IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE ALASKA CENTER EDUCATION FUND, ALASKA PUBLIC INTEREST RESEARCH GROUP, and FLOYD TOMKINS,

Plaintiffs,

v.

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

Defendants.

Case No. 3AN-20-08354 CI

#2 **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES**

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TABLE OF CONTENTS

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For the reasons set forth in the motion and memorandum below, Plaintiffs—the Alaska Center Education Fund ("Education Fund"), the Alaska Public Interest Research ("AKPIRG"), and Floyd Tomkins—move the Court pursuant Alaska Rule of Civil Procedure 65 to preliminarily enjoin enforcement by Defendants of any state law, policy, or practice that allows or requires election officials to reject absentee ballots because the return envelope is missing a voter signature, voter identifier, or witness attestation (to the extent if any witness attestation will still be required in the 2020 general election) without offering the voter the opportunity to correct the omission before the election results are finalized, which occurs fifteen days after Election Day. Defendants' failure to provide voters an opportunity to cure ballots that currently will be rejected for these honest and anticipated mistakes impermissibly and unfairly burdens the fundamental right to vote and fails to provide voters with any—let alone adequate—procedural due process before depriving them of their right to vote in violation of the Alaska Constitution.

These signature and identifier requirements, without a way to cure, have disenfranchised hundreds of voters in past elections when mail-in vote totals were relatively low in Alaska. Absent relief from this Court before the 2020 general election, these requirements will disenfranchise thousands of Alaskans in the face of the dramatic increase in absentee mail-in voting that has now just begun for the 2020 general election.

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INTRODUCTION

Every election, Alaska election officials reject mail-in ballots that are cast by lawful Alaska voters because the voter (1) forgot to sign the ballot envelope, AS 15.20.203(b)(1) (the "Voter Signature Requirement"); (2) forgot to provide an Voter Identifier under their signature (i.e., their voter number, Alaska Driver's License number, date of birth, or last four digits of their Social Security Number) as required under 6 AAC 25.510, .580 (the "Voter Identifier Requirement"); or (3) forgot to have a witness sign or notarize the ballot envelope, AS 15.20.203(b)(2) (the "Witness Requirement"). Alaska law does not provide these voters any opportunity to fix their mistake. Instead, their ballots are rejected, and the voter is disenfranchised.

In the upcoming 2020 general election, more Alaska voters than ever before will be voting using mail-in ballots—we now know that over 81,000 were mailed this week. It undoubtedly follows that, absent relief from this Court, more Alaska voters than ever before will be disenfranchised by these three requirements that the Division of Elections has now recently announced it will enforce without timely notice to voters of these mistakes or an opportunity to cure them.

The Division of Elections makes it easy for Alaskans to request mail-in ballots, and their website advertises "anyone may request a ballot by mail. You don't need a reason." What the Division of Elections did not tell voters when they requested these ballots, but what they announced on Twitter this week, is that the Division is choosing

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not to provide notice and an opportunity to correct signature, voter identifier, and voter witness mistakes that will inevitably occur.

But this need not be the case: the Alaska Statutes do not prohibit providing voters an opportunity to cure such inadvertent omissions before election results are finalized. The Alaska Supreme Court has consistently instructed that, when reviewing and interpreting election statutes, "where any reasonable construction of [a] statute can be found which will avoid [disenfranchisement], the courts should and will favor it." *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010) (quoting *Carr v. Thomas*, 586 P.2d 622, 626 (Alaska 1978)). And it has repeatedly held that "the voter shall not be disenfranchised because of mere mistake, but [the voter's] intention shall prevail." *Id.* (alteration in original) (quoting *Edgmon v. State, Off. of the Lieutenant Governor, Div. of Elections*, 152 P.3d 1154, 1157 (Alaska 2007)). Alaska voters who take the time to request a mail-in absentee ballot, fill it out, and return it to the State most assuredly intend to have their vote counted.

To be sure, Defendants have many convenient, low cost, and effective notice and cure options available, and are likely aware that various cure procedures have already been implemented in jurisdictions across the country. These include emailing voters, calling or texting voters, and/or immediately mailing written notices where no other contact details are available, and allowing voters to affirm their identity either verbally,

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electronically, or via mail. Indeed, the Municipality of Anchorage already provides notice and a cure opportunity for ballot defects during municipal elections.

In the upcoming general election, ballot envelope mistakes—which happen in every election—will undoubtedly be compounded by the fact that most Alaska voters who requested mail-in ballots will be casting ballots by mail for the first time. Absentee mail-in voting has historically been relatively low in Alaska, but not this year, and research shows that first-time absentee voters are even more susceptible to common mistakes like forgetting to sign their ballot envelope or have their signature witnessed.

Without preliminary—and ultimately permanent—injunctive relief, voters' ballots will be cast aside based on missing voter signatures, voter identifiers, or witness attestations (to the extent witness attestations are required this year) on ballot envelopes without any opportunity for voters to cure such honest and predictable omissions and mistakes. As detailed below, this will impose a severe and unjustifiable burden on Alaskans' fundamental right to vote, and it will also deprive Alaskans of that right without constitutionally adequate process in violation of the Alaska Constitution. Our democracy cannot tolerate such an unjust result, which likewise undermines the Alaska Division of Elections' mission to ensure fairness in elections. *See* www.elections.alaska.gov.

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BACKGROUND

I. The Voter Signature, Voter Identifier, and Witness Requirements.

More than 81,000 absentee ballots were just mailed to Alaska voters (*see* Ex. 5), and thousands of others were sent previously to overseas, military, and other absentee voters. Each of these ballots include a return envelope that has blank lines for the voter signature, voter identifier, and witness attestation. *See* Ex. 2 (Sample Mail-in Absentee Ballot Envelope). If a voter makes a mistake with any of these three items, their ballot will be rejected.[1] *See* AS 15.20.203(b)(1)-(2); 6 AAC 25.570; 6 AAC 25.580(7)-(9).

Although Alaska law requires ballots to be rejected if they omit required voter signatures, voter identifiers, and witness attestations, the law does not preclude Defendants from notifying voters of their mistakes and providing them with an opportunity to cure those errors before election results are certified. There is both time and opportunity for a cure period to occur in Alaska, just as it occurs during Anchorage Municipal elections and elections in many other states.

[1] Plaintiffs note that there is currently a separate lawsuit pending in Alaska State Court that challenges and seeks to remove the Witness Requirement for mail-in ballots during the 2020 general election due to the impacts of COVID-19 and concerns about forcing voters to leave their homes or otherwise face potential exposure to obtain a witness attestation. *See Arctic Vill. Council, et al. v. Meyer et al.*, Case No. 3AN-20-07858CI. The *Arctic Village* case challenges the Witness Requirement as it is being applied in the 2020 general election and is seeking a very important remedy in light of the current pandemic. The State Superior Court issued an injunction eliminating the Witness Requirement for the 2020 general election and the Division of Elections has appealed to the Alaska Supreme Court. *See* Case No. S-17902.

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II. Notice to voters of ballot envelope errors.

The Division of Elections must "make available through a free access system to each absentee voter a system to check to see whether the voter's ballot was counted and, if not counted, the reason why the ballot was not counted" within "10 days after certification of the results for a primary election" and "30 days after the certification of results of a general election." AS 15.20.203(j). Of course, nothing prevents the Division from taking the constitutionally-required step of providing that notice much sooner, and in time for it to make a difference to voters. But the Division is choosing not to do so.

Rather, the Division intends to wait until after the election is certified to affirmatively notify voters that their ballot was rejected and their vote was not counted. This is what happed to Plaintiff Floyd Tompkins in the 2020 primary election. *See* Tomkins Aff. Ex. 1 (rejection letter). The Division knows how to and does provide notice of ballot envelope errors, but as of today, has indicated that for the 2020 general election such notice will not be provided until after the voter is already disenfranchised

This week, the broader public was likewise told in a Twitter post what Mr. Tomkins learned after his primary vote was not counted—that the Division of Elections will *not* notify voters of these common and correctable omissions until after the election. even though the district absentee ballot counting boards will be identifying these mistakes on ballot envelopes right away. Nor is the Division providing voters with an opportunity to correct such omissions and have their vote counted. *See* Schirack Aff. ¶ 3. On October

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6, the Division posted a tweet stating that there will be no opportunity for Alaska voters to "check if there was a problem" with their absentee mail-in ballot, and that they will not receive notification of a ballot rejection until "after [the] election is certified." Ex. 4. No rationale was provided for this decision.

Logic would dictate that this year, more than any other, the Division should be preparing to assist the tens of thousands of new mail-in voters by providing an opportunity to cure the types of omissions at issue here. Instead, as applied by the Division of Elections, the notice required by AS 15.20.203(j) is nearly meaningless and does not satisfy procedural due process requirements because it is sent too late for any voter to correct their ballot and have their voted counted. Fairness and voter enfranchisement dictate a better approach, and the Alaska Constitution requires it.

III. The potential cure timeframe in the Alaska election calendar.

Alaska's election calendar provides ample time in which voters could be provided with notice and an opportunity to cure missing signatures and/or missing identification information before election results must be certified. Just recently, the Division of Elections began convening non-partisan district absentee ballot counting boards. *See* AS 15.20.190. When voters return their mail-in ballots—which can be done well before election day—a district counting board looks at the ballot envelope (without opening the ballot envelope) and makes an initial determination as to whether the absentee ballot

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return envelope has been properly executed. AS 15.20.203(b). It is at this point that the honest mistakes at issue in this lawsuit are identified, and where an opportunity to make corrections can be provided to the voter.

Nothing in Alaska law prohibits the ballot envelope review process from beginning right away, and under State law that process *must* begin no later than seven days before the general election.[2] AS 15.20.201(a) ("No less than seven days preceding the day of election, the election supervisor, in the presence and with the assistance of the district absentee ballot counting board, shall review all voter certificates of absentee ballots received by that date."). This review process continues thereafter until "the 15th day following the day of the election," at which time the district absentee ballot counting board must certify the absentee ballot review. AS 15.20.201(c).

Thus, Alaska's election calendar provides, at a minimum, for a 22-day window during which Defendants can provide voters who would otherwise be disenfranchised under the Voter Signature, Voter Identifier, and Witness Requirements with notice and an opportunity to cure their ballots. Even for voters whose absentee mail-in ballots do not arrive to the Division until the last permissible day for them to do so and still be counted (if postmarked by Election Day)—which is 10 days after a general election, *see*

[2] Notably, many absentee mail-in ballots will likely be received well in advance of the voting deadline since the Division of Elections is already mailing ballots to voters now. *See* Ex. 5.

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AS 15.20.081(e)—there still would be a five day window in which Defendants could effectuate notice and an opportunity to cure before vote counts must be completed on the 15th day following the election. AS 15.20.205.

IV. Past and forthcoming disenfranchisement due to the Voter Signature, Voter Identifier, and Witness Requirements as mail voting drastically increases.

Since at least the 2012 general election, Alaska election officials have rejected more than 586 absentee ballots based on a missing signature, and more than 1,240 ballots based on a missing witness attestation or notarization, according to the Election Administration and Voting Survey ("EAVS").[3]

The stage is set for this problem to increase drastically in the November 2020 general election because there will be more inexperienced and first-time absentee mail-in voters than ever before. Studies show that inexperienced voters are far more likely to have their absentee ballots rejected based on error or omission. *See* Ex. 6 ("A surge of inexperienced [vote-by-mail] voters, particularly in what is expected to be a high-turnout election, may lead to an increase in the number of signature-related errors in November 2020."); Ex. 7 ("All states require a signature, and it's not uncommon for people who have never voted absentee before to forget to sign.").

[3] The data submitted to the United States Election Assistance Commission by Defendants and all other states is publicly available at U.S. Elections Assistance Commission, *Surveys and Data*, https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys (last visited Oct. 7, 2020). It is unclear based on Defendants' EAVS submissions how many ballots have been rejected based on a missing voter identifier.

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In the 2020 primary, over 62,000 Alaskans requested absentee ballots, which the Anchorage Daily News reported as "setting a record for all elections, not just the primary." Ex. 8. And this number was already more than double the rate of absentee participation in Alaska's last presidential *general election*, where only 31,817 Alaskans voted absentee. Moreover, only 22% of Alaska's registered voters participated in the 2020 primary; presidential elections typically have a 63% turnout. Ex. 8. Indeed, over 81,000 mail-in absentee ballots were sent to voters on Monday for the 2020 general election. Ex. 5. Other states' experiences in administering elections this year are also instructive as to recent substantial increases in absentee voting. *See* Compl. ¶ 36.

LEGAL STANDARD

Under Alaska Rule of Civil Procedure 65, the Alaska Supreme Court applies two different tests, depending on the "the nature of the threatened injury," to determine whether a plaintiff is entitled to a preliminary injunction. *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

> If the plaintiff faces the danger of irreparable harm and if the opposing party is adequately protected, then we apply a balance of hardships approach in which the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit. If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a clear showing of probable success on the merits.

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Id. (internal quotation marks omitted). "The balance of hardships is determined by weighing the harm that will be suffered by the plaintiff if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction." *State v. Kluti Kaah Native Vill.*, 831 P.2d 1270, 1273-73 (Alaska 1992).

ARGUMENT

The Court should apply the "balance of the hardships" test because the threatened harm to Plaintiffs and Plaintiffs' members—disenfranchisement—is necessarily irreparable as a denial of a fundamental right, and Defendants are adequately protected here. And there can be no question that Plaintiffs raise serious and substantial questions going to the merits of the case, since "[t]he inquiry in this respect is directed only to insuring the [] issues raised are not frivolous or obviously without merit." *A. J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 541 (Alaska 1970), *modified*, 483 P.2d 198 (Alaska 1971). Because Plaintiffs' claims involve the fundamental right to vote and due process of law, "the questions raised by the petitioner are sufficiently serious and substantial to allow an injunction to iss[u]e." *Id.* As Section II details below, Plaintiffs are likely to succeed on the substantive merits of their claims. Plaintiffs therefore meet the balance of the hardships standard.

Even if the Court were to find that Defendants cannot be adequately protected—which is the only open question since disenfranchisement is inherently irreparable—

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Plaintiffs will still prevail under the "probable success on the merits" test, because of their "clear showing of probable success on the merits." *Metcalfe*, 110 P.3d at 978.

I. The "balance of hardships" tip sharply in Plaintiffs' favor.

A. Plaintiffs and their members face danger of irreparable harm—disenfranchisement—absent an injunction.

Plaintiffs and their members are at risk of irreparable harm—disenfranchisement—absent an injunction because the right to vote is fundamental, and being deprived of that right necessarily constitutes irreparable harm. The Alaska Supreme Court has recognized the "bedrock principle that the '[t]he right of the citizen[s] to cast [their] ballot[s] and thus participate in the selection of those who control [their] government is one of the fundamental prerogatives of citizenship.'" *Miller*, 245 P.3d at 868 (quoting *Carr*, 586 P.2d at 626). The right to vote is "fundamental to our concept of democratic government." *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995); *see also Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) (recognizing that "the right to vote" is "fundamental.").

Defendants' failure to provide notice and an opportunity to cure in conjunction with the Voter Signature, Voter Identifier, and Witness Requirements ultimately disenfranchises voters. If voters do not have an opportunity to cure any ballots that they might have inadvertently forgotten to sign, note identifying information on, or get a witness attestation for, their vote will not be counted in the 2020 general election. "[O]nce

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the election occurs, there can be no do-over and no redress" to those voters that were improperly disenfranchised. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Thus, courts have long recognized that disenfranchisement constitutes irreparable injury. *See, e.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.") (citation omitted); *Nick v. Bethel*, No. 3:07-CV-0098 TMB, 2008 WL 11456134, at *3 (D. Alaska July 30, 2008) ("Given the importance accorded an individual's constitutional right to vote, the Court finds at the outset that the Plaintiffs have satisfied the 'irreparable harm' prong of the first preliminary injunction standard."); *see also League of Women Voters of N.C.*, 769 F.3d at 247 ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Touchston v. McDermott*, 234 F.3d 1133, 1158-59 (11th Cir. 2000) ("[B]y finding an abridgement to the voters' constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (denial of the right to vote is "irreparable harm").

B. Defendants will be adequately protected.

Defendants are adequately protected where, as here, "the injury that will result from the injunction can be indemnified by a bond or where it is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the

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injunction is not granted." *Id.* at 978-79. Any injury that might result to Defendants from the requested injunction is relatively slight because Defendants are adequately protected for at least six reasons.

First, Defendants' interest in verifying that the voter who submitted any given ballot is who the voter says they are—by requiring their signature, identifying information, and witness attestation—will still be met if the injunction issues, since it does nothing to undermine or obviate those requirements before a ballot can be counted. *See Vogler*, 651 P.2d at 2 (holding that the state's interests in ensuring uniform elections and ensuring that candidates had sufficient support before appearing on a ballot could be "achieved equally well" through a different petition signature numeric threshold requirement).

Second, Defendants' interest in certifying election results by the 15th day after the election will not be threatened if Plaintiffs' requested relief is granted since the proposed cure period would only last until that 15th day after the election, and no longer.

Third, the Alaska Statues already require Defendants to provide notices to voters who are disenfranchised under the Voter Signature, Voter Identifier, and Witness Requirements. *See* AS 15.20.203(j). Plaintiffs are simply asking that Defendants be ordered to provide such notice earlier, in time to satisfy Defendants' obligation to provide procedural due process under the Alaska Constitution. *See* ALASKA CONST. art. I, § 7.

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The only other obligation that Defendants would need to comply with if relief is granted would be to provide some mechanism by which voters can promptly act on this notice before they are disenfranchised.

Fourth, the administrative burdens associated with effectuating a notice and cure period are minimal, and, in fact, already exist in many other states.[4] Indeed, even in Anchorage Municipal Elections, voters are already provided with notice and an opportunity to cure. *See* AMC 28.70.030(D). All that requires is a clerk "send[ing] a letter

[4] *See* ARIZ. REV. STAT. §16-550 (requiring that voters be provided notice and until the fifth business day after an election to correct a signature); CAL. ELECT. CODE § 3019 (requiring that voters be provided until 5 p.m. two days prior to certification of the election to provide a signature verification statement and until 5 p.m. on the 8th day after the election to submit an unsigned ballot statement); COLO. REV. STAT. §1-7.5-107.3 (requiring notice be sent by the 3rd day after the election and giving voters until the 8th day after the election to cure); FLA. STAT. § 101.68 (voters have until the 2nd day after the election to cure); GA. CODE § 21-2-386 (requiring prompt notice and giving the voter until the 3rd day after the election to cure); HAW. REV. STAT. § 11-106 (giving voters until the 5th day after the election to cure); 10 ILL. COMP. STAT. 5/19-8 (requiring notice be sent by the 2nd day after the election and giving voters until the 14th day after the election to cure); IOWA CODE § 53.18(2) (providing a pre-election day cure period for ballots that would otherwise be rejected due to a defect on the ballot envelope); MASS. GEN. LAWS ch. 54 § 94) (requiring that voters are provided prompt notice and, time permitting, provided a new ballot to avoid disenfranchisement); MINN. STAT. § 203B.121 (allowing voters to submit a replacement ballot and cure before election day); MONT. CODE § 13-13-241; § 13-13-245 (giving voters until 8:00 p.m. on election day to cure); NEV. REV. STAT. § 293.325 (giving voters until the 7th day after the election to cure); N.J. STAT. ANN. § 19:63-17 (giving voters until 48 hours before final results are certified to cure); OHIO REV. CODE § 3509.06 (giving voters until the 7th day after the election to cure); OR. REV. STAT. § 254.431 (giving voters until the 14th day after the election to cure); R.I. GEN. LAWS § 17-20-26 & 410-RICR-20-00-23 (requiring prompt notice my mail, email, or phone, and giving voters until the 7th day after the election to cure); UTAH CODE ANN. § 20A-3-308(7) (giving voters until either the 7th and 14th day after the election to cure); WASH. ADMIN. CODE § 434-261-050 (giving voters until the 21st day after the election to cure).

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to the voter explaining the lack of a valid signature," and allowing the voter to either "[f]ill out the form included with the letter and return the form to the municipality," or "[c]ome to the location identified in the letter and present valid identification to an election official and sign a form provided by the municipality authenticating the envelope." *Id.* Defendants have sufficient time to structure a similarly straightforward cure process because Plaintiffs' requested relief would not have to be implemented before October 27. *See* AS 15.20.201(a) (providing that the district absentee ballot counting boards must begin reviewing ballot envelopes by no later than the seventh day preceding an election). And critically, Defendants would only have to provide notice and an opportunity to cure to those voters who would otherwise be disenfranchised. That is, Defendants would have no obligation to affirmatively notify *all voters* of a cure period if relief is granted, but instead would only be required to notify *impacted voters* and provide those voters with an opportunity to cure before absentee ballot totals are certified 15-days after election day.[5]

Fifth, Defendants' interest in ensuring a uniform election—notably, some absentee mail ballots have already been mailed to voters—is not threatened since

[5] Defendants will likely argue that the burdens imposed by the Voter Signature, Voter Identifier, and Witness Provisions are low because the number of impacted voters is likely to be relatively small. To the extent Defendants make this argument, then any risk to Defendants of administrative burdens they might face if relief is improvidently granted must be similarly reduced.

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Plaintiffs' requested relief would only apply on the back end (after voters have mailed their ballots), and would not affect any aspect of voters' completion and mailing of ballots as is already underway now.

And *sixth*, Defendants will have sufficient time to seek emergency review, if so desired, by petitioning the Alaska Supreme Court before having to effectuate any such remedy. While it makes good sense and supports the mission of the Division to begin creating a notice and cure opportunity right away, Alaska law does not require that absentee ballot review boards begin examining absentee ballot envelopes before October 27 for the 2020 general election. AS 15.20.201(a). Thus, while Defendants could begin reviewing absentee ballot envelopes and providing notice and cure opportunities right away, issuing an injunction (including time for any emergency appeal) requiring the requested relief by October 27 is consistent with the current absentee ballot review schedule. If this matter is briefed and decided on an expedited basis, as requested, then Defendants will have sufficient time to appeal any order of relief to the Alaska Supreme Court on an emergency basis, as they have done in other recent election law cases. *See* ARAP 402.

Accordingly, Defendants are adequately protected from any serious risk of harm if preliminary relief is granted, and thus the balance of hardships favor Plaintiffs.

II. A preliminary injunction is also warranted under the "probable success on the merits" standard.

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Even if the Court were to rule that Plaintiffs must satisfy the higher standard of establishing "probable success on the merits," *Metcalfe*, 110 P.3d at 978, a preliminary injunction is still warranted. There is an abundance of caselaw showing that the lack of a cure process imposes a burden on the right to vote and also violates the right to procedural due process. Accordingly, even under this higher standard, preliminary injunctive relief is proper.

The Alaska Supreme Court has repeatedly declared that "the voter shall not be disenfranchised because of mere mistake, but [the voter's] intention shall prevail." *Miller*, 245 P.3d at 869 (alteration in original) (quoting *Edgmon*, 152 P.3d at 1157). And it has "consistently emphasized the importance of voter intent because the opportunity to freely cast [one's] ballot is fundamental." *Id.* As noted above, Alaska voters who take the time to request a mail-in absentee ballot, fill it out, and return it to the State most assuredly intend to have their vote counted.

Plaintiffs' proposed cure period is justified because "inclusiveness is consistent with the overarching purpose of an election: 'to ascertain the public will.'" *Id.* at 869 & n.9 (quoting *Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972)). In reverence to this, the Alaska Supreme Court "consistently construe[s] election statutes in favor of voter enfranchisement," and has held that Alaska courts "must interpret [an] election statute to preserve a voter's clear choice rather than to disenfranchise the voter." *Id.* at 870. To that

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end, the Court has repeatedly instructed that, when reviewing and interpreting election statutes, "where any reasonable construction of [a] statute can be found which will avoid [disenfranchisement], the courts should and will favor it." *Id.* at 869 (quoting *Carr*, 586 P.2d at 626). Because the Alaska Statutes do not preclude the proposed cure period, they can be construed in favor of voter enfranchisement by providing for notice and an opportunity to cure any inadvertent defects to a voter signature, voter identifier, or witness attestation on a mail-in ballot envelope. Plaintiffs thus have a strong probable success on the merits.

A. Plaintiffs are likely to succeed on the merits of their undue burden on the right to vote claim.

The Voter Signature, Voter Identifier, and Witness Requirements, absent an opportunity to cure, impose an impermissible and unconstitutional burden on the fundamental right to vote. Where the constitutionally protected right to vote is challenged, Alaska courts "assess the character and magnitude of the asserted injury to the right[]" and weigh that against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *State, Div. of Elections v. Green Pty. of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005) (quotation marks and citations omitted). Alaska courts then "judge the fit between the challenged legislation and the state's interests in order to determine the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* (quotation marks and citations omitted). "This is a

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flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the state's interest must be closer." *Id.*

Because the character and magnitude of Plaintiffs' asserted injury is severe—that is, the unnecessary disenfranchisement of Plaintiff Tomkins and the heightened risk of disenfranchisement of the Education Fund and AKPIRG's members and constituents as a result of the State's failure to provide notice and a cure opportunity—and because the State has no compelling interest in failing to provide notice and a cure opportunity, strict scrutiny should apply. *See Jordan v. Reed*, 544 P.2d 75, 81 (Alaska 1975) ("[T]he right to vote is a fundamental right and its denial ought to be strictly scrutinized by the courts."); *cf. Metcalfe*, 110 P.3d at 979 ("We review ballot access restrictions with strict scrutiny.") (citing cases). However, even if the Court were to find that the burden imposed by the lack of notice and cure were less than severe (it is not), Plaintiffs would still prevail even under the lesser standard, because the State had no interest in arbitrarily disenfranchising voters on the basis of a simple mistake, instead of providing them a reasonable opportunity to correct their omission, verify their identity, and have their voices heard.

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1. The Voter Signature, Voter Identifier, and Witness Requirements impose a severe burden on Plaintiffs.

Here, the Voter Signature, Voter Identifier, and Witness Requirements impose a severe burden—outright disenfranchisement—on the right to vote for voters who forget to sign their ballot envelope, include a voter identifier, or get a witness to sign, or are unable to safely do so, particularly due to the global pandemic.

It is all but certain that, absent relief, hundreds—if not thousands—of Alaska voters will be disenfranchised for this reason. Indeed, in prior elections, hundreds of voters have been disenfranchised by the Voter Signature, Voter Identifier, and Witness Requirements during each election. And none of those voters had any opportunity to cure their ballots, despite the fifteen-day window that Alaska law already provides between election day and the date by which all absentee election results must be certified.

Disenfranchisement is a severe burden on the fundamental right to vote. *See Fla. Democratic Pty. v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) ("If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does."); *see also Stewart v. Blackwell*, 444 F.3d 843, 871-72 (6th Cir. 2006) (finding "severe" burden where unreliable punch card ballots and optical scan systems resulted in thousands of votes not being counted).

It is therefore not surprising that numerous courts have held—even before this

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election season, and including in response to complaints filed closer to, or in one instance *after* election day—that the arbitrary rejection of absentee ballots without timely notice and an opportunity to cure the rejection imposes an undue burden on the right to vote in violation of the First and Fourteenth Amendments to the U.S. Constitution, which contain a similar substantive right to vote as Article V, Section 1 of the Alaska Constitution. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312, 1319-20 (11th Cir. 2019) (denying a motion to stay district court's post-election order enjoining signature laws regarding provisional and vote-by-mail ballots based on the state's failure to provide any cure process, and the state's failure to provide an adequate cure process, respectively); *Detzner*, 2016 WL 6090943, at *8 (holding Florida signature law that provided no opportunity to cure imposed "an unconstitutional obstacle to the right to vote"). And at least one court has enjoined a regulation that prohibited local election officials from using the voter file to contact voters who had omitted certain necessary information from their absentee ballot envelopes in order to provide them with an opportunity to cure. *See League of United Latin Am. Citizens ("LULAC") of Iowa, et al. v. Pate*, No. CVCV056608 (Iowa Dist. Ct Jan. 23, 2019) (attached as Ex. 9).

In recent months, even more courts have ordered relief similar to what Plaintiffs request here: requiring election officials to give voters a post-election period to cure absentee ballots. *See League of Women Voters of N.J., et al. v. Tahesha Way*, No. 20-cv-

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05990, ECF No. 34 (E.D.N.J. June 17, 2020) (granting preliminary injunction and ordering New Jersey election officials to allow voters to cure absentee ballots with missing or mismatched signatures for sixteen days after Election Day) (attached as Ex. 10); *Frederick v. Lawson*, No. 1:19-cv-01959-SEB-MJD, 2020 WL 4882696, at *17 (S.D. Ind. Aug. 20, 2020) (permanently enjoining Indiana election officials from rejecting any absentee ballot because of perceived signature mismatch absent adequate notice and cure procedures to the affected voter); *League of Women Voters of the U.S. v. Kosinski, et al.*, No. 1:20-cv-05238, 2020 WL 5608635 (S.D.N.Y. Sept. 17, 2020) (consent decree requiring New York election officials to provide five days for voters to cure absentee ballot after voter is notified of the need to cure the ballot).

Indeed, "the basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many[.]" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318, 1321 (11th Cir. 2019) (same). And, for this reason, courts have found a severe burden even where relatively small numbers of votes were not counted. *See, e.g., Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3% of total votes inflicted "substantial" burden on voters). In light of this veritable mountain of caselaw in support of the fact that a state's failure to provide voters with notice and an opportunity to cure defects or

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omissions on their absentee ballot envelopes imposes an undue burden on the right to vote, Plaintiffs are likely to succeed on the merits of their undue burden on the right to vote claim.

2. The State has no compelling interest in maintaining the Voter Signature, Voter Identifier, and Witness Requirements without an opportunity to cure that justifies the burden on the fundamental right to vote.

The state cannot put forward any compelling interests that justify the severe burden imposed by rejecting absentee mail ballots based solely on a missing signature from either a voter or witness or for omitting identifying information from the ballot envelope without an opportunity to cure. As noted in Section I.B, above, Plaintiffs' proposed notice and cure period does nothing to undermine the existence of the Voter Signature, Voter Identifier, and Witness Requirements, and thus any fraud prevention interest that Defendants might articulate related to those Requirements remains intact. As a result, the proposed notice and opportunity to cure, which is a "less restrictive alternative" than Defendants' current practice, would "adequately protected the asserted governmental interests." *Metcalfe*, 110 P.3d at 979. As also noted above in footnote 4, notice and cure opportunities similar to Plaintiffs' requested relief already exist in many other states. The Alaska Supreme Court has held that comparing Alaska's election laws "with the requirements of other states" is "one reasonable way to determine whether less restrictive alternatives exist." *Metcalfe*, 110 P.3d at 980. Here, that comparison confirms

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that less restrictive alternatives do indeed exist and are widely implemented across the country.

Additionally, the proposed cure period is contemporaneous with the existing deadline for certifying election results, and thus Defendants' interest in maintaining their election schedule is still fulfilled even if an injunction issues. Because election results are not finalized during the requested cure period, Defendants will not be delayed. Finally, to the extent Defendants might suggest that minimizing their administrative burden is an interest worthy of credence, Section I.B highlights how any administrative burden from the proposed notice and cure is incremental and minimal by any objective measure.

Courts have been clear that disenfranchisement is a severe burden. But, even if some lesser level of scrutiny applies (which it does not), Defendants' failure to provide timely notice and a process by which voters can cure ballot return envelope defects would still be unconstitutional, because the state has no interest that justifies those harms. Because there is no close "fit" between the challenged practice and Defendants' interests which makes it necessary to burden Plaintiffs' rights, the challenged lack of notice and opportunity to cure places an undue burden on the right to vote. *Green Pty. of Alaska*, 118 P.3d at 1061.

B. Plaintiffs are likely to succeed on the merits of their procedural due process claim.

Plaintiffs are equally likely to succeed on the merits of their procedural due

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process claim based on Article I, Section 7 of the Alaska Constitution—which mirrors the guarantee of procedural due process under the U.S. Constitution—as similar plaintiffs have elsewhere in the recent past. *See, e.g., Self Advoc. Sols. N.D. v. Jaeger*, No. 3:20-cv-00071, 2020 WL 3068160, at *1 (D.N.D. June 5, 2020) (concluding that North Dakota's cure procedures for absentee ballots violated due process and ordering North Dakota's election officials to allow voters six days after Election Day to cure their absentee ballot); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D.N.H. 2018) (holding New Hampshire's signature law "violates the requirements of procedural due process because it lacks *any* pre-deprivation process: voters receive neither prior notice of, nor an opportunity to cure, a rejection" based on signature) (emphasis added); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1339-40 (N.D. Ga. 2018) (holding Georgia's signature law, which afforded only an illusory cure process, violated the Due Process Clause).

Article I, Section 7 of the Alaska Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." As noted above, the Alaska Supreme Court has held that the right to vote is "fundamental." *Vogler*, 651 P.2d at 3. Because Alaska law allows fundamental voting rights to be exercised by mail, there is a constitutionally protected liberty interest in mail voting that Defendants may not deprive without adequate procedures. Federal courts—in looking to the federal due process clause that mirrors the Alaska Constitution due process clause—have

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consistently held that "[w]hile it is true that [mail ballot] voting is a privilege and a convenience to voters," a state does not have "the latitude to deprive citizens of due process with respect to the exercise of this privilege" once it is extended. *Martin*, 341 F. Supp. 3d at 1338; *see also Saucedo*, 335 F. Supp. 3d at 217 ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

The Alaska Supreme Court has held that "the Alaska Constitution's due process clause must be flexibly applied by balancing three factors: the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail." *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1026 (Alaska 2005) (quotation marks and citation omitted). This standard is identical to the federal standard set forth by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See also Midgett v. Cook Inlet Pre–Trial Facility*, 53 P.3d 1105, 1111 (Alaska 2002) (adopting test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

1. Plaintiffs' private interest is of paramount importance.

The nature of the private interest at stake in this case—the right to vote and to

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have that vote count—is the most critical liberty interest of all because it is preservative of all other basic civil and political rights. *Vogler*, 651 P.2d at 3 ("Other rights even the most basic, are illusory if the right to vote is undermined.") (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)). When Defendants reject absentee ballots based on a voter's failure to comply with the Voter Signature, Voter Identifier, or Witness Requirements without first providing notice and an opportunity to cure, the Alaska voter is deprived of that most "precious" of all rights. *Yick Wo v. Hopkins*, 18 U.S. 356, 370 (1886). For this reason, the private interest affected by those Requirements is of paramount importance. *See, e.g.*, *Martin*, 341 F. Supp. 3d at 1338 ("the private interest at issue," in mail ballot case, "implicates the individual's fundamental right to vote and is therefore entitled to significant weight"); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (adequate process required before mail ballot voters are "denied so fundamental a right"). Accordingly, the first *Mathews* factor therefore weighs strongly in Plaintiffs' favor.

2. The risk of erroneous deprivation of Plaintiffs' rights is high, and the provision of a cure process would significantly lessen that risk.

It is virtually certain that some voters who are registered to vote and who timely submit their mail ballots will inadvertently fail to sign their return ballot envelope, include identifying information, and/or have a witness or notary attest to their signature (although note that Judge Crosby has enjoined enforcement of the witness requirement

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for the 2020 general election and this issue is currently being appealed by the State). This same fate has befallen hundreds of voters in prior elections, and now, due to the global pandemic, exponentially more voters will be voting by mail in the 2020 general election. Every mail ballot contained in an envelope that is unsigned by a voter or a qualified witness or notary, or omits some identifying information—unless cured—will be rejected. And, under current law, voters are not provided any meaningful notice and opportunity to cure ballot envelope defects at all. At bottom, absent relief, voters who could easily cure their return ballot envelopes within the fifteen days between election day (if not before) and when absentee ballot totals must be certified will be deprived of a meaningful opportunity to fix their mistake and have their vote counted. Accordingly, there is a substantial risk of erroneous deprivation of Plaintiffs' rights.

Conversely, affording voters notice and an opportunity to cure these defects on an absentee ballot return envelope within the fifteen-day window (if not longer, depending on when the district absentee ballot counting board begins reviewing ballot envelopes prior to the election) between election day and when results must be certified would significantly lessen the risk that Plaintiffs' rights will be erroneously deprived. Indeed, absentee ballot counting boards begin counting absentee ballots seven days *before* election day, AS 15.20.201(a), which suggests that they could begin providing notice to voters and an opportunity to cure any signature issues on ballots received even before

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election day, to prevent any bottleneck thereafter.

Again, "even one disenfranchised voter . . . is too many." *League of Women Voters of N.C.*, 769 F.3d at 244. Given this, courts adjudicating challenges to signature cure procedures in other states have found simple procedural safeguards to add significant probative value where potential disenfranchisement was in an even smaller range. *See Saucedo*, 335 F. Supp. 3d at 217 (so holding, where potential "disenfranchisement of dozens, if not hundreds, of otherwise qualified voters" was at issue); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *9 (N.D. Ill. Mar. 13, 2006) (where 1,100 mail ballots were rejected for signature mismatches, "the risk of erroneous deprivation" is "not enormous, but the probable value of an additional procedure is likewise great in that it serves to protect the fundamental right to vote"). The second *Mathews* factor thus weighs significantly in favor of Plaintiffs as well.

3. Additional procedures would further Defendants' interests and involve minimal administrative burdens.

To the extent there is any additional administrative burden that would result if Defendants are ordered to provide notice and an opportunity to cure to voters whose ballots would otherwise be rejected under the Voter Signature, Voter Identifier, and Witness Requirements, the burden is manageable, as detailed in Section I.B, above. Defendants have a 22-day window within which to notify voters that their ballots have been flagged for rejection—seven days before election day, and fifteen days after, when

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election results must be reported. This window provides more than ample time for Defendants to notify voters by mail, email, or phone about the peril facing their ballot and provide them with a reasonable opportunity to promptly cure the defect to their return ballot envelope.

Any incremental administrative burden of making reasonable efforts to contact those voters who will otherwise be disenfranchised pursuant to the Voter Signature, Voter Identifier, and Witness Requirements and afford them a process by which the voter may cure their ballot would not justify the burden on Plaintiffs' rights. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify practices that impinge upon fundamental rights); *Johnson v. Halifax Cnty.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) ("[A]dministrative and financial burdens on the defendant . . . are not . . . undue in view of the otherwise irreparable harm to be incurred by plaintiffs."). In any event, such burdens are minimal, as described above. *See supra* I.B.

Providing notice and opportunity to cure for voters who would otherwise be disenfranchised under the Voter Signature, Voter Identifier, and Witness Requirements would not otherwise harm Defendants' interest in any perceptible way. It would not remove any of the identification requirements under Alaska law which Defendants will surely argue are necessary prevent fraud. And it would not delay the certification of absentee ballot results since the proposed cure period is contemporaneous with the

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existing deadline for certifying election results.

Rather, providing for such notice and cure would simply ensure that voters have an adequate opportunity to fix inadvertent errors in completing and returning their ballot envelopes and prevent those voters from being disenfranchised. If anything, the notice and cure process that Plaintiffs seek would further Defendants' interest in ensuring that no mail ballot is needlessly rejected. *See, e.g.*, *Saucedo*, 335 F. Supp. 3d at 220 ("[A]dditional procedures further the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised . . . [and] only serve to enhance voter confidence in elections.").

For these reasons, the third *Mathews* factor also weighs strongly in Plaintiffs' favor. Thus, under the *Mathews* balancing test, Plaintiffs are likely to show that Defendants' failure to provide notice and an opportunity to cure in conjunction with the Voter Signature, Voter Identifier, and Witness Requirements denies the right to vote without due process.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court enter a preliminary injunction requiring Defendants to provide notice and a meaningful opportunity for voters who would otherwise be disenfranchised by the Voter Signature, Voter Identifier, and Witness Requirements to cure inadvertent omissions on their ballot envelopes and have their votes counted, as set forth in the proposed order.

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