

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.)

FILED in the TRIAL COURTS
State of Alaska Third District

SEP 21 2020

Clerk of the Trial Courts
By _____ Deputy

Case No.: 3AN-20-07858 CI

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

I. INTRODUCTION

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

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

II. STATEMENT OF FACTS

The mission of the Alaska Division of Elections is to ensure public confidence in the electoral process by administering voter registration and elections with the highest level of professional standards, integrity, security, accuracy and fairness.¹

Administering elections in Alaska requires a system that operates fairly and uniformly from densely-populated urban areas to small, remote communities with limited services. A thorough understanding of the highly complex process of administering elections in Alaska, and the challenges associated with it, is essential to an informed resolution of this matter.

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

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

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

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

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

Registered Alaska voters have four basic options for voting: absentee, early, special needs, and in-person.⁵ No excuse is required to vote absentee.⁶ Voters can vote absentee-in-person before an Absentee Voting Official beginning fifteen days before an election.⁷ These voters do not need to apply in advance for an absentee ballot.⁸

Absentee-in-person voting is widely available across the state, including in remote communities such as Arctic Village.⁹ Voters may also vote early at at least seven locations in essentially the same process as in-person voting beginning fifteen days

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

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

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

⁶ AS 15.20.081(a).

⁷ AS 15.20.061.

⁸ *Id.*

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

before the election.¹⁰

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

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

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


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

¹¹ AS 15.20.081.

¹² AS 15.20.081(d); AS 15.20.066(b).

¹³ AS 15.20.030.

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

Return Address:	U. S. Postal FIM	First class postage required
 Official Return Ballot Envelope Mail your ballot and have it postmarked by Election Day To be opened only by the Absentee Review Board E36F1 (Rev. 7/1/19)	Election USPS Logo Here DIVISION OF ELECTIONS REGION I ELECTIONS OFFICE PO BOX 110018 JUNEAU AK 99811-0018 Intelligent Mail Barcode Here	

The back of the envelope looks like this:

1. You MUST Sign AND Provide One Identifier ➔	<u>Voter Certificate, Signature and Identification</u> I declare that I am a citizen of the United States and that I have been a resident of Alaska for at least 30 days. I have not requested a ballot from any other state and am not voting in any other manner in this election. If I had this certificate attested by a witness, other than an authorized official, it was because no official empowered to administer an oath was reasonably available. I certify, under penalty of perjury, that the foregoing is true and accurate.
	Voter Signature: _____ Voter Identifier: _____ <div style="display: flex; justify-content: space-between;"> Voter No. AK Driver's License No. Date of Birth Last 4 of SSN </div>
2. Your Signature MUST be Witnessed ➔	<u>Witness Affidavit</u> Have your signature witnessed by an authorized official or, if an authorized official is not reasonably available, by someone 18 years of age or older.
	Signed in my presence: This _____ day of _____, 20____, at _____ <div style="text-align: right;">(City & State or Country)</div> Witness Signature: _____ If authorized official, official title: _____

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

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

E36B (Rev. 7/1/2019)

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

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



Before Sealing this Envelope	
Did you...	
<input type="checkbox"/>	Sign the envelope?
<input type="checkbox"/>	Provide ONE Identifier?
<input type="checkbox"/>	Have your signature witnessed?
<input type="checkbox"/>	Applied postage to front of this envelope?

This envelope MUST BE postmarked by Election Day

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

Absentee ballots will still be counted if they are received by mail up to ten days

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

¹⁶ AS 15.20.081(e).

¹⁷ 6 AAC 25.560.

following the election.¹⁸

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

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

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

¹⁹ AS 15.20.072.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

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

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

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

B. A recent absentee voter fraud scandal in Alaska.

In March of this year, a prominent member of the Alaska House of Representatives and two of her associates were indicted on multiple counts of voter fraud based on incidents in 2014 and 2018.²⁷ These indictments arose out of a criminal

²⁵ AS 15.20.203(h), (i).

²⁶ *Id.*

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

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

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

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

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

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

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

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

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

²⁹ See, e.g., Anchorage Daily News, Devin Kelly and Alex DeMarban, "Alaska Elections officials report voting 'irregularities' in east Anchorage house district primary" (August 28, 2018) (available online at <https://www.adn.com/politics/2018/08/27/alaska-elections-officials-report-voting-irregularities-in-east-anchorage-house-district-primary/>); Anchorage Daily News, Alex DeMarban, "Winner emerges in Anchorage House race, but GOP asserts felony-level Arctic Village Council, et al. v. Kevin Meyer, et al. Case No. 3AN-20-07858 CI Opp. to Pltff.'s Mot. for Prelim. Inj. and Cross-Mot. to Dismiss Page 10 of 52

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

C. COVID-19.

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

Although it appears that anyone can suffer complications, hospitalization or

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

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

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

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

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

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

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

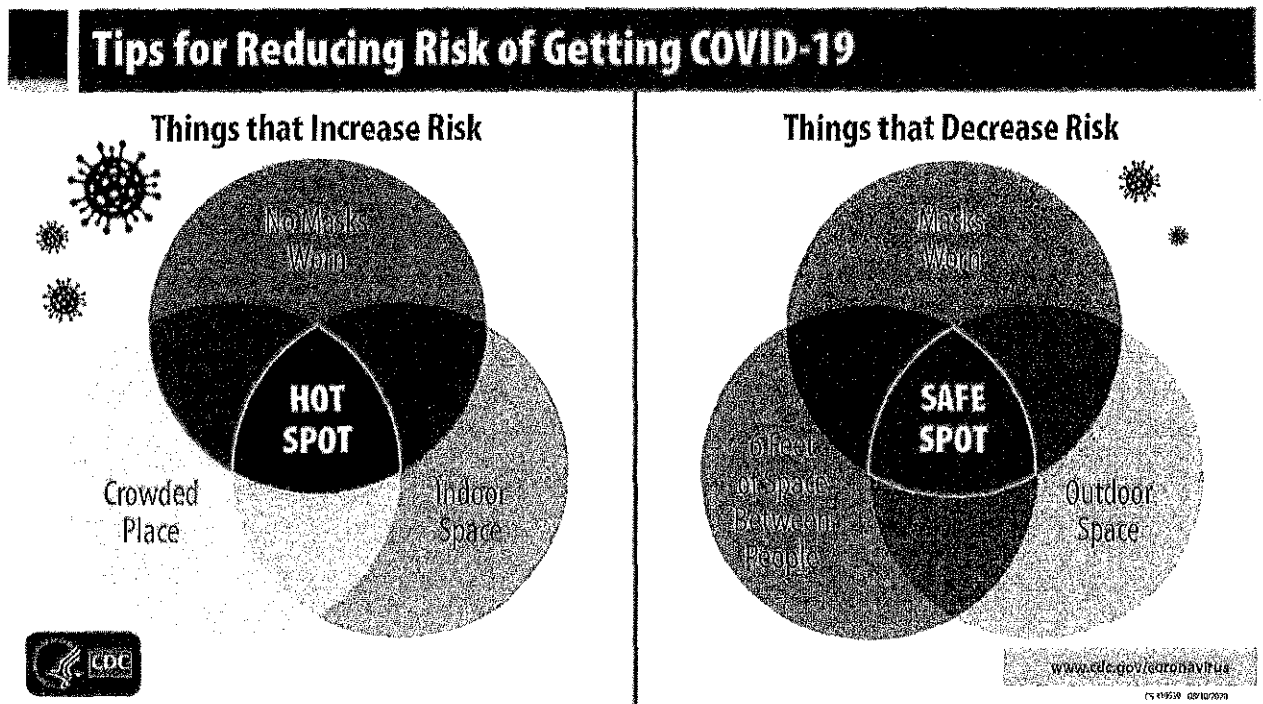
³⁴ See Alaska Department of Health and Social Services Coronavirus Response, Data Hub Presentation, <https://coronavirus-response-alaska-dhss.hub.arcgis.com/datasets/table-3-demographic-distribution-of-confirmed-cases/data> (as of September 17, 2020, according to Alaska DHSS data, individuals confirmed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

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

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

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

The United States Centers for Disease Control has created this helpful graphic summarizing the risks of transmission of COVID-19.³⁹



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

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

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

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

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

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

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

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

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

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

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

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

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

D. The 2020 primary election in Alaska.

The Alaska primary election took place on August 18.⁴⁷ The Division issued 62,455 absentee ballots (not including absentee-in-person ballots) of which 43,545 were returned. This return rate, 69.72 percent, was comparable to the return rates seen in the 2018 and 2016 primaries, which were 69.26 percent and 60.36 percent respectively. Of

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

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

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

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

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

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

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

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

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

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

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

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

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

E. The 2020 REAA election in Alaska.

The 2020 REAA Election will take place on October 6, 2020.⁵² The absentee ballots for that election are already being sent to voters, and the deadline to apply for an

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

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

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

F. The 2020 general election in Alaska.

The 2020 general election will take place on November 3.⁵³ Most of the preparatory work for the absentee voting process in the general election has already taken place. The Division placed its first order for about 64,000 absentee ballot envelopes in April, its second order of 233,500 envelopes in early June, and a final order of 112,500 envelopes on August 5. Those are scheduled to arrive tomorrow, September 22. The total cost for these 410,000 envelopes was \$105,792.60. The instructional cover sheets are currently being printed.

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

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

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

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

voters, with the return envelope and instruction sheet explaining the witnessing requirement, last Friday, September 18.⁵⁴ The Division expects to begin sending in-state and domestic absentee ballots by October 9th at the latest, but as early as the week of September 28 if possible. Voters may, and are encouraged to, vote and return their ballots as soon as received. Division staff will begin logging the absentee ballots as soon as they are returned (although formal review by the review board will not begin until late October). The deadline to apply for an absentee ballot by mail is October 24.⁵⁵

The plaintiffs formally notified the Division of their constitutional concerns about the absentee ballot witnessing requirement for the first time on August 31.⁵⁶ The Lieutenant Governor responded promptly on September 4.⁵⁷ The plaintiffs filed their complaint, with accompanying motion for preliminary injunction, on September 8.

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

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

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

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

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

election.⁵⁸

III. RELEVANT LEGAL STANDARDS

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

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

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

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

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

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

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

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

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

⁶³ *Id.* at 54.

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

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

⁶⁶ *Alsworth*, 323 P.3d at 54.

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

IV. ARGUMENT

A. The plaintiffs’ claims are barred by laches.

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

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

⁶⁷ *Metcalf*, 110 P.3d at 978-79.

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

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

⁷⁰ *Id.* at 903.

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

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

The circumstances underlying plaintiffs' suit are neither new nor unforeseen. The Governor declared a state of emergency in Alaska due to the pandemic in March.⁷⁴ Arctic Village reports that it began imposing restrictions on community members as early as March 13, and imposed its first lockdown on May 16.⁷⁵ Plaintiff Elizabeth Jones reports beginning her ongoing efforts to avoid contact with others in late February,⁷⁶ and plaintiff Barbara Clark in March.⁷⁷ The Division began ramping up for increased absentee voting in May. The plaintiffs have no excuse for failing to raise this

⁷² See Complaint ¶¶iii, iv.

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

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

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

⁷⁶ Affidavit of Elizabeth Jones at ¶6.

⁷⁷ Affidavit of Barbara Clark at ¶5.

issue until well into September.

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

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

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

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

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

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

state's requirement on May 19,⁸³ the League of Women Voters North Carolina sued in federal court over that state's requirement on May 22,⁸⁴ the League of Women Voters of Louisiana sued in federal court over that state's requirement sometime in May,⁸⁵ and the League of Women Voters of Rhode Island sued over that state's requirement on July 23.⁸⁶ Other plaintiffs brought additional cases challenging absentee ballot witnessing requirements during the same time frame: April 22 (South Carolina),⁸⁷ May 1 (Alabama),⁸⁸ June 4 (Minnesota state court),⁸⁹ and July 10 (North Carolina state

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

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

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

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

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

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

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

court).⁹⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹⁷ *Id.* at 314.

⁹⁸ *Id.* at 315-316.

⁹⁹ *Id.* at 316.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the requirement disenfranchises voters due to the pandemic. The Division saw no increase in the percentage of absentee ballots rejected for lack of a witness signature from recent elections; in fact, the percentage of absentee ballots rejected for lack of witnessing in the 2020 primary was the lowest in the last five statewide elections. This demonstrates that, even in years with no pandemic, a certain number of absentee voters fail to follow the instructions on the ballot envelope¹⁰⁹ or otherwise fail to have their ballots witnessed for reasons unrelated to fear of disease. A certain amount of voter noncompliance is inherent in the absentee voting process, and there is no reason to believe that, but for the pandemic, the one percent of absentee voters whose ballots were rejected would have obtained a witness signature and had their ballots counted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁵ *Id.*

¹¹⁶ *Id.*

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

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

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

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

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

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

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

¹²⁰ *Id.* at *2.

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

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

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

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

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

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

¹²⁴ *Id.*

¹²⁵ *Id.* at 1059.

¹²⁶ *Id.*

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

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

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

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

But the burdens associated with the absentee ballot witnessing requirement

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

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

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

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

¹²⁹ See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 199-200 (2008) (holding that alleged burdens on voting that were not supported by record evidence were insufficient to outweigh state's interest in *Anderson-Burdick* analysis).

primary election.

Because the burden on voters of absentee ballot witnessing is no different from the generalized burdens of life during this pandemic, this Court should find it warrants only the lowest level of scrutiny in the *Anderson-Burdick* balancing test. The absentee ballot witnessing requirement does not ask any more of Alaskans than any other important life activity like grocery shopping or seeking medical care. And there is no evidence that it actually inhibited absentee voting in the 2020 primary election, either by the named plaintiffs or the electorate as a whole.

2. The State's interests in preventing voter fraud and maintaining public confidence in the election are more than sufficient to uphold the constitutionality of the challenged statute.

The absentee ballot witnessing requirement serves two compelling State interests: preventing election fraud and instilling public confidence in the results. There is no question that prevention of voter fraud is a compelling state interest, as is the separate but related interest of maintaining public confidence in the integrity of elections.¹³⁰ The absentee ballot witnessing requirement serves both interests by deterring fraud, and by adding a level of formality and accountability to the absentee voting process.

The absentee ballot witnessing requirement aids in preventing fraud by

¹³⁰ *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) (“While that interest [safeguarding voter confidence] is closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance”).

mandating independent verification that the person who filled out the ballot also sealed it in the envelope and signed it. The expectation that a voter obtain notarization or an official witness, when available, also provides independent verification that the person who voted the ballot is who they claim to be. The Alaska Legislature views this requirement as a meaningful one: in 2005 the Alaska legislature reduced the non-official witness requirement from two witnesses to one, and removed the prior requirement that non-official witnesses be United States citizens, while adding new accountability for those witnesses.¹³¹ This Court should not lightly disregard the legislature's view of the role this statute plays in Alaska's elections framework when it chose to retain this requirement.¹³²

That a determined fraudster might simply forge a witness signature does not negate the requirement's broader fraud deterrent effect. And, as can be seen from the Division's recent detection of fraudulent absentee voter applications, Division employees are alert to the potential for fraud, and may notice irregularities in a

¹³¹ See 2005 Alaska Laws 1st Sp. Sess. Ch. 2 (H.B. 94). Amending AS 15.20.066 (electronic delivery absentee ballots) and AS 15.20.081 (by-mail absentee ballots) to change number of non-official witnesses from two to one and remove requirement of U.S. citizenship, and amending AS 15.20.030 to add: "The [absentee ballot] envelope with the voter's certificate must include a notice that false statements made by the voter or by the attesting official or witness on the certificate are punishable by law").

¹³² See *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 980-81 (Alaska 2005) (discussing the importance of according deference to the legislature in matters of election policy).

fraudulently witnessed absentee ballot that could prompt a timely investigation.¹³³

When considering the constitutionality of an election statute, Alaska courts consider the practices of other states relevant.¹³⁴ Absentee ballot witnessing is one of two primary models for absentee ballot verification among the states; the other is a signature-matching process.¹³⁵ Most states that do not require absentee ballots to be witnessed will not count an absentee ballot if the voters' signature does not substantially match the signature on file with the state.¹³⁶ Thus, although the plaintiffs correctly point out that Alaska is one of only eleven states with an absentee ballot witnessing requirement, invalidating Alaska's requirement will not simply place Alaska on the same footing with the remaining states. Alaska has no formal signature-matching

¹³³ The fact that the Division is not aware of any recent incidents of absentee voter fraud related to the witnessing requirement does not negate this interest. As the Alaska Supreme Court has explained, "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 981 (Alaska 2005) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)).

¹³⁴ See *Metcalfe*, 110 P.3d at 980 ("We view this analysis—comparing Alaska's ballot-access requirements with the requirements of other states—as one reasonable way to determine whether less restrictive alternatives exist").

¹³⁵ See National Association of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options," Table 14 "How States Verify Voted Absentee Ballots," <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx>.

¹³⁶ The Municipality of Anchorage also uses signature matching in its by-mail voting process. See Anchorage Municipal Code 28.70.030(C) ("The signature on the ballot declaration must be compared with the signature(s) in the voter's voter registration file using the standards in this subsection").

process.¹³⁷ Although all Alaska voters must sign their absentee ballots, an X or any other mark indicating voter intent to affirm the sworn statement is sufficient to count the ballot.¹³⁸ Thus, Alaska's absentee ballot witnessing requirement is within the mainstream of other states' absentee ballot verification practices, the majority of which employ one of these two fraud-prevention measures.

In addition to fraud prevention, Alaska's absentee ballot witnessing requirement has independent value in safeguarding voter confidence. The witnessing requirement adds a measure of formality and accountability to the absentee voting process, which may enhance its legitimacy in the eyes of the public. And, regardless of the value of the witnessing requirement itself, any kind of last-minute, temporary exemption to election laws is likely to damage voter confidence in the integrity and consistency of the elections system as a whole. If the absentee ballot witnessing requirement is suspended at the last minute for just this election, voters may perceive the election system as weak, or malleable, or volatile. That such a change would be ordered amidst widespread

¹³⁷ The Division's voter database does preserve images of voter's signatures, which can be used as a fraud-detection aid when necessary, but the Division does not routinely check for voter signature match and has no authority to exclude an absentee ballot on this basis alone. *See* AS 15.20.203 (listing grounds for not counting absentee ballots). Nor are Division employees particularly trained in signature matching procedures. *See* Municipality of Anchorage, Elections, "Frequently Asked Questions" <http://www.muni.org/Departments/Assembly/Clerk/Elections/Pages/FrequentlyAskedQuestions.aspx> (explaining, with regards to its signature-matching process: "Election officials who adjudicate signatures are trained with techniques used to identify matches and forgeries. If two trained election officials agree that the signature doesn't match, the voter is contacted by mail and provided an opportunity to cure the discrepancy.").

¹³⁸ 6 AAC 25.550(b) ("The signature of the voter may be any written or printed form of the voter's name or initials, or any other mark intended as a signature").

public skepticism about the security of elections in general, and by-mail voting in particular, only exacerbates that concern. Abandoning a statute intended to prevent absentee voter fraud has very real potential to undermine public confidence in the integrity of the 2020 general election.

Moreover, at all times the State has a legitimate “interest in the consistent administration of elections according to a considered statutory scheme.”¹³⁹ Waiving the absentee ballot witnessing requirement for the 2020 general election undermines the consistency of the overall statutory scheme. For example, it has the potential to cause voter confusion in *future* elections when the requirement will again be enforced. Absentee voters in 2022 may not understand that the requirement was waived only during the COVID-19 pandemic, and have their absentee ballots disqualified for lack of a witness signature at the next election.

In support of their motion, the plaintiffs cite to trial court orders granting injunctions against enforcement of other states’ absentee ballot witnessing requirements during the pandemic, but these citations are misleading. The plaintiffs fail to explain that the states did not defend their requirements in any of these cases. In two of the cases, the state entered into a consent judgment with the plaintiffs, and the decision cited was not granting a motion for preliminary injunction but rather an order approving

¹³⁹ *Metcalf*, 110 P.3d at 979 n. 11.

a consent judgment.¹⁴⁰ And in the third case, the executive director of the state's elections commission publicly disavowed the requirement, and had supported its removal.¹⁴¹ The court found that fact dispositive in its analysis of the state's interests.¹⁴²

As discussed above, appellate courts have stayed the only two preliminary injunctions enjoining a state's absentee ballot witnessing requirement entered in adversarial cases.¹⁴³ And plaintiffs challenging absentee ballot witnessing requirements have failed to secure preliminary injunctions in other adversarial cases.¹⁴⁴ In North Carolina, a federal district court held that plaintiffs had failed to demonstrate probable success on the merits of their constitutional challenge to that state's absentee ballot

¹⁴⁰ *League of Women Voters of Virginia v. Virginia Bd. of Elections*, — F.Supp.3d —, 2020 WL 4927524 (W.D. Va. 2020); *Common Cause Rhode Island v. Gorbea*, — F.Supp.3d —, 2020 WL 4365608 (D.R.I. 2020).

¹⁴¹ *Thomas v. Andino*, — F.Supp.3d —, 2020 WL 2617329 at *20 (D.S.C. 2020).

¹⁴² *Id.* at *21.

¹⁴³ *See Merrill v. People First of Alabama*, — U.S. —, 2020 WL 3604049 (2020); *Democratic Nat'l Committee v. Bostelmann*, Not Reported in Fed. Rptr., 2020 WL 3619499 (7th Cir. 2020).

¹⁴⁴ *See Clark v. Edwards*, — F.Supp.3d —, 2020 WL 3415376 (M.D.La. 2020) (dismissing on lack of standing grounds); *Democracy North Carolina v. North Carolina State Bd. of Elections*, — F.Supp.3d —, 2020 WL 4484063 (M.D.N.C. 2020); *Chambers v. State*, North Carolina Superior Court, Wake County, Case Number: 20 CVS 500124 (Order on Injunctive Relief, September 3 2020) (“State Defendants would be required to replace or modify existing absentee ballot envelopes... Any modification or redaction of information contained on the existing envelopes would be a time-, labor-, and cost-intensive process. Indeed, such a process will create delays in mailing ballots ... and would likely lead to voter confusion ... [Therefore] the Court concludes the balance of the equities weighs in Defendants’ favor.”) A copy of the order is available online at https://www.acluofnorthcarolina.org/sites/default/files/field_documents/20200903162856_scan.pdf.

witnessing requirement.¹⁴⁵ The court first determined that, with the appropriate precautions of social distancing, masking and handwashing, the risk of infection with COVID-19 from the brief interaction required for absentee ballot witnessing was so low that it did not create a significant burden on the voter.¹⁴⁶ The court then noted the state's recent experience with an incident of absentee voter fraud, which it found relevant even though that scheme did not directly involve the witnessing requirement.¹⁴⁷ The court found that the witnessing requirement served the state's interests "not only [in] deterring fraud at the outset but also in establishing certain minimal standards to allow for detection, investigation, and ultimately rejection of fraudulent ballots."¹⁴⁸ The court concluded:

The court finds that even high-risk voters can comply with the One-Witness Requirement in a relatively low-risk way, as long as they plan ahead and abide by all relevant precautionary measures... [T]he burden on voters is modest at most. Turning to the State's interest... the deterrent effect of the One-Witness Requirement, in addition to North Carolina's recent history of voter fraud involving absentee ballots, are sufficiently weighty to justify the modest burden on voters.¹⁴⁹

This Court should reach the same conclusion based on Alaska's similar circumstances.

¹⁴⁵ *Democracy North Carolina*, 2020 WL 4484063 at *36.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *35.

¹⁴⁹ *Id.* at *36.

3. The plaintiffs' equal protection claim fails because the absentee ballot witnessing requirement applies to all voters equally.

The equal protection clause of the Alaska Constitution is not offended by laws that treat all citizens equally.¹⁵⁰ Because Alaska's absentee ballot witnessing requirement applies uniformly to all voters, the equal protection clause does not apply. The distinctions among voters of which the plaintiffs complain are the result of the vagaries of COVID-19 and the particular circumstances of voters' personal lives, not Alaska law.

This is highlighted by the ill-defined nature of the alleged categorization of voters described in the plaintiffs' motion for preliminary injunction.¹⁵¹ The plaintiffs themselves struggle to identify exactly which voters they are talking about. Due to the myriad personal circumstances of voters, not all voters at high risk from COVID-19 are affected in the same way. Even for those who live alone, no doubt many have family members, friends, caregivers, or others in their lives whom they trust and are comfortable having contact with. Voters also exercise personal choice and have varying levels of risk assessment. Many may not be concerned about the brief contact associated with having an absentee ballot witnessed. It is also likely that many plan to vote absentee-in-person, early or by special needs ballot, and some may feel comfortable going to the polls given the Division's many COVID-19 prevention measures. Thus it is

¹⁵⁰ See e.g. *Manning v. State, Dep't of Fish & Game*, 420 P.3d 1270, 1279-80 (Alaska 2018) ("the [challenged regulation] applied equally to all Alaska citizens and thus did not implicate equal protection").

¹⁵¹ See Motion for Preliminary Injunction at pages 29-30.

impossible to clearly identify the class of voters the plaintiffs allege the law treats differently.

Voters always have, and always will, face circumstances in their personal lives that make it more or less difficult to vote. But those types of personal circumstances do not implicate equal protection. The equal protection clause only applies if the State treats people differently based on those personal circumstances. For example, election laws that distinguish based on length of residency trigger an equal protection analysis.¹⁵² But uniformly applicable laws do not.¹⁵³

The categories of voters identified by the plaintiffs are the result of the individual circumstances of those voters, not of the law. This Court should hold that the plaintiffs have not clearly shown probable success on the merits of their claim that the universally-applicable absentee ballot witnessing requirement violates the equal protection clause of the Alaska Constitution.

¹⁵² See *e.g. Pelozo v. Freas*, 871 P.2d 687 (Alaska 1994) (holding three-year residency requirement for candidates for city council violated equal protection); *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974) (holding three-year residency requirement for candidates for state legislature did not violate equal protection).

¹⁵³ See *Manning*, 420 P.3d at 1279-80. In *Manning*, like in this case, the plaintiff alleged that the uniformly-applicable law actually impacted people differently based on race, but that did not change the Court's analysis. In that case, uniformly-applicable hunting regulations were based on traditional Alaska Native hunting traditions, but hunters of any race could comply with them. *Id.* at 1280. The Court found this did not implicate the equal protection clause. *Id.* Similarly, statistical data suggesting that Alaska Natives may be at higher risk than individuals of other races from COVID-19 does not change the analysis.

V. CONCLUSION

Based on the foregoing, this Court should dismiss the plaintiffs' claims as untimely filed under the doctrine of laches, or, in the alternative, deny the plaintiffs' motion for a preliminary injunction.

DATED September 21, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: 

Lael Harrison
Alaska Bar No. 0811093
Margaret Paton Walsh
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**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

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

Plaintiffs,)

v.)

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

Defendants.)

Case No.: 3AN-20-07858 CI

AFFIDAVIT OF JEREMY JOHNSON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Jeremy Johnson, declare under penalty of perjury that the following is true and correct:

1. I am the Election Supervisor of the Fairbanks office of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. One of my job duties is to coordinate with poll workers, Absentee Voting Officials, and local and tribal governments in Region III regarding voting in their communities.

2. On the morning of August 17, 2020, the day before the primary election, my staff were making telephone calls to precinct chairs reminding them of the election the next day. At 12:30 pm, my trainer emailed informing me that the chair in Arctic Village was not answering her phone. My staff then called the Absentee Voting Official for Arctic Village who informed us that the chair's father, with whom the chair shares a house, was COVID-19 positive and in quarantine. The Absentee Voting Official was also in quarantine but was going to call around and try to find workers for election day. She asked if the Division of Elections could fly someone to Arctic Village to conduct the election. Shortly before 5:00 pm I was informed that the entire community was in lockdown and residents were not able to leave their homes, so Election Day voting could not take place.

3. I was told that two men, including the Second Chief, were making patrols through the village to ensure people were staying in their homes. Therefore, I asked, and the Second Chief agreed, to go to the home of the Absentee Voting Official and get the absentee-in-person voting materials.

4. On the morning of August 18, my staff provided phone training to the Second Chief on conducting absentee-in-person voting. He agreed to go door-to-door on his patrols to offer the opportunity to vote absentee-in-person to any voter who had not already voted.

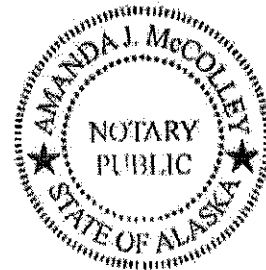
5. Arctic Village was one of a handful of locations in Region III where the Division had to work with communities in some form of lockdown to make special provisions for voting in the primary election. For example, a few small communities

along the Richardson Highway had placed barricades to prevent outsiders from entering, but those communities either agreed to remove the barricades on election day to allow for voting, or we were able to establish a new polling place outside the barricade.

Jeremy Johnson
Jeremy Johnson

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

Amanda McColley
Notary Public in and for Alaska
My commission expires: in office



anc.law.ecf@alaska.gov

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

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

Plaintiffs,)

v.)

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

Defendants.)

Case No.: 3AN-20-07858 CI

AFFIDAVIT OF ANGELIQUE HORTON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

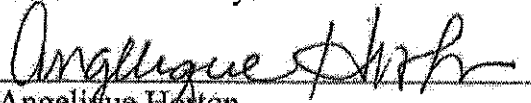
I, Angelique Horton, declare under penalty of perjury that the following is true
and correct:

1. I am the Election Supervisor of the Nome office of the Division of
Elections for the State of Alaska, and I have personal knowledge of the matters in this
declaration. One of my job duties is to coordinate with poll workers, Absentee Voting
Officials, and local and Tribal governments in Region IV regarding voting in their
communities.

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

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

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


Angelique Horton

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

Notary Public in and for Alaska
My commission expires: _____

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA

AT Anchorage
(City or town where the court is located)

Plaintiff/Petitioner,
v.

Defendant/Respondent.

Case No. 2AN-20-07858 CI

**SELF-CERTIFICATION
(NO NOTARY AVAILABLE)**

[If a notary public or other person with the power to take oaths is not available to notarize a document that you are filing with the court, you may fill out this form and attach it to your document.]

As allowed by AS 09.63.020, I, (Name) Angelique M. Horton, certify under penalty of perjury that the following is true:

1. I am attaching this *Self-Certification* to the following attached document:

Affidavit of Angelique Horton

If the attached document is required to be served on another party, I have attached a copy of this *Self-Certification* to the document when I served it.

2. No notary public or other person with the power to take oaths is available to watch me sign because:

- ☐ I live somewhere with no available notary public or other person who can take oaths.
☐ I cannot access the courthouse or private notary for medical reasons including quarantine.
☒ No notaries available within reasonable distance

3. I told the truth to the best of my knowledge and belief in the attached document.

Signature: Angelique Horton

Signed on: (date) 09/18/2020 at: (city) Nome, (state) AK

Mailing Address: PO Box 577, Nome AK 99762

Cell Phone: (907)304-1189

Work Phone: (907)443-5285

Home Phone: _____

Email*: Angelique.Horton@alaska.gov

*☒ I authorize the court to email me court documents in this case to the email address above.

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

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

Plaintiffs,)

v.)

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

Defendants.)

Case No.: 3AN-20-07858 CI

AFFIDAVIT OF JULIE HUSMANN

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

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

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

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

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

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

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

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

Julie Husmann
Julie Husmann

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

Doreen R. Barber
Notary Public in and for Alaska
My commission expires: 4/1/21
State of Alaska
Notary Public
Doreen R. Barber

**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 FENUMIAL, in her official)
capacity as the Director of the Alaska)
Division of Elections; and ALASKA)
DIVISION OF ELECTIONS,)

Defendants.)

Case No.: 3AN-20-07858 CI

AFFIDAVIT OF LAURI WILSON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Lauri Wilson, declare under penalty of perjury that the following is true and correct:

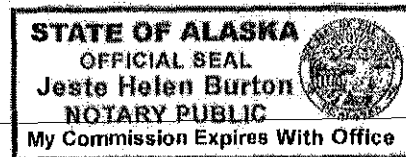
1. I am the Election Supervisor of the Juneau office of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. One of my job duties is to coordinate with poll workers, Absentee Voting Officials, and local and Tribal governments in Region I regarding voting in their communities.

2. On the morning of August 14, 2020, four days before the primary election, I received an email from the City Clerk in Kake who informed me that, due to an outbreak of COVID-19 in the community, the community was in lockdown. However, at that time she was uncertain about whether polling for the primary would be able to continue as planned. I spoke to her on August 17, the morning before the primary election, and she informed me that no polling place would be available on primary election day. She believed that the poll workers would be unwilling to work due to fear of contagion. We discussed the issue, and she agreed to make absentee-in-person voting available by appointment with her through 8:00 pm on primary election day. She told me she would inform voters by public announcements, and by posting notices around the community.

Lauri Wilson
Lauri Wilson

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

Jeste Helen Burton
Notary Public in and for Alaska
My commission expires: with office



anc.law.ecf@alaska.gov

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

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

Plaintiffs,)

v.)

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

Defendants.)

Case No.: 3AN-20-07858 CI

CERTIFICATE OF SERVICE

I hereby certify, that on this date, true and correct copies of the **Motion to Accept Overlength Brief, [Proposed] Order Granting Defendant's Motion to Accept Overlength Brief, Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross-Motion to Dismiss, Affidavit of Gail Fenumiai, Affidavit of Carol Thompson, Affidavit of Jeremy Johnson, Affidavit of Angelique Horton, Affidavit of Julie Husmann, Affidavit of Lauri Wilson, [Proposed] Order Granting Defendant's Motion to Dismiss, [Proposed] Order Denying Plaintiffs' Motion for Preliminary Injunction**, and this **Certificate of Service** were served via email and U.S. Mail on the following:


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

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Matthew N. Newman
Wesley J. Furlong
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Anchorage, AK 99501
nlandreth@narf.org
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Ezra D. Rosenberg
Pooja Chaudhuri
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Stephen Koteff
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Dale E. Ho
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dho@aclu.org


Virginia Bozeman
Litigation Assistant

9/21/20
Date

anc.law.ecf@alaska.gov

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

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

Plaintiffs,)

v.)

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

Defendants.)

Case No.: 3AN-20-07858 CI

AFFIDAVIT OF CAROL THOMPSON

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Carol Thompson, declare under penalty of perjury that the following is true and correct:

1. I am the Division Operations Manager of the Anchorage office of the Division of Elections for the State of Alaska, and I have personal knowledge of the matters in this declaration. I have been a Division Operations Manager since November 2007. One of my job duties is to review absentee ballot applications when received by the Division and determine whether they comply with state law and whether the voter is eligible to vote in the election.

2. In 2014, I and my staff first noticed irregularities in absentee ballot applications from House District 15. Specifically, it appeared that numerous applications were written in the same handwriting. This was unusual, as we typically see applications in the voter's own handwriting, although not necessarily illegal. Although it was unusual, there was not enough evidence of fraud at that time to warrant opening an investigation.

3. My staff and I noted no irregularities in absentee ballot applications from House District 15 in 2016.

4. In 2018 we again observed the unusual circumstance of many absentee ballot applications in the same handwriting from House District 15. When we compared the signatures on those applications to the applicants' signatures in our voter database, they matched, but each signature began a uniform distance from the pre-printed colon. In our experience, typically voter signatures begin at randomly different points along the signature line, so this also appeared abnormal.

5. Additionally, we noticed that the return addresses on the envelopes containing the applications were in the same handwriting as the applications. This was also unusual, as in our experience voters typically write their own return addresses. They also all had the same stamp as though mailed in a batch.


6. My staff and I then began following up with these voters, and found that some phone numbers given were disconnected or not functioning. Some letters were returned undeliverable. Some voters that we were able to reach did not recall completing an application or were confused. When we received an absentee ballot

application for a voter we could confirm was dead, we notified the Alaska State Troopers. Eventually we received a total of seven applications for voters we could confirm were dead.

7. I also made sure others in the Division were aware of the issue, including Julie Husmann who was responsible for reviewing received absentee ballots as part of the Absentee Ballot Review Board.


Carol Thompson

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


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

Official Seal
State of Alaska
Notary Public
Doreen R. Barber

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

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

Plaintiffs,)

v.)

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

Defendants.)

Case No.: 3AN-20-07858 CI

FILED in the TRIAL COURTS
State of Alaska Third District
SEP 21 2020
Clerk of the Trial Courts
By Deputy

AFFIDAVIT OF GAIL FENUMIAI

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

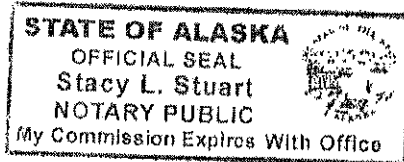
16. The Division hires temporary employees to review and log absentee ballots in addition to its own staff. For the primary election, the Division utilized 5-7 temporary employees in Region I, 5.5 temporary employees in Region II, 3 temporary employees in Region III and 2 temporary employees in Region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

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

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


Gail Fenumiai

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





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

EXHIBIT A

Exhibit A is an exemplar absentee ballot return envelope that will be filed in-person with the clerk of court and served on opposing counsel by mail.

Before Sealing this Envelope

Did you...

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

This envelope MUST BE postmarked by Election Day



Official Return Ballot Envelope

Mail your ballot and have it
postmarked by Election Day

To be opened only by the
Absentee Review Board

DIVISION OF ELECTIONS
REGION III ELECTIONS OFFICE
675 7TH AVE STE H3
FAIRBANKS AK 99701-4594



First C
Post
Requ



DIVISION OF ELECTIONS
REGION III ELECTIONS OFFICE
675 7TH AVE STE H3
FAIRBANKS AK 99701-4594



**You MUST
Sign AND
Provide One
Identifier**



Voter Certificate, Signature and Identification

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

Voter Signature: _____

Voter Identifier: _____

Voter No.

AK Driver's License No.

Date of Birth

Last 4 of SSN

Witness Affidavit

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

Signed in my presence:

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



Witness Signature: _____

If authorized official, official title: _____

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

Review Board Use Only

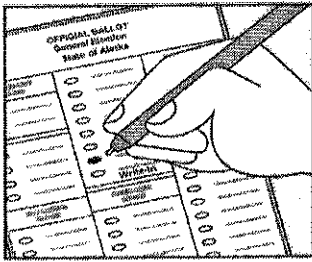
Count Code: _____ Sequence No.: _____

No Count Code: _____ Initials: _____

E36B (Rev. 7/1/2019)


EXH. A

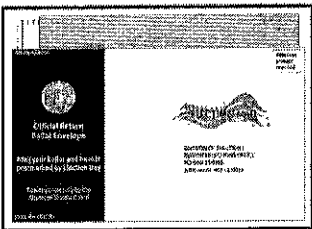
November 3, 2020 By-Mail Voting Instructions



1. Vote Ballot

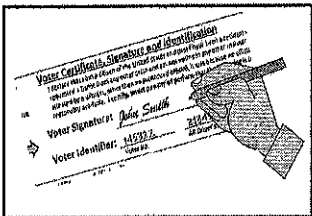
- Fill in the oval next to your choices using blue or black pen.
- For write-in candidates, print the person's name on the blank line and fill in the oval next to the name you have written.
- Follow the instructions on the ballot for voting your ballot.
- If you make a mistake voting, call the elections office below to request a replacement ballot or draw a line through the oval and candidate or issue you voted, write "no" next to it and then continue voting by filling in the oval next to your choice.

Example:  Candidate Name *NO*



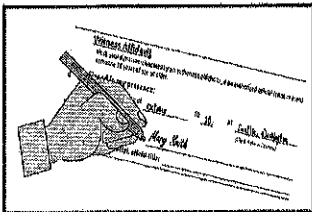
2. Place Ballot Inside the Return Ballot Envelope

- Fold your ballot and place it inside the gray secrecy sleeve.
- Place gray sleeve with your ballot inside the return ballot envelope.



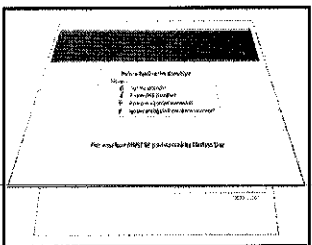
3. Sign the Return Envelope and Provide ONE Identifier

- Sign your Return Ballot Envelope where your witness can view it within a safe social distance.
- Write ONE of your identifiers on the back of the envelope:
 - Voter number, Alaska driver's or state ID number, date of birth or last four of SSN.



4. Have Your Signature Witnessed

- Have your signature witnessed by anyone 18 years of age or older.
- Or, you may choose to have your signature witnessed by an official if reasonably accessible. (Notary public, commissioned officer of the armed forces, district judge or magistrate, registration official or other person qualified to administer oaths.)

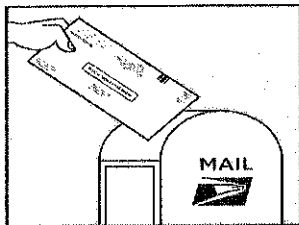


5. Secure your ballot

- Fold over the flap of the return envelope to cover up your signature, identifier and witness information.
- Secure your envelope by moistening the glue at the top and bottom of the flap and sealing it to the envelope.

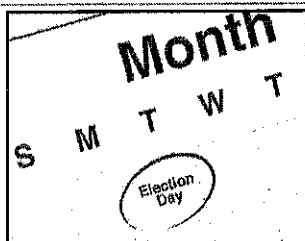
See Other Side for More Instructions

107 (Rev. 09/10/2020)



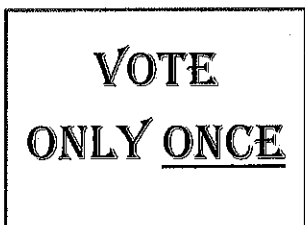
6. You May Return Your Voted Ballot By-Mail

- Apply 55 cents postage to the front of the envelope when returning your voted ballot by-mail (one Forever stamp).
- When mailing your ballot from outside the U.S., apply the correct amount of postage required for the area where you are located.
- Your ballot **MUST** be **POSTMARKED** or **RECEIVED** on or before Election Day, Tuesday, November 3, 2020.



7. You May Drop-Off Your Voted Ballot

- You may drop-off your ballot at any voting location in Alaska. This includes absentee voting, early voting and polling place locations. To find a drop-off location, visit our website at www.elections.alaska.gov.
- If you drop off your ballot, it **MUST** be **RECEIVED** by 8:00 p.m. on Election Day, Tuesday, November 3, 2020.



8. Vote **ONLY ONE** Time

- Once you vote and return your by-mail ballot either by-mail or if you drop it off, **you cannot vote again in any other manner in this election.**
- If you intentionally vote again in this election, you will be committing a crime of voter misconduct in the first degree, which is a class C felony offense. (AS 15.56.040)



9. Questions?

- Call: (907) 270-2700 or (877) 375-6508 (toll free in U.S.)
- Language assistance call: 1-866-954-8683
- Visit: www.elections.alaska.gov for additional information including the Official Election Pamphlet.

See Other Side for More Instructions

107 (Rev. 09/10/2020)

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

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

	By-mail rec'd	By-mail ret'd	Return %	Online rec'd	Online ret'd	Return %	Fax rec'd	Fax ret'd	Return %	FWAB rec'd	FWAB ret'd	Return %	Total apps	Total ret'd	Total Rtn %
2020 Primary	53,903	40,721	75.54%	8,527	2,809	32.94%	23	14	60.87%	2	1	50.00%	62,455	43,545	69.72%
2018 Primary	9,822	6,936	70.62%	949	524	55.22%	31	20	64.52%	5	5	100.00%	10,807	7,485	69.26%
2016 Primary	8,526	5,560	65.21%	1,604	555	34.60%	43	18	41.86%	20	19	95.00%	10,193	6,152	60.36%
2018 General	25,795	22,356	86.67%	6,677	5,448	81.59%	137	125	91.24%	65	51	78.46%	32,674	27,980	85.63%
2016 General	30,732	27,459	89.35%	9,706	8,420	86.75%	284	255	89.79%	512	432	84.38%	41,234	36,566	88.68%

FWABs are only counted (considered returned) if their official ballot is not returned.

09/09/2020 7:49:47AM

STATE OF ALASKA - DIVISION OF ELECTIONS
ABSENTEE REVIEW BOARD REPORT DETAILS

Page 18 of 18

ELECTION NAME: 20PRIM-2020 PRIMARY ELECTION

BALLOT RECEIVED DATE FROM:

BALLOT RECEIVED DATE TO: 09/09/2020

TOTAL NUMBER OF BALLOTS ACCEPTED	46324
A	45640 FULL COUNT
L	41 STATEWIDE AND SENATE
P	1 HOLD CHECK WITH DIRECTOR
S	642 STATEWIDE RACES ONLY
TOTAL NUMBER OF BALLOTS REJECTED	1333
2	34 IDENTIFIER DOES NOT MATCH VOTER RECORD
5	31 NOT ELIGIBLE FOR PRIMARY BALLOT CHOICE
C	9 NO AFFIDAVIT WITH ONLINE BALLOT
D	92 DUPLICATE BALLOT
E	21 BALLOT ENVELOPE EMPTY
G	54 NO IDENTIFIER PROVIDED
I	3 REGISTRATION INACTIVE WHEN BALLOT CAST
K	26 BALLOT NOT APPLIED FOR AS REQUIRED BY LAW
T	15 REGISTERED TOO LATE
U	4 NO DATE OR PM RECEIVED AFTER ED
V	66 BALLOT RECEIVED TOO LATE
W	422 BALLOT POSTMARKED AFTER ELECTION DAY
X	8 VOTER NOT REGISTERED WHEN BALLOT CAST
Y	458 IMPROPER OR INSUFFICIENT WITNESSING
Z	90 VOTER DID NOT SIGN
TOTAL NUMBER OF BALLOTS DELETED	25
D	25 DELETED BALLOT
TOTAL BALLOTS	47657