

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,

vs.

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

**ORDER DENYING
APPLICATION FOR TEMPORARY RESTRAINING ORDER
(CASE MOTION #5)**

I. INTRODUCTION

Plaintiffs have filed an *Application for Temporary Restraining Order* (Case Motion #5) asking the court to grant a temporary restraining order (“TRO”) restraining Defendants from mailing absentee ballots on October 2, 2020, and to maintain the October 9, 2020 mailing date previously communicated to the public, by which time Plaintiffs anticipate that the court will have resolved the merits of their *Motion for*

*Preliminary Injunction.*¹ Plaintiffs contend that the TRO is necessary to preserve the court's ability to hear this case and issue any meaningful and necessary relief.

In their *Motion for Preliminary Injunction*, Plaintiffs ask the court to declare application of the Witness Requirement (described below) unconstitutional during the pandemic because it would force individuals particularly vulnerable to COVID-19 to choose between risking exposure to COVID-19 through complying with the Witness Requirement or forgoing their right to vote. The purpose of Plaintiffs' *Application* is to preserve the possibility of modifying the absentee ballot packages to eliminate the Witness Requirement if the court grants Plaintiffs' *Motion for Preliminary Injunction*.

Defendants oppose the *Application* on a number of grounds, including: (1) Alaska law requires the Division of Elections to mail absentee ballots "as soon as they are ready for distribution," and absentee ballot packages are, or shortly will be, ready for mailing; (2) with the ongoing global pandemic, a highly anticipated election, and fear of delays in the mailing process, Defendants have planned for and been working towards mailing absentee ballot packages on October 2 to giving voters extra time to vote; (3) Plaintiffs will not suffer irreparable harm from sending absentee ballots out by October 2 because, if this court grants the requested injunction, the witness requirement will not be enforced regardless of whether the return envelope asks for it or not; (4) there is no time to reprint

¹ The court has scheduled oral argument on Plaintiffs' *Motion for Preliminary Injunction* and Defendants' *Motion to Dismiss* for Thursday, October 1, 2020. Plaintiffs' *Application* assumes that the court will render a decision on these motions prior to October 9, but Plaintiffs make clear that, if the court does not issue a decision by that day, Plaintiffs would reserve the right to seek further relief from the mailing of absentee ballots.

the ballot envelopes if Plaintiffs' injunction is granted, and thus granting the injunction will serve only to postpone the mailing of absentee ballots and limit the time voters will have to vote and mail back their ballots; and (5) compressing the time to return the ballots could result in overwhelming the U.S. Postal Service's capacity to process the ballots, particularly in rural areas, which could result in postmarks after Election Day or ballots being received more than 10 days after Election Day, both of which would result in rejection of ballots.

As explained below, the court denies Plaintiffs' *Application* because, as a practical matter, it would not be reasonable to require the Division of Elections to modify the absentee ballot packets even if the court granted Plaintiffs' *Motion for Preliminary Injunction*. In addition, the court can still issue meaningful and necessary relief if it grants Plaintiffs' *Motion for Preliminary Injunction*.

II. BACKGROUND INFORMATION

Alaska law requires voters who vote absentee by mail or electronic means to either: (1) sign their ballot envelopes in the presence of a notary or other official authorized to administer oaths; or (2) sign their ballots in the presence of a witness 18 years or older and to obtain a signature from the witness ("Witness Requirement").² The witness affidavit box is located on the back of the return envelope; there is also a

² AS 15.20.081(d); AS 15.20.066(b)(2).

completion checklist on the return envelope's cover flap that includes the question of "Did you have your signature witnessed?"³

With its opposition to the *Application*, Defendants submitted a September 28, 2020 affidavit of Gail Fenumiai, Director of the Alaska Division of Elections. Director Fenumiai's affidavit explains the process of preparing absentee ballot packages, which consist of five items: (1) return ballot envelopes; (2) ballot; (3) secrecy sleeve; (4) instructions; and (5) an outer envelope for mailing the first four items. First, voters' addresses are printed on the return ballot envelope using a piece of equipment. Then, all five items are placed into the inserter bins of a mail inserter machine, which inserts the materials into the outer envelopes and seals them. The machine has limited number of inserter slots, and all of them are used when preparing the absentee ballots for mailing.

In a September 18, 2020 affidavit, Director Fenumiai explained that, due to the non-standard nature of the absentee ballot envelopes, printing orders must be placed at least six weeks in advance. According to the affidavit, the Division began preparing for an increase in absentee voting due to COVID-19 months ago, and it placed orders for absentee ballot envelopes in April, June, and August. As of September 18, the Division had already sent out for printing the instructional cover sheets to be mailed with the absentee ballots. As of the same date, the Division had processed about 70,000 absentee ballot applications. According to Director Fenumiai's September 28, 2020 affidavit, the Division has now processed over 95,000 absentee ballot applications.

³ Defendants included a sample of a return envelope with their *Opposition to Plaintiffs' Motion for Preliminary Injunction and Cross-Motion to Dismiss*.

III. ANALYSIS

Plaintiffs ask this court to issue the TRO so that, if they are successful on their *Motion for Preliminary Injunction*, the court can order modifications to the absentee ballot package to reflect elimination of the Witness Requirement. They also suggest that, if the court does not grant the TRO, it will be unable to provide meaningful relief to them if the court agrees that the Witness Requirement should be eliminated during the COVID-19 pandemic. However, as explained below, it would not be practical to modify the absentee ballot packages at this stage of election preparations, and thus the Division of Elections should not be restrained from distributing the ballots to voters. In addition, the court believes it can provide meaningful relief apart from modifying the ballot packages if Plaintiffs prevail on their *Motion for Preliminary Injunction*.

Plaintiffs have made suggestions as to how the absentee ballot packages could be modified if the court grants their *Motion for Preliminary Injunction*. For example, Plaintiffs suggest placing a sticker over the portion of the return ballot requiring a witness signature.⁴ To do this, the Division of Elections would need to order or produce tens of thousands of stickers, possibly with explanatory language, and then place a sticker on every ballot return envelope by hand. This solution is not viable because it would take time to procure/produce the stickers and to affix them to the envelopes, which would significantly delay mailing of absentee ballots and create problems associated with a later

⁴ Realistically, two stickers per envelope would be required: one to cover the portion where a witness would sign, and one to cover the portion of the checklist referring to the witness signature.

distribution.⁵ Moreover, Ms. Fenumiai's affidavit is clear that staff capacity for such a task is lacking.

Plaintiffs alternatively propose that Defendants include an insertion with the absentee ballot explaining that the Witness Requirement is suspended for the November general election. While printing an insertion would presumably not be as difficult as obtaining/creating stickers, it would need to be hand-inserted into tens of thousands of absentee ballot packages because the machines used for assembling the absentee ballot packages cannot accommodate an additional insert. Another problem is that staff would need to unseal tens of thousands of outer envelopes (the insert machine automatically seals them) and re-seal them in some manner. Finally, even if an insertion explained that the Witness Requirement was suspended, the ballot return envelope would still have the witness signature box as well as the related question ("Did you have your signature witnessed?") on the completion checklist. This could easily generate confusion for absentee voters.

Given the above, even if the court ordered Defendants to refrain from sending absentee ballots prior to the court's decision on Plaintiffs' *Motion for Preliminary Injunction* and Plaintiffs ultimately prevailed, the court would not order modification of the absentee ballot packages. Rather, given the closeness of the election, the hurdles to modifying the absentee ballot packages, and the competing interest in mailing out the

⁵ These include less time to complete and return absentee ballots and increased stress on the postal system associated with more ballots being returned at the same time, which could arguably result in ballots not being postmarked by Election Day and ballots not being received until after the window for counting absentee ballots closes.

absentee ballot packages in a timely manner, the court would grant different relief, such as requiring Defendants to publicize that the Witness Requirement is eliminated for the November 2020 general election due to COVID-19 by posting announcements on appropriate websites, communicating it on television and radio, and posting information about the elimination on social media. The court could also order a separate mailing communicating the elimination of the Witness Requirement.⁶

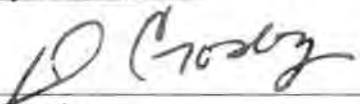
IV. CONCLUSION

In sum, due to the timing of this lawsuit (which is the subject of Defendants' *Motion to Dismiss* based on laches), the practical barriers to modifying the absentee ballot packages to effectively eliminate the Witness Requirement, and the importance of distributing absentee ballots as soon as possible, the court would not order modification of the absentee ballot packages as relief. Moreover, the court believes that it can fashion meaningful relief if Plaintiffs prevail on their *Motion for Preliminary Injunction*.

Plaintiffs' *Application for Temporary Restraining Order* is DENIED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 30 September 2020.



Dani Crosby
Superior Court Judge

⁶ Of course, relief would necessarily include an order requiring the Division to count absentee ballots that lacked a witness signature, but complied with the law in all other respects.

I certify that on 9/30/2020 a copy of the above was mailed to each of the following at their address of record:

M. Rabinowitz	W. Furlong
S. Kodiline	N. Landreth
	M. Newman
	L. Harrison
	M. Paton-Walsh

CEH
Judicial Assistant