note 9.

[94] 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

### B. Enforcement of the Witness Requirement during the COVID-19 Pandemic Is Not Justified by State Interests.

The State attempts to justify the burdens on voters with two state interests: preventing voter fraud and public confidence in the election results.[95] They also state a general interest in preventing voter confusion and distrust. The Superior Court correctly rejected both, concluding that they did not outweigh the severe burden on the right to vote.

As noted above, Petitioners were unable to articulate how enforcing the Witness Requirement would prevent fraud. "[W]hile 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 . . . the state must explain why the interests it claims are concretely at issue and how the challenged legislation advances those interests."[96] Hence, the Superior Court's conclusion that, "[b]ased on the record before it, the court cannot find that the Witness Requirement is an effective tool for detecting voter fraud,"[97] was not erroneous.[98]

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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. And higher turnout is expected for the November general election.

[95] Pet. for Review at 19.

[96] *Green Party*, 118 P.3d at 1066.

[97] Appx. M at 12 (Sup. Ct. Order, Oct. 5, 2020).

[98] Recognizing this failure of proof, Petitioners argue that the Witness Requirement would "prevent more pedestrian fraud, like a spouse filling out and mailing a spouse's ballot." Pet. for Review at 21-22. But, again, they have presented no evidence that such "spousal voter fraud" ever occurs. Similarly, they attempt to excuse the Heritage Foundation's failure to refer to more than a tiny number of incidents of voter fraud in Alaska on the basis that "it does not capture reported instances that are not investigated or

Petitioners claim 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.[99] But Petitioners conceded at oral argument that 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.[100]

Petitioners' argument that the Witness Requirement is within the mainstream of state absentee ballot verification processes is irrelevant, as this is not a facial challenge to the Requirement, but an as applied challenge in the context of the circumstances of Alaska in this general election cycle. 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.[101]

Similarly, that the legislature thought the Requirement important does not further Petitioners' position.[102] When determining the value of the Witness Requirement in 2005, the legislature was not considering it in the context of a global pandemic. The same can

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prosecuted." Pet. for Review at 19, n51. Presumably if cases are reported but are not investigated or prosecuted, they do not rise to the level of voter fraud.

[99] Appx. M at 20 (Sup. Ct. Order, Oct. 5, 2020).

[100] Oral Arg, 1:21:47-1:22:03 (Oct. 1, 2020), https://www.youtube.com/watch?v=feIs10R1O3Y ("The Court: The witness is not performing the function of confirming that the voter is in fact the voter who's submitting the ballot, correct? Attorney for the State: Officially that's correct.").

[101] AS 12.55.125(d).

[102] Pet. for Review at 20.

be said for Petitioners' argument that the legislature did not remove the Witness Requirement when considering pandemic-related election legislation in March and April of this year. As noted above, Alaska's COVID case count in March and April was relatively low. The case number has since spiked dramatically, and the context for these considerations has changed. The burden is now significantly higher on voters.

Petitioners further argue that the Court must consider the importance of the state's role in light of recent federal court decisions in Alabama, South Carolina, and Wisconsin. But this Court is not limited by the decisions of the United States Supreme Court interpreting the United States Constitution given that Respondents seek relief under the Alaska Constitution. This Court has repeatedly held that it "is not obliged to interpret our constitution in the same manner as the Supreme Court of the United States has construed parallel provisions of the federal Constitution."[103] "The Alaska Constitution may have broader safeguards than the minimum federal standards"[104] because "Alaska's constitutional heritage may require individual protections over and above federal guarantees."[105] As this Court has said, in *Baker v. City of Fairbanks*, 106 "we are at liberty to make constitutional progress in Alaska by our own interpretations"[107] and "[i]t

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[103] *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972). *See also Roberts v. State*, 458 P.2d 340, 342–43 (Alaska 1969) (emphatically stating that this Court is "not limited by decisions of the United States Supreme Court or the United States Constitution when [it] expound[s] our state constitution."
[104] *Roberts*, 458 P.2d at 342–43.
[105] *Club SinRock, LLC v. Municipality of Anchorage, Office of the Mun. Clerk*, 445 P.3d 1031, 1037 (Alaska 2019).
[106] 471 P.2d 386 (Alaska 1970).
[107] *Id.* at 401.

is our duty to move forward in those areas of constitutional progress which we view as necessary to the development of a civilized way of life" and "ordered liberty which is at the core of our constitutional heritage" in Alaska.[108] In fact, "[t]o look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities."[109]

Finally, Petitioners argue that the Witness Requirement is paramount to safeguarding voter confidence because any last minute, temporary changes would compromise the integrity of the system.[110] But here the changes are simple: inform voters they do not need witnesses on their absentee ballot, and do not reject ballots that lack a witness signature. Petitioners also argue that a temporary suspension of the Requirement and future enforcement has the potential to cause voter confusion. However, if Petitioners fulfill their duty to appropriately educate voters ahead of the 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.[111] The Superior Court recognized that "…eliminating the Witness Requirement [to

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[108] *Id.*
[109] *Roberts*, 458 P.2d at 342. *See also State v. Browder*, 486 P.2d 925, 936 (Alaska 1971) ("It would be an abdication of our constitutional responsibilities to look only to the [U.S.] Supreme Court for guidance.").
[110] Pet. for Review at 25.
[111] James Brooks, *Some absentee ballots list the wrong candidate in an Anchorage House race,* Anchorage Daily News (Sept. 22, 2020), https://www.adn.com/politics/alaska-legislature/2020/09/21/some-absentee-ballots-list-the-wrong-democratic-candidate-in-an-anchorage-house-race/; Pat Forgey, *Voter Pamphlet omission may have affected earliest*

protect individuals' rights to protect their health *and* to vote] 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."[112] The superior court's finding was not in error.

### IV. The Superior Court Erred as a Matter of Law in Finding that Respondents Did Not Prevail on the Balance of the Hardships.

While the Superior Court correctly found that Respondents are likely to prevail on the merits of their claims, it erred in concluding that Respondents did not meet the balance of hardships standard.[113] It reached this conclusion by applying an incorrect legal standard to the balance the hardships analysis, a conclusion this Court should review de novo. And because this Court can uphold the Superior Court's issuance of the preliminary injunction on any grounds in the record, even those rejected by the Superior Court,[114] this Court may conclude that the injunction should stand because Respondents should have prevailed on the balance of hardships standard.

To "balance the hardships," courts apply a three-pronged analysis to determine if 1) the moving party will suffer certain and irreparable harm if the court does not issue the preliminary injunction, 2) the opposing party is "adequately protected" if the injury is small compared to the moving party's injury, and 3) the issues raise serious and

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*mailed ballots*, Anchorage Daily News (Oct. 17, 2014), https://www.adn.com/politics/article/voter-pamphlet-issue-may-have-affected-1900-ballots/2014/10/17/.

[112] Appx. M at 13 (Sup. Ct. Order, Oct. 5, 2020).

[113] *Id.* at 11.

[114] *Torrey v. Hamilton*, 872 P.2d 186, 188 (Alaska 1994).

substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.[115] The superior court correctly outlined this standard and rightly noted that Respondents' claims are clearly not frivolous or without merit, recognizing that Respondents "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."[116]

The Superior Court also properly found that Respondents will suffer certain and irreparable harm without an injunction. The court noted that "Plaintiffs Jones and Clark are elderly, live alone, and are immunocompromised," that "[t]hey are at a higher risk of contracting COVID-19 and experiencing severe consequences," and that they "will be forced to choose between voting and risking their health" to comply with the witness requirement.[117] As for Arctic Village Council, the court recognized its "untenable choice of lifting the shelter-in-place order to allow absentee voters living alone (approximately one-third of the village)" to find a witness.[118] And the court rightly found that more than half of the League of Women Voters of Alaska's members are senior citizens, many who live alone, who "will be forced to choose between voting and risking their health."[119]

These factual findings should be upheld as a proper exercise of the superior court's discretion. But the court erred—as a matter of law—in its failure to apply the balance of hardships standard because it did not "compare" these injuries to those of

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[115] *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 (Alaska 1992).
[116] Appx. M at 8 (Sup. Ct. Order, Oct. 5, 2020).
[117] *Id.* at 9.
[118] *Id.*
[119] *Id.* at 9–10.

Petitioners, as the standard requires. Instead, the court held that Respondents did not meet the balance of hardships standard simply because it found the injury to Petitioners is not "slight."[120] But the standard for the grant of a preliminary injunction is not whether an injury is slight in the abstract; it is whether the injury is slight *relative* to the injury to the other party.[121]

Properly weighing the relative injuries of Respondents and Petitioners would have compelled the superior court to conclude that Petitioners met the balance of hardships standard. Petitioners, of course, will suffer some injury as a result of the injunction. As the superior court recognized, if the Witness Requirement is lifted, Petitioners "will have to engage in some level of public education . . . [and] alter [their] ballot review practices."[122] But this administrative burden pales in comparison to voter disenfranchisement. Courts have repeatedly held that such administrative burdens and costs do not outweigh fundamental voting rights.[123] "Any potential hardship imposed" on

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[120] *Id.* at 10–11.
[121] *Kluti Kaah Native Vill. of Cooper Center*, 831 P.2d at 1273.
[122] Appx. M at 10 (Sup. Ct. Order, Oct. 5, 2020).
[123] *See, e.g.*, *Obama for America v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) ("[T]he State has not shown that its regulatory interest in smooth election administration is 'important,' much less 'sufficiently weighty' to justify the burden it has placed on . . . voters."); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (describing the imposition of administrative, time, and financial burdens on Georgia as "minor when balanced against the right to vote, a right that is essential to an effective democracy").

the State "pales in comparison to that imposed by unconstitutionally depriving [Petitioners] of their right to vote."[124]

"[E]ven one disenfranchised voter . . . is too many."[125] This Court has held that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," further noting that the most basic of other rights "are illusory if the right to vote is undermined."[126] And Petitioners' administrative burdens, already relatively slight when compared to the harm to Respondents, have been greatly reduced by the nearly identical proposed preliminary injunction orders the parties have filed with the superior court. The court's preliminary injunction will therefore impose little to no additional financial burden on Respondents. Other than requiring cost-free web-based notification of the lifted Witness Requirement—emails to absentee voters, a handful of social media posts, a press release, and revisions to website text—the preliminary injunction will require no more than a public service announcement on the radio and television notification via ad space Petitioners have already purchased.

All told, the balance of hardships, properly considered, weighs heavily in Respondents' favor. Because the superior court erred as a matter of law in failing to apply

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[124] *Fla. Democratic Party v. Detzner*, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016) ("administrative inconvenience . . . cannot justify stripping Florida voters of their fundamental right to vote and to have their votes counted.").
[125] *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014).
[126] *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) (citing *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)).

the appropriate balance of hardships standard, this Court may exercise de novo review of that error and, giving deference to the superior court's factual findings, affirm the court's preliminary injunction on that basis.

## CONCLUSION

For the foregoing reasons, this Court should deny the State's Petition for Review and affirm the superior court's preliminary injunction decision and grant Respondents' requested relief.

DATED this 8th day of October, 2020.


*s/ Natalie Landreth*
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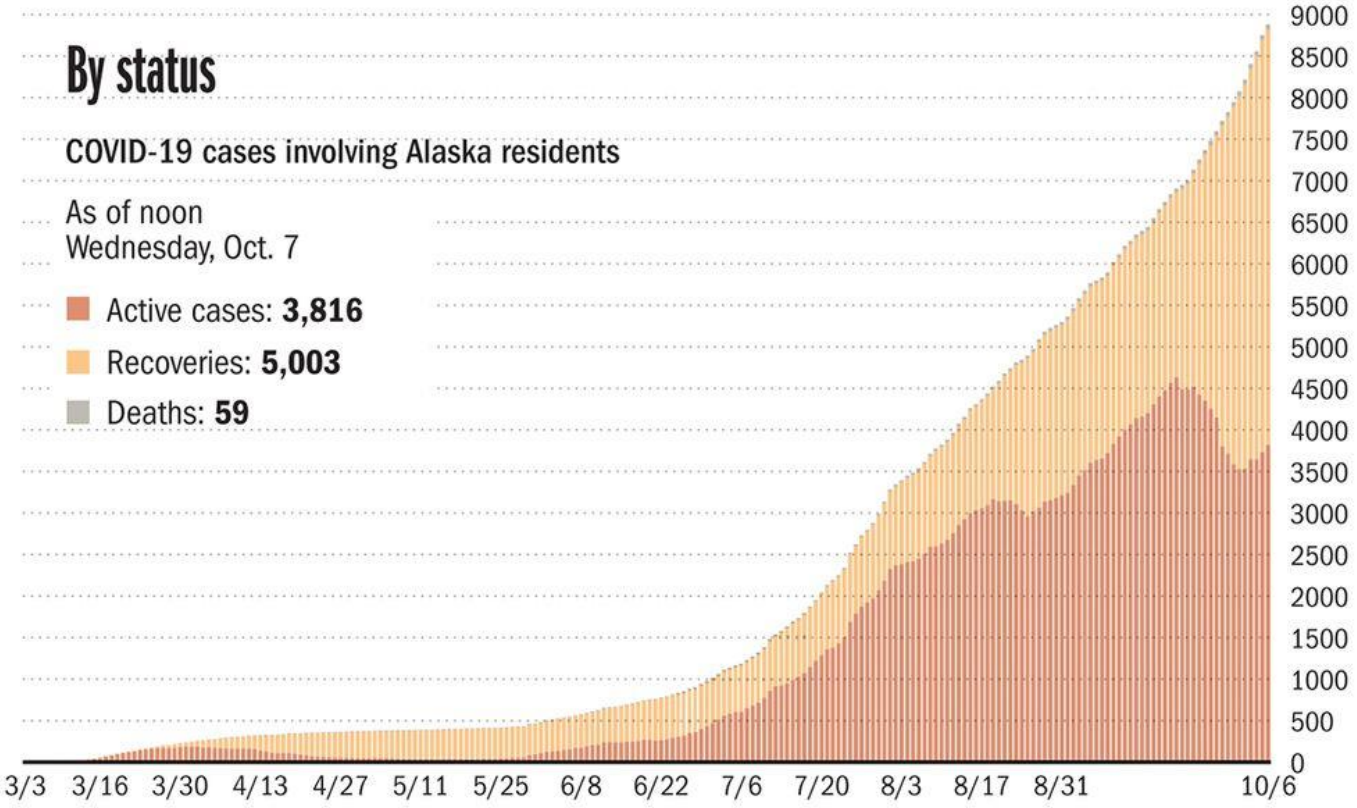
*Counsel for all Respondents*

*Counsel for League of Women Voters of Alaska, Elizabeth Jones, and Barbara Clark*

* *Pro Hac Vice* forthcoming

# EXHIBIT A




Source: Alaska Department of Health and Social Services

**KEVIN POWELL** / Anchorage Daily News

# RESPONDENTS' APPENDICES

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,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | ) | Case No.: 3AN-20-07858 CI |

**AFFIDAVIT OF ANGELIQUE HORTON**

STATE OF ALASKA )
) ss.
THIRD JUDICIAL DISTRICT )

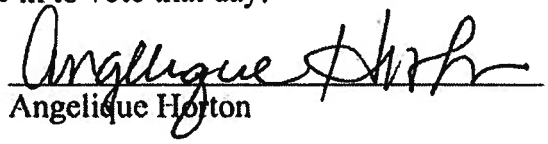
I, Angelique Horton, declare under penalty of perjury that the following is true and correct:

1. I am the Election Supervisor of the Nome 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 IV regarding voting in their communities.

2. On August 5, 2020, thirteen days before the primary election, I got an email from the administrator of Cold Bay, who is our Absentee Voting Official and election day Chairperson informing me that the community was shutting down to prevent spread of COVID-19, and that no polling place would be available on primary election day. I spoke to her on the phone the following day and discussed possible public space options for voting and she informed me that she would be leaving the community on August 15th to attend to her mother who resides elsewhere. She did not have suggestions for alternative workers or a polling place. Taking into account the small size of Cold Bay, she offered to personally contact all registered voters in the community and offer them the opportunity to vote absentee-in-person by appointment with her or she would bring the ballot to their homes. On August 14th and 15th, she contacted all households in Cold Bay where voters reside and scheduled absentee voting. She informed me that she successfully assisted seventeen voters on those two days.

3. On August 11, seven days prior to the primary election, I got a call from the Chairperson of the Nunam Iqua precinct stating that the community had gone into lockdown due to recent positive COVID-19 tests within the community. She also stated that she herself was in quarantine as one of the positive tests was a direct family member of hers so she would not be able to conduct elections on August 18th as planned. I then attempted contact with the City and Tribal offices. The Tribal administrator returned my call later that day and agreed to have the clerk offer absentee-in-person voting at the Tribal office through election day by appointment. On election

day, I contacted the clerk and she reported that she would stay open until 8:00pm that day and that she had ten voters who came in to vote that day.



Angelique Horton

SUBSCRIBED AND SWORN to before me this ___ day of _____, 2020.

_____
Notary Public in and for Alaska
My commission expires: _____

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

| | |
|---|---|
| ARCTIC VILLAGE COUNCIL *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>KEVIN MEYER *et al.*,<br><br>Defendants. | Case No. 3AN-20-07858 CI |

**[PROPOSED] PRELIMINARY INJUNCTION ORDER**

On October 5, 2020, the Court granted Plaintiffs Arctic Village Council's, League of Women Voters of Alaska's, Elizabeth L. Jones's, and Barbara Clark's Motion for Preliminary Injunction and requested the parties submit a proposed order detailing how Defendants Kevin Meyer, Gail Fenumiai, and Alaska Division of Elections must implement the Court's order. Accordingly, finding good cause,

**IT IS HEREBY ORDERED** that the "Witness Requirement" for Absentee Ballots, as required by AS § 15.20.066(b), AS § 15.20.081(d), 6 AAC 25.550, and 6 AAC 25.680 is hereby vacated as an unconstitutional burden on the right to vote in the 2020 General Election during the COVID-19 pandemic.

**IT IS FURTHER ORDERED:**

(1) Defendant Alaska Division of Elections ("the Division") must count all returned absentee ballots for the 2020 General Election without witness signatures, provided that they satisfy all other requirements.

(2) The Division must send all voters to whom it sent absentee ballots a separate

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mailing as soon as practicable explaining that they do not need to have their ballots witnessed given the COVID-19 pandemic.

(3) As soon as practicable, the Division will send out an email to the list the Division has from the Permanent Fund Dividend Division that includes voters who applied for a PFD this year explaining that they do not need to have their ballots witnessed for the 2020 general election.

(4) Defendants must train all persons who count absentee ballots on the absentee ballot counting boards to count those ballots without witness signatures, provided that they satisfy all other requirements.

(5) The Division must post on its social media accounts, including but not limited to Facebook, www.facebook.com/akelections, and Twitter, www.twitter.com/ak_elections, notifications that the Witness Requirement is not in effect for the 2020 General Election and that voters do not need to have their absentee ballots witnessed. The first social media notifications will be posted shortly after this final order is issued and then on a weekly basis through the day of the election.

(6) Defendant Kevin Meyer must post on his official social media accounts, including, but not limited to, Facebook, https://www.facebook.com/LtGovMeyer/, and Twitter, https://twitter.com/ltgovmeyer, notifications that the Witness Requirement is not in effect for the 2020 General Election and that voters do not need to have their absentee ballots witnessed. Defendant Meyer may fulfill this requirement by immediately re-posting, sharing, and retweeting posts from the Division on its own social media accounts within a reasonable amount of time.

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(7) The text of the above posts should read, "Recently, a court decided that voters do not need to have their by mail ballot witnessed. This is only for the November 2020 general election. Voters must still sign and provide an identifier on the back of the envelope. It is recommended for voters to date their signature."

(8) The Division must issue a press release announcing that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(9) The Division must make the following modifications to its website:

(i) On its "Press Releases and Public Service Announcements" page, https://www.elections.alaska.gov/Core/pressreleasesandpublicserviceannouncements.php, the Division must post an announcement that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(ii) On its "Public Notice" page, https://www.elections.alaska.gov/Core/publicnotice.php, the Division must create a new heading and post an announcement that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(iii) On its homepage, https://www.elections.alaska.gov/, the Division must post under "News" the press release that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

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(iv) On its "Early and Absentee Voting Options" page, https://elections.alaska.gov/Core/AKVoteEarly.php, the Division must: (A) post under "Absentee Voting By-Mail FAQ" a new FAQ to the effect of: "Do I need a witness signature for my absentee ballot?" "No. Recently, a court decided that voters do not need to have their by mail ballot witnessed. This is only for the November 2020 general election. Voters must still sign and provide an identifier on the back of the envelope. It is recommended for voters to date their signature. This applies to by-mail, by-fax, and online absentee ballots. Un-witnessed ballots will still be counted. If you do have your ballot witnessed, your vote will still count."; (B) remove the FAQ entitled "What does reasonably accessible mean regarding witnessing?"; and (C) modify the answer for "If I have a Power of Attorney (POA) can I sign the ballot envelope for the voter?" to indicate that the Witness Requirement is not required for the 2020 General Election.

(v) On its "By-Mail Ballot Delivery" page, https://www.elections.alaska.gov/Core/votingbymail.php, the Division must: (A) include a notification that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed; and (B) under "How to Vote your By-Mail Ballot," modify the instructions to state that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(vi) On its "By-Fax Ballot Delivery" page, https://www.elections.alaska.gov/Core/votingbyfax.php, the Division must: (A)

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include a notification that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed; and (B) under "How to Vote your By-Mail Ballot," modify the instructions to state that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(vii) On its "Online Ballot Delivery" page, https://www.elections.alaska.gov/Core/votingbyonline.php, the Division must: (A) include a notification that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed; and (B) under "How to Vote your By-Mail Ballot," modify the instructions to state that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(10) The Division previously purchased television ad space for the 2020 general election, but the Division may not be able to change or add to the ads at this late date. If the Division determines it is possible, the Division will include information on the elimination of the ballot witnessing requirement in some of its ads.

(11) The Division must create a short Public Service Announcement ("PSA") explaining that the Witness Requirement is suspended for the 2020 General Election and that voters do not need to have their absentee ballots witnessed. The Division will distribute the PSA to Alaska radio stations, but the Division has no control over whether the radio stations play the PSA.

(12) The Division will contact community get-out-vote organizations, tribal

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organization, Native Corporations, and political parties for which the Division already has an email or mailing address and encourage them to notify voters of the elimination of the witness requirement.

(13) The Division must share the text of the above-mentioned PSA with every bilingual outreach worker and ask that they announce it on local radio in the villages.

In the event the Supreme Court of Alaska affirms this Court's injunction or denies Defendants' petition for review to the Supreme Court, Defendants will be one-hundred percent prepared and ready to effectuate immediately all the relief set forth in this Order, without further delay. Defendants will not use any additional time or delay caused by the stay as a defense for not being able to comply with the terms of this Preliminary Injunction Order.

DATED this _____ day of October, 2020 at Anchorage, Alaska.

_____
Hon. Dani Crosby
Superior Court Judge

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2020, I emailed a true and correct copy of the foregoing to:

Margaret Paton-Walsh
Lael Harrison
Cori M. Mills
Alaska Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov
lael.harrison@alaska.gov
cori.mills@alaska.gov

*/s/ Wesley James Furlong*
Wesley James Furlong (AK Bar No. 1611108)

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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. | ) | |

**STATE'S NOTICE OF FILING PROPOSED PRELIMININARY INJUNCTION ORDER**

The State hereby files a proposed preliminary injunction order as directed by this Court's October 5, 2020 order granting the plaintiffs' motion for a preliminary injunction. The terms of the order were negotiated with the plaintiffs today; and the State believes that the only remaining dispute relates to its motion for a stay of the order pending appeal. The State proposes that the Court stay the effective date of the order pending the outcome of its petition for review to the Alaska Supreme Court. That proposal is reflected in the last sentence which reads: "This order will go into effect only in the event of a ruling from the Alaska Supreme Court upholding the preliminary injunction."

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DATED October 6, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: M. A. Paton Walsh

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**

| | | |
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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, | ) | Case No.: 3AN-20-07858 CI |
| Defendants. | ) | |

**[PROPOSED] PRELIMINARY INJUNCTION ORDER**

On October 5, 2020, the Court granted Plaintiffs Arctic Village Council's, League of Women Voters of Alaska's, Elizabeth L. Jones's, and Barbara Clark's Motion for Preliminary Injunction and requested the parties submit a proposed order, or if agreement could not be reached separate proposed orders, detailing how Defendants Kevin Meyer, Gail Fenumiai, and Alaska Division of Elections must implement the Court's order. The Court agrees with the proposed order submitted by Defendants Lieutenant Governor Kevin Meyer, Director of the Division of Elections Gail Fenumiai, and the Division of Elections. Accordingly, finding good cause,

**IT IS HEREBY ORDERED** that the "Witness Requirement" for Absentee Ballots, as required by AS § 15.20.066(b), AS § 15.20.081(d), 6 AAC 25.550, and

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6 AAC 25.680 is hereby vacated as an unconstitutional burden on the right to vote in the 2020 General Election during the COVID-19 pandemic.

**IT IS FURTHER ORDERED:**

(1) Defendant Alaska Division of Elections ("the Division") must count all returned absentee ballots for the 2020 General Election without witness signatures, provided that they satisfy all other requirements.

(2) The Division must send all voters to whom it sent absentee ballots a separate mailing as soon as practicable explaining that they do not need to have their ballots witnessed given the COVID-19 pandemic;

(3) As soon as practicable, the Division will send out an email to the list the Division has from the Permanent Fund Dividend Division that includes voters who applied for a PFD this year explaining that they do not need to have their ballots witnessed for the 2020 general election.;

(4) Defendants must train all persons who count absentee ballots on the absentee ballot counting boards to count those ballots without witness signatures, provided that they satisfy all other requirements.

(5) The Division must post on its social media accounts, including but not limited to Facebook, www.facebook.com/akelections, and Twitter, www.twitter.com/ak_elections, notifications that the Witness Requirement is not in effect for the 2020 General Election and that voters do not need to have their absentee ballots witnessed. The first social media notifications will be posted shortly after this final order is issued and then on a weekly basis through the day of the election.

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(6) Defendant Kevin Meyer must post on his official social media accounts, including, but not limited to, Facebook, https://www.facebook.com/LtGovMeyer/, and Twitter, https://twitter.com/ltgovmeyer, notifications that the Witness Requirement is not in effect for the 2020 General Election and that voters do not need to have their absentee ballots witnessed. Defendant Meyer may fulfill this requirement by immediately re-posting, sharing, and retweeting posts from the Division on its own social media accounts within a reasonable amount of time.

(7) The text of the above posts should read, "Recently, a court decided that voters do not need to have their by mail ballot witnessed. This is only for the November 2020 general election. Voters must still sign and provide an identifier on the back of the envelope. It is recommended for voters to date their signature."

(8) The Division must issue a press release announcing that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(9) The Division must make the following modifications to its website:

(i) On its "Press Releases and Public Service Announcements" page, https://www.elections.alaska.gov/Core/pressreleasesandpublicserviceannouncements.php, the Division must post an announcement that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(ii) On its "Public Notice" page, https://www.elections.alaska.gov/Core/publicnotice.php, the Division must create a new

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heading and post an announcement that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(iii) On its homepage, https://www.elections.alaska.gov/, the Division must post under "News" the press release that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(iv) On its "Early and Absentee Voting Options" page, https://elections.alaska.gov/Core/AKVoteEarly.php, the Division must: (A) post under "Absentee Voting By-Mail FAQ" a new FAQ to the effect of: "Do I need a witness signature for my absentee ballot?" "No. Recently, a court decided that voters do not need to have their by mail ballot witnessed. This is only for the November 2020 general election. Voters must still sign and provide an identifier on the back of the enevelope. It is recommended for voters to date their signature. This applies to by-mail, by-fax, and online absentee ballots. Un-witnessed ballots will still be counted. If you do have your ballot witnessed, your vote will still count."; (B) remove the FAQ entitled "What does reasonably accessible mean regarding witnessing?"; and (C) modify the answer for "If I have a Power of Attorney (POA) can I sign the ballot envelope for the voter?" to indicate that the Witness Requirement is not required for the 2020 General Election.

(v) On its "By-Mail Ballot Delivery" page, https://www.elections.alaska.gov/Core/votingbymail.php, the Division must: (A) include a notification that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed; and (B) under "How to

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Vote your By-Mail Ballot," modify the instructions to state that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(vi) On its "By-Fax Ballot Delivery" page, https://www.elections.alaska.gov/Core/votingbyfax.php, the Division must: (A) include a notification that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed; and (B) under "How to Vote your By-Mail Ballot," modify the instructions to state that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(vii) On its "Online Ballot Delivery" page, https://www.elections.alaska.gov/Core/votingbyonline.php, the Division must: (A) include a notification that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed; and (B) under "How to Vote your By-Mail Ballot," modify the instructions to state that the Witness Requirement is suspended for the 2020 General Election and voters do not need to have their absentee ballots witnessed.

(10) The Division previously purchased television ad space for the 2020 general election, but the Division may not be able to change or add to the ads at this late date. If the Division determines it is possible, the Division will include information on the elimination of the ballot witnessing requirement in some of its ads.

(11) The Division must create a short Public Service Announcement ("PSA")

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explaining that the Witness Requirement is suspended for the 2020 General Election and that voters do not need to have their absentee ballots witnessed. The Division will distribute the PSA to Alaska radio stations, but the Division has no control over whether the radio stations play the PSA.

(12) The Division will contact community get-out-vote organizations, tribal organization, Native Corporations, and political parties for which the Division already has an email or mailing address and encourage them to notify voters of the elimination of the witness requirement.

(12) The Division must share the text of the above-mentioned PSA with every bilingual outreach worker and ask that they announce it on local radio in the villages.

This Order will go into effect in the event that the Alaska Supreme Court upholds the preliminary injunction.

DATED this _____ day of October, 2020 at Anchorage, Alaska.

_____
Hon. Dani Crosby
Superior Court Judge

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