

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

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

Plaintiffs,

v.

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

Defendants.

Case No. 3AN-20- 07858C1

FILED
STATE OF ALASKA
THIRD JUDICIAL DISTRICT
2020 SEP -8 PM 2:34
CLERK OF THE TRIAL COURTS
OF
JUDICIAL DISTRICT

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

NATIVE AMERICAN RIGHTS FUND

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I. INTRODUCTION

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

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

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

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

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

II. BACKGROUND

A. COVID-19 Pandemic

The novel coronavirus, SARS-CoV-2, causes a deadly disease known as COVID-19. The World Health Organization declared the COVID-19 disease a pandemic on March 11, 2020.² Globally, COVID-19 has infected more than 27 million individuals and has caused more than 881,400 deaths.³ The pandemic has had an especially severe impact on the United States. The first known COVID-19-related death in the United States occurred in February 2020.⁴ Since then, the United States has experienced more than 6 million official cases of COVID-19 and more than 188,000 deaths.⁵

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

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

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

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

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

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

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

B. COVID-19 in Alaska

On March 11, 2020, Governor Michael Dunleavy declared a public health emergency advising all state executive departments coordinate COVID-19 emergency responses.⁸ Alaska's first known case of COVID-19 was on March 12, 2020.⁹ As of September 8, Alaska had more than 6,600 confirmed cases and 39 resulting deaths.¹⁰ The numbers are only rising. The Municipality of Anchorage in particular is one of the State's primary hotspots. Anchorage has at least 3,425 of Alaska's total cases and the majority of new cases in Alaska.¹¹

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

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

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

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

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

¹¹ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

indoor service from August 3 to August 30.²¹ On August 28, the Mayor modified this order to allow bars and restaurants to operate at 50% capacity, while recognizing that there continues to be widespread community transmission and concerning outbreaks among vulnerable populations.²²

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

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

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

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

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

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

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

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

C. Impacted Populations

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

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

²⁶ Alaska Municipal League, *supra* note 24.

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

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

In addition to age, several other underlying health factors increase the risks associated with COVID-19. People who have underlying health conditions (such as heart disease, diabetes, cancer, high blood pressure, obesity, and lung disease such as chronic obstructive pulmonary disease (COPD)), have weakened immune systems, , or who are pregnant are considered populations at an increased risk for severe illness from COVID-19.²⁹

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

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

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

³¹ *Id.*

³² *Id.*

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

D. Witness Requirement

In Alaska, any qualified voter can vote absentee without an excuse.³⁴

After a local election office receives an absentee ballot application, the Director must send the voter an absentee ballot and other absentee voting materials by the most expeditious mail service and as soon as the materials are ready for distribution.³⁵ If the application requests electronic transmission of the absentee ballot, the election officials must send the absentee ballot and other absentee voting material by electronic transmission.³⁶

Once the voter receives the absentee ballot, the voter must sign the voter certification in the presence of a notary or other official authorized to administer oaths or, if these are unavailable, then in the presence of a witness who is 18 years old or older.³⁷

An absentee voter must provide proof of identification or other information to aid in the establishment of the voter's identity, either at the time the voter applies for an absentee

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

³⁴ AS 15.20.081(a).

³⁵ AS 15.20.081(c).

³⁶ *Id.*

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

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

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

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

³⁸ AS 15.20.081(f); 6 AAC 25.510.

³⁹ AS 15.20.081(f).

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

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

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

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

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

⁴³ Brooks, *supra* note 1.

III. APPLICABLE LAW

A. Standard for a preliminary injunction

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

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

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

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

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

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

of the case and determine that the moving party is “more likely than not” to ultimately prevail.⁴⁸

IV. ARGUMENT

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

A. Plaintiffs have standing to bring their claims.

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

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

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Id.

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

⁵⁰

Id.

⁵¹

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

protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."⁵²

Plaintiffs Arctic Village Council and LWVAK have members who will not be able to safely vote in the upcoming general election if the State enforces the Witness Requirement. Ex. A, Yatlin Decl. ¶ 11; Ex. B, Andree Decl. ¶¶ 8–9. Both Plaintiffs are also having to divert resources to educate members on how to vote given that they cannot safely vote absentee. Ex. A Yatlin Decl. ¶ 12; Ex. B, Andree Decl. ¶ 9.

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

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

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

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

⁵² *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 915 (Alaska 2000).
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the election of those who make the laws under which, as good citizens, we must live,” further noting that “[o]ther rights even the most basic, are illusory if the right to vote is undermined.”⁵³

Plaintiffs face the danger of serious health consequences or even death if they vote in person or try to locate a notary—making absentee or mail-in voting the only way that they can safely cast a ballot in the upcoming general election. The Witness Requirement prevents Plaintiffs and Plaintiffs’ members from being able to vote safely even by mail or electronic means. Plaintiffs Jones and Clark are elderly, live alone, and are immunocompromised, with high blood pressure, obesity, and chronic obstructive pulmonary disease (COPD). Ex. C, Jones Decl. ¶¶ 10–11; Ex. D, Clark Decl. ¶ 7. They do not have an adult to witness their signing and sign their absentee ballots. *See id.* They do not have access to notaries and the State’s new law allowing for remote notarization does not go into effect until January 1, 2021.⁵⁴ Plaintiffs have voted in past elections and want to continue to exercise their fundamental, democratic right in the upcoming general election. Ex. C, Jones Decl. ¶¶ 4, 13, 17; Ex. D, Clark Decl. ¶¶ 3–4, 13. They cannot, not without risking their health.

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

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

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

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

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

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

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

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

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

2. *Defendants' interests are adequately protected.*

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

⁵⁶ *Id.* at 6.

⁵⁷ *See, e.g.*, 832 P.2d at 174–76.

⁵⁸ *Id.*

⁵⁹ *Metcalf*, 110 P.3d at 978–79.

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

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

⁶⁰ 651 P.2d 1, 2 (Alaska 1982).

⁶¹ *Id.*

⁶² *Id.* at 5.

⁶³ 323 P.3d 47, 56 (Alaska 2014).

⁶⁴ *Id.*

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

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

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

⁶⁶ *Id.*

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

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

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

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

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

of the case.

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

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

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

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

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

⁷² *A.J. Indus.*, 470 P.2d at 541.

⁷³ *Id.*

⁷⁴ *Id.*

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

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

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

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

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

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

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

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

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

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

⁷⁹ 426 P.3d 901, 909 (Alaska 2018).

⁸⁰ *Id.* at 909–10.

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

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

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

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

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

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

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

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

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

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

⁸⁵ *Id.*

compelling and that the legislation's means-to-ends fit be correspondingly closer.”⁸⁶

Applying this standard, the Court concluded “[t]hree years is an unacceptably long time to burden the right of local voters to make their own decisions.”⁸⁷ As for the state’s interests, the Court noted that the state’s interest in ensuring that voters are familiar with candidates in local elections was not “sufficiently compelling” to outweigh the “significant burden” that the law placed on plaintiff.⁸⁸

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

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

⁸⁶ *Id.* at 691.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See Alaska Pacific Ins. Co. v. Brown*, 687 P.2d 264, 269 (Alaska 1984).

⁹⁰ *See, e.g., Vogler*, 651 P.2d at 3.

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

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

V. CONCLUSION

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

⁹¹ AS 15.20.081(f); 6 AAC 25.510.

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Case No. 3AN-20-_____

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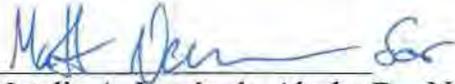
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