

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-20-08354CI

FILED In the Trial Courts
State of Alaska Third District
OCT 12 2020
By Clerk of the Trial Courts
Deputy

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED
CONSIDERATION**

The plaintiffs are challenging the facial constitutionality of a statute that has been uniformly enforced for more than a decade; there is no reason to expedite consideration of their challenge in the waning days before the most administratively complex general election in state history. The plaintiffs could have brought their case at any time since 2003 at the latest,¹ and yet demand the opportunity to fully litigate it in two courts in 10

¹ AS 15.20.203(b) states that absentee ballots that are not signed by the voter or attested by a witness may not be counted. AS 15.20.081(f) requires that by-mail absentee voters provide identification information. There are no exceptions to these requirements, or authority to count a ballot based on later-received information. The prohibition on counting unsigned or unwitnessed ballots goes back decades; but prior to 2003 the identification information was not an absolute requirement. 2003 Alaska Laws

business days.² All while the Division of Elections is in the middle of certifying one election and preparing for another.³ And the general election for which the Division is preparing is fraught with unusual administrative difficulty due to the ongoing COVID-19 pandemic. The Division is arranging for infection-prevention measures in more than 440 polling places, struggling to recruit election workers in a year when far fewer people are willing to serve in that role, and processing a unprecedented number of absentee ballot applications and ballots.⁴ Furthermore, given its experience in the primary election, the Division expects increased administrative duties and stress in the weeks leading up to the election in coordinating voting in remote communities that have “locked down” to avoid the spread of COVID-19.⁵

Ch. 113 §15 (changing identification requirement language “may” to “shall”). Every year absentee ballots are been rejected on these bases. Both organizational plaintiffs have been in existence since the 1970s.

² The plaintiffs demand relief from this Court, and an opportunity to complete an appeal, by October 27, the date on which the Absentee Ballot Review Board is expected to begin its process. Six of those intervening days are weekends and two are federal or state holidays, Columbus Day (Oct. 12) and Alaska Day (Oct. 19).

³ The state Regional Education Attendance Area (REAA) election took place on Tuesday, October 6, and the general election will take place Tuesday November 3.

⁴ See Affidavit of Gail Fenumiai (September 21, 2020) ¶3 attached as Exhibit A; Alaska Division of Elections, “COVID-19 Information for Voters and Election Officials,” <https://www.elections.alaska.gov/Core/COVID19faq.php>; Alaska Division of Elections, “List of Polling Place Locations,” <https://www.elections.alaska.gov/Core/listofpollingplacelocations.php>.

⁵ See Affidavit of Gail Fenumiai (September 21, 2020) ¶13 attached as Exhibit A; “At least 3 Southwest Alaska villages go into lockdown as coronavirus spreads,” Anchorage Daily News (October 9, 2020) (available online at <https://www.adn.com/alaska-news/rural-alaska/2020/10/09/at-least-3-southwest-alaska-villages-go-into-lockdown-as-coronavirus-spreads/>).

The plaintiffs give no explanation for why they waited until 19 calendar days before they demand that their requested relief take effect to file this lawsuit and move for a preliminary injunction. The statutes that they challenge are not new, and are not being interpreted or applied any differently this year than any prior year. Information about them is publicly available and has been for years.⁶ And even the 2020 events to which the plaintiffs point in support of their motion took place more than a month ago. Mr. Tompkins received notice that his absentee ballot for the August 18 primary election was rejected on September 9,⁷ and the plaintiffs refer to news articles from August 3⁸ and September 2.⁹ And yet they filed their motion for preliminary injunction and expedited review at the end of the day on October 8.

At this point, the plaintiffs' stated goal of obtaining injunctive relief before October 27 is patently unachievable.¹⁰ This is particularly true given the unsettlingly vague nature of the relief that they request. The Alaska Rules of Civil Procedure require that every injunction "shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be

⁶ In 2016 the Division began publishing online the number of rejected absentee ballots, as well as the number of ballots requested and received. *See* Alaska Division of Elections, "Absentee, Early, and Question Ballot Statistics," <https://www.elections.alaska.gov/doc/info/statstable.php>.

⁷ *See* Affidavit of Floyd Tompkins ¶4, and accompanying exhibit 1.

⁸ *See* Exhibit 7 to Plaintiffs' Motion for Preliminary Injunction.

⁹ *See* Exhibit 8 to Plaintiffs' Motion for Preliminary Injunction.

¹⁰ *See* Motion for Expedited Consideration at pages 2-3.

restrained.”¹¹ And for good reason: without clear terms, an enjoined party may risk contempt of court despite good faith efforts to comply. And yet the plaintiffs’ proposed order would vaguely require the Division to provide voters who submit a deficient absentee ballot “with reasonable notice and an opportunity to cure those issues.” There is no detail about the form or timing of either the notice or the opportunity to cure. This proposed order lacks all the essential elements of *what, where, when, and how*.

The defendant’s motion leaves the *defendants* to do all the work of researching and designing *the plaintiffs own requested relief*. This is a totally inappropriate use of the preliminary injunction vehicle, particularly considering that preliminary injunctions should be issued on an expedited basis only to preserve the status quo.¹² Preliminary injunctions are not suited to designing and implementing a entirely new state program in less than three weeks.

The plaintiffs’ Motion for Preliminary Injunction asserts that “Defendants have many convenient, low cost, and effective notice and cure options available, and ... various cure procedures have already been implemented in jurisdictions across the country.”¹³ But the motion does not identify any, leaving the Division to undertake this research to determine what jurisdictions they are talking about and what cure methods those jurisdictions use. There is no time between now and the general election for the Division to

¹¹ Alaska R. Civ. P. 65(d).

¹² *Martin v. Coastal Villages Region Fund*, 156 P.3d 1121, 1126 (Alaska 2007) (“The purpose of a preliminary injunction is to maintain the status quo”). *See also* Alaska R. Civ. P. 65(d) referring to the “acts sought to be restrained.”

¹³ At page 3.

meaningfully identify and analyze the various methods of cure utilized by other states and whether such methods could be functionally adapted to the large geographic distances and dispersed population of Alaska, even regardless of the merits of the plaintiffs' constitutional arguments. The only concrete example that the plaintiffs give is the Municipality of Anchorage, which they allege mails letters to voters inviting them to come in person to the municipal elections office to cure a ballot deficiency.¹⁴ Obviously that system is well suited to a small, dense urban population with quick mail service and easy road access to the election center. But statewide, mail service can be significantly slower and large numbers of absentee voters, including Mr. Tomkins himself, do not live within easy road access of a Division of Elections office. So the plaintiffs' lone real-world example is not helpful.

And the Division needs time to present, and this Court to consider, its legal arguments. The plaintiffs' preliminary injunction motion suggests that Alaska statutes implicitly allow, or at least do not prohibit, voters to cure deficient absentee ballots, and that it is simply asking this Court to find the Division's practices unconstitutional. This is wrong. Alaska Statute 15.20.203(b) states: "An absentee ballot may not be counted if (1) the voter has failed to properly execute the certificate; (2) an official or the witnesses authorized by law to attest the voter's certificate fail to execute the certificate." The statute prohibits counting an unsigned or unwitnessed ballot, regardless of what the voter might submit separately or later. Thus, the plaintiffs are asking this Court to take

¹⁴ At pages 15-16.

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the drastic step of finding a longstanding elections statute facially unconstitutional in the final hours before a highly contentious general election.

For these reasons the defendants respectfully request that this Court deny the plaintiffs' motion for expedited consideration. The Division should have the usual forty days to answer the complaint and the following ten days to oppose the motion for a preliminary injunction. At that point, the general election will be complete and the Division can meaningfully address its attention to this matter. Furthermore, if this Court finds that the plaintiffs have shown probable success on the merits, the Alaska Legislature will have an opportunity to consider the statutory scheme during its 2021 session and that politically accountable branch of government can consider what form a cure mechanism might take. This is a much more suitable resolution of this case, even if the plaintiffs succeed on the merits, than a last-minute, hastily-designed, poorly-researched cure process created from whole cloth by the Judicial branch in the final days before the election.

DATED October 9, 2020

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