

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.)

**FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT**

SEP 30 2020

**Clerk of the Trial Courts
By _____ Deputy**

Case No.: 3AN-20-07858 CI

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

I. Introduction.

The plaintiffs acknowledge that they have been taking protective measures against the spread of COVID-19 since at least March, yet they waited until September 8 to file suit. Their efforts to justify this lack of diligence in bringing this lawsuit ignore or mischaracterize the facts presented in the affidavits.¹ And they fail to acknowledge, much less appreciate, the scope of the prejudice to the defendants—and Alaskan voters—caused by their delay.

Because no evidence supports the plaintiffs' incredible contention that "the

¹ Both parties rely on material that is outside of the plaintiffs' complaint in arguing the laches issue, so this Court should convert the motion to dismiss on laches into a motion for summary judgment. Alaska Civil Rule 12(b). The State is entitled to summary judgment under the doctrine of laches on the facts presented here.

unprecedented circumstances that have necessitated this suit did not appear fully until late August,” [Reply at 5] and because their delay in filing suit means that their demanded remedies would impose an extraordinary additional administrative burden on the Division of Elections and, more importantly, would almost certainly disenfranchise some—potentially many—absentee voters. Delay in mailing ballots could leave voters without enough time to return their ballots and have their votes counted. And confusion about what is actually required could lead to other voter errors in filling out their ballots.

Therefore, this Court should dismiss the complaint as barred by laches.

II. The plaintiffs unreasonably delayed bringing this lawsuit.

The pandemic reached the United States in February and accelerated rapidly beginning in March and April. Nevertheless, the plaintiffs argue that “the need for a swift remedy for the November general election only became clear after the mid-August primary—when Defendants’ enforcement of the Witness Requirement during the accelerating pandemic caused actual voter disenfranchisement.” [Reply at 2] They claim that even the Division “did not fully appreciate the potential effect of the pandemic on voting until August.” [Reply at 9] But both these claims are contradicted by the evidence, and neither excuses the plaintiffs’ lack of diligence based on the information available to them months before they filed suit.

First, the plaintiffs have not pointed to any evidence supporting their assertion that the Division’s enforcement of the witness requirement “during the accelerating pandemic caused actual voter disenfranchisement.” [Reply at 2] As the Division explained in its opposition to the preliminary injunction motion, the rate of absentee

ballots rejected for lack of witnessing in the 2020 primary was the lowest in the last five statewide elections and less than half the rate in the last two primary elections. [See *Fenumiai Aff't*, Sept. 18, 2020, at ¶ 10, Exhibit C] If the witness requirement creates an unusual burden in the context of the pandemic, as the plaintiffs claim, that should be reflected in an increased rate of ballot rejection for lack of a witness signature this year in comparison to earlier elections. But the election data plainly contradicts the plaintiffs' assertion. [See *id.*]

The plaintiffs have neither statistical nor anecdotal evidence that would suggest that the August primary was somehow significant in making them aware of the basis for their claims in a way that they had not been earlier. They complain that the Division is wrongly requiring them to provide “‘statistical’ evidence of disenfranchisement.” [Reply at 24] But although they may not need statistical evidence of disenfranchisement, they do need *some evidence* of disenfranchisement to support their claims. And the August primary was not the source of any such evidence. The only individual voters they have identified were both able to vote in the primary election.² [Complaint at ¶¶ 14-15] The low rate of ballot rejection because of the witness requirement in the 2020 primary belies their claim that they could not have been expected to see a problem until those numbers were available in August. If anything, the

² The Division's affidavits also demonstrate that voters in Arctic Village were not actually prevented from voting in the primary election by the community's shutdown. The Division worked collaboratively with Arctic Village, as it did with other communities in shut down, to ensure that community members did not lose their opportunity to vote due to lockdown. [Fenumiai Aff't, Sept. 18, 2020 at ¶ 2]

August numbers demonstrate that the pandemic has had little if any impact on any burden created by the requirement.

Second, the plaintiffs' claim that the Division did not "fully appreciate the potential effect of the pandemic on voting until August" ignores the uncontested testimony of Division Director Gail Fenumiai that the Division began preparing for increased absentee voting due to the pandemic in May. [Fenumiai Aff't, Sept. 18, 2020 at ¶¶ 2, 14] They also misunderstand the voting data they cite and conflate data for June, July, and August. [Reply at 9] Although they say the Division's initial order of 64,500 absentee ballot envelopes was "less than half those cast in the 2016 and 2018 primary and general elections," [Reply at 7, and n. 25] they have misread the numbers.³ In 2016, there were 8,715 by-mail absentee ballots issued in the primary and 31,499 by-mail absentee ballots issued in the general—for a total of 40,214. In 2018, there were 9,827 absentee by-mail ballots issued in the primary and 25,807 absentee by-mail ballots issued in the general—for a total of 35,634. The Division's April 2020 order of absentee ballot envelopes was thus greater than the total number of absentee by-mail ballots issued in either 2016 or 2018.

More importantly, the Division anticipated a dramatic increase in absentee voting shortly after that, ordering a further 233,500 absentee ballot envelopes on June 5.

[Fenumiai Aff't, Sept. 18, 2020 at ¶ 14] Thus, by early June, the Division had ordered

³ Plaintiffs appear not to distinguish between the different ways in which voters cast early and absentee ballots. The absentee ballot envelopes referred to in the Affidavit of Gail Fenumiai, Sept. 18, 2020 at ¶ 14 are used only for by-mail absentee ballots.

more than seven times as many absentee by-mail ballot envelopes than it had used in 2016 or 2018. The plaintiffs' assertion that the Division did not realize the pandemic's potential impact on voting until August is thus plainly wrong.

Moreover, laches turns on when "it became reasonable to expect plaintiffs to act upon the wrong,"⁴ not on what the defendants knew, and the plaintiffs' own evidence reflects they reasonably should have acted months before they finally decided to file suit. They argue that "it was not until August 17, 2020, the day before the primary, that plaintiff Arctic Village Council learned that the pandemic made in person voting impossible and closed the polling place." [Reply at 5] But this claim is contradicted by the affidavit cited to support it. Tiffany Yatlin's affidavit indicates that Arctic Village issued a shelter in place order on or about May 16; [Yatlin Aff't at ¶ 8] so it was clearly taking the pandemic seriously at that time. [Yatlin Aff't at ¶ 8-9] And even if the May 16 shelter-in-place order was not enough to alert Arctic Village to the witness signature issue, the experience of the primary election must surely have done so. But inexplicably—and to the Division's detriment—the plaintiffs waited three more weeks after the primary before filing suit.

Arctic Village was not the only plaintiff that has long been aware of the issues they now complain about. Just as Arctic Village was taking steps to combat the pandemic by April 2020, [Complaint at ¶ 12], so too were the individual plaintiffs. The complaint alleges that both were avoiding contact with others as much as possible

⁴ *Moore v. State of Alaska*, 553 P.2d 8, 16 (Alaska 1976).

starting in February—Elizabeth Jones⁵—and March—Barbara Clark.⁶ It is thus simply not credible for them to claim that “[t]he reason that the full extent of the potential for disenfranchisement was not evident until August is that the dangers of the resurgent pandemic were not evident until then.” [Reply at 6] Their own allegations and evidence demonstrate that this is not true. Thus, three of the four plaintiffs here have been taking precautionary measures for many months that should have led them to act upon the perceived injury at issue here. Their decision not to act either before—or immediately after—the primary election represents “acquiescence in the alleged wrong.”⁷

The plaintiffs also appear to suggest that there is some threshold level of infection that was necessary to alert the League of Women Voters that the threat posed by the virus in Alaska rendered the witness requirement unconstitutional. [Reply at 8, n. 29 (comparing infection and death rates in states where League affiliates brought suit earlier in the year with those in Alaska at the same time)] But the affidavit provided by the League of Women Voters makes no such claims, and this suggestion is not supported by the evidence. In any case, they fail to identify what that threshold actually is, much less establish when Alaska reached it in their view and how they, the Division, or this Court are supposed to determine in advance whether Alaska will remain in this

⁵ Complaint at ¶ 14: Elizabeth Jones “has been self-isolating at her home since late February, only leaving her home when necessary.”

⁶ Complaint at ¶ 15: Barbara Clark “has been self-isolating at her home since early March, not even leaving to get food.”

⁷ *Kollander v Kollander*, 322 P.3d 897, 903 (Alaska 2014).

hypothetical danger zone when absentee voting begins.⁸

Even setting this infirmity of the plaintiffs' theory aside, the plaintiffs' own characterization of events demonstrates that they should have brought this suit months earlier than they did. Although Alaska's infection numbers were initially lower than many other states, the plaintiffs acknowledge that those numbers began to "grow exponentially" in June. [Reply at 9] And by their own account, every plaintiff was well aware of the pandemic's broader impact and was taking steps to mitigate it. Yet they waited several additional months and allowed the primary election to pass before taking any action. Given the circumstances—and the many examples of comparable litigation filed months earlier⁹—the plaintiffs' delay was unreasonable.

III. The defendants—and absentee voters—are unduly prejudiced by the plaintiffs' delay.

By failing to file this complaint until early September, after all absentee by-mail ballot envelopes have been ordered, the plaintiffs have created a situation in which the remedies they now seek would, if granted, delay the distribution of absentee ballots to

⁸ This highlights a fundamental problem with the theory underpinning this lawsuit—that the constitutionality of a statute can vary from day to day based on the vagaries of an ever-evolving pandemic. Indeed, the plaintiffs seek to "permanently" enjoin the witness requirement during this and future election years, without any consideration for how the state will determine when the pandemic is over. [Complaint at 28]

⁹ See Defendants' Opp. to P.I. Mot. & X-Mot. to Dismiss at 25-27. The plaintiffs also speculate that had they filed this lawsuit in the same timeframe as the litigation in other states, the defendants would have argued it was filed too soon. [Reply at 6] They offer no support for that speculation. It does not appear that any state made a ripeness defense to any of those lawsuits, and the evidence is clear that Alaska was taking the pandemic very seriously during that timeframe.

voters, thereby increasing the likelihood that voters will be disenfranchised because they are unable to timely vote and return their ballots. Similarly, the additional administrative burden that their proposed remedies would place on the Division during this critical period would not serve the public interest in a safe, smoothly run election.

The plaintiffs argue that their delay in bringing this litigation “will not cause Defendants undue prejudice,” and claim that “[e]ven if it did, any prejudice is clearly outweighed by the public interest in protecting Plaintiffs’ fundamental right to vote and ensuring that the public can vote safely in the general election.” [Reply at 10] But they ignore the realities of election administration and the obvious harm that their requested remedies will cause. The public interest in protecting the right to vote and ensuring a safe election does not actually cut in their favor.

The plaintiffs’ requested remedies have evolved, but they remain unworkable and would cause real-world harm. Although the plaintiffs now explain that they do not intend to require the Division to reprint ballot envelopes, their “simple, practical” alternative is no more feasible. [Reply at 10] They now propose, for the first time, that the court should order the Division to “either place a sticker over the witness signature printing on the ballot informing the voter that it is no longer required, or insert a sheet inside the envelope informing voters that they do not need to provide a witness signature for this election only.” [Reply at 11] But this newly identified remedy—which the Division has not had any opportunity to fairly address given the plaintiffs’ failure to

raise it until their reply brief—is no less problematic than their initial one.¹⁰

But the Division had already processed over 70,000 absentee ballot applications by September 18, more than a month before the application deadline.¹¹ [Fenumiai Aff't, Sept. 18, 2020, at ¶ 15] And absentee ballot materials to be mailed to voters are not prepared by hand. [Fenumiai Aff't, Sept. 28, 2020, at ¶ 5] The Division uses mail inserter equipment that inserts the required materials into the envelopes and then seals them. [Fenumiai Aff't, Sept. 28, 2020, at ¶ 5] The machine has a limited number of inserter slots, however, all of which are required for the existing materials. [Fenumiai Aff't, Sept. 12, 2020, at ¶ 5] So, the Division cannot simply add another sheet explaining that voters do not need to get a witness, as the plaintiffs suggest. Both of the plaintiffs' purported remedies—a sticker or an additional sheet of paper—would require Division staff to handle each envelope individually, either by placing the sticker or unsealing and resealing envelopes to add another sheet of paper. [Fenumiai Aff't, Sept. 28, 2020, at ¶ 5] The Division does not have the staff to accomplish either type of task in the limited time left before the ballots must be mailed to voters, particularly

¹⁰ Given that the plaintiffs did not identify this remedy in their prayer for relief and did not even identify it until their reply, the Division has had no opportunity yet to fairly address it. For that reason, this Court should consider the Director's affidavit submitted in support of its opposition to the TRO, which explains why the alternative remedy is as problematic as what the plaintiffs initially requested.

¹¹ See AS 15.20.081(b).

given the many other tasks the Division must accomplish to prepare for the election.¹²

Although the plaintiffs assert that the Division has “done this on several occasions,” [Reply at 11] the examples they cite are vastly different, and far more limited in scope, from what they propose here. The 2014 official election pamphlet omission was addressed by sending a separate follow-up supplement to the pamphlet, not by adding stickers or flyers to thousands of absentee ballot packets.¹³ And the issue with UOCAVA ballots that had the wrong Democratic candidate involved only 135 voters who had requested electronic delivery of their ballots—a situation that could be fixed with a simple follow-up email to 135 voters.¹⁴ These situations are completely different in scale and complexity from the plaintiffs’ new, more specific demand for relief, which would require individual handling and modification of each absentee ballot package.

The resulting prejudice of granting this proposed remedy would not be limited to an extraordinary administrative burden on the Division—it would also harm voters. Requiring the Division to take any of the steps the plaintiffs have demanded will further curtail the limited time absentee voters have to cast and return their ballot. Even if it

¹² For example, even assuming only 70,000 absentee ballots were involved, at a rate of 100 stickers per hour, it would take 20 people 35 hours to put stickers on the envelopes. Obviously, opening envelopes, adding a sheet of paper, and resealing would take even longer.

¹³ See <https://www.adn.com/politics/article/voter-pamphlet-issue-may-have-affected-1900-ballots/2014/10/17/>.

¹⁴ See <https://www.adn.com/politics/alaska-legislature/2020/09/21/some-absentee-ballots-list-the-wrong-democratic-candidate-in-an-anchorage-house-race/>.

were possible for the Division to redirect limited resources to put a sticker on tens of thousands of absentee by-mail ballot envelopes, this simply could not be done quickly enough to get those ballots sent out to voters on schedule. And any delay in sending the ballots out will inevitably increase the number of voters who either can't vote because they don't get their ballot in time, or whose votes are not counted because they are not received back by the Division in time.

This is not a mere hypothetical harm. In the primary election, more voters had their ballots rejected because of lateness than because of improper or insufficient witnessing. [Fenumiai Aff't, Sept. 18, 2020, Ex. E]¹⁵ And this happened even though the Division began mailing absentee ballots for the primary election two days ahead of its target date. [Fenumiai Aff't, Sept. 28, 2020, at ¶ 2] Thus, the plaintiffs' proposed remedy would likely disenfranchise as many, or more, voters than it would help. And a fundamental change like this one, in the middle of an ongoing election cycle, could lead to voter confusion with unpredictable consequences.

If the plaintiffs had sued back in May or even June, the Court could have ordered relief in time for the Division to obtain ballot envelopes that did not require a witness signature, train its employees appropriately, and pursue a meaningful educational campaign so that voters understood what was required. The Division no longer has the time and resources to meaningfully accomplish those steps. Even if it did, granting the plaintiffs' requested relief threatens to disrupt the election and disenfranchise voters.

¹⁵ 66 ballots were "received too late," and 422 ballots were "postmarked after election day."

"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."¹⁶ Here, the plaintiffs recognized the threat posed by the pandemic as early as March but they did nothing; they then acquiesced in the alleged wrong by participating—successfully—in the primary election under the current law. Their delay places the defendants in an impossible position because the plaintiffs' proposed remedy will at best place an unmanageable administrative burden on a state agency already dealing with the unprecedented task of conducting an election in a pandemic and at worst may disenfranchise far more voters than the remedy assists.

IV. Conclusion.

Because the plaintiffs unreasonably delayed bringing this action by waiting months after they had all the information they needed—with the result that the relief they request would significantly delay the distribution of absentee ballots and thus disenfranchise an unknown number of Alaskan voters—their claim is barred by laches and this Court should dismiss their complaint.

DATED September 30, 2020.

CLYDE "ED" SNIFFEN, JR.
ACTING ATTORNEY GENERAL

By: 

Lael Harrison
Alaska Bar No. 0811093
Margaret Paton Walsh
Alaska Bar No. 0411074
Assistant Attorneys General

¹⁶ *Kollander*, 322 P.3d at 903.

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 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. This is my second affidavit filed in this matter.

2. The October 9 "target date" listed on the Division's website for sending out absentee voting materials for the November general election has always been just that: a target date. The "target date" for the primary election was July 24, 2020; but

ballots were mailed starting July 22.

3. For weeks now, the Division has been diligently working to process applications in an attempt to get as many ballots out in the first mailing as possible. The absentee ballots arrived ahead of schedule and the Division decided to begin mailing as soon as possible, which at this time is likely to be sometime between October 2 through 5. That decision had nothing whatsoever to do with this lawsuit. Our goal has only been to give Alaska absentee voters as much time as possible to receive, vote and return their ballots to us, and to give ourselves as much time as possible to prepare and send absentee voting materials and to process returned ballots.

4. I understand that the plaintiffs in this lawsuit have suggested that, instead of reprinting absentee ballot envelopes to remove the witnessing requirement, the Division place stickers over the parts of the envelopes related to witnessing, and/or include a flyer with the absentee ballots. Possibly the stickers would be preprinted with information about dating the envelope. Neither of these options is realistically practical or possible.

5. Absentee ballot materials to be mailed to voters are not prepared by hand. They are prepared by mail inserter equipment. First, voters' addresses are printed on the return ballot envelopes for each house district using a separate piece of equipment. The outer envelope, return envelope, ballot, secrecy sleeve and instructions are then placed into inserter bins. The equipment inserts all of these materials into the outer envelopes, and seals them. The equipment that is used to process the mailings only has a certain number of inserter slots and we already use all the inserter slots available with what we

insert already: the outer envelope, return envelope, instructions, ballot and secrecy sleeve.

6. Inserting an additional flyer would require unsealing and re-sealing the envelopes completed by the equipment, which may not be physically possible. Unsealing the outer envelopes would ruin the seal and the division does not have an adequate supply of outer envelopes to use to replace existing ones. In any case, we do not have staff capacity to do this work. Our staff is currently completely taken up with other work related to both the REAA election and general election.

7. The instruction sheets for the absentee ballot mailings have already been printed. That printing took about four days.

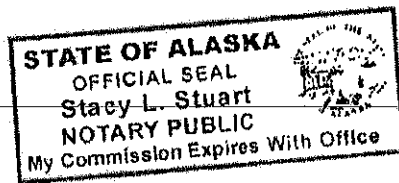
8. We do not have in stock any kind of sticker that would be appropriate to cover up the portions of the absentee ballot return envelope that address witnessing. I do not know how or where we would order something like that. It would take time to research and place an order. I also do not know whether it would be possible to have those stickers printed with instructions about dating the envelope as part of an order or whether the Division would have to find a way to do that with our own printers. I do not know how long it would take to fulfill an order or, once fulfilled, if it would be possible to print the stickers on our own printers.

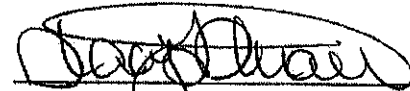
9. However, we do not have the staff capacity to undertake this kind of sticker-placing project at this late date. Again, Division staff is already completely maxed out with the work that they need to do to prepare and administer the REAA and general elections. I do not have staff available to assign to this type of project.

10. Also, I do not know how the stickers might affect the inserter machine. It is possible these stickers could catch in the equipment and slow processing or damage the ballot package and/or equipment.


Gail Fenumiai

SUBSCRIBED AND SWORN to before me this 28 day of September, 2020.




Notary Public in and for Alaska
My commission expires: _____

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 **Defendants'**

Reply in Support of Motion to Dismiss and this **Certificate of Service** were served


via email on the following:

Natalie A. Landreth
Matthew N. Newman
Wesley J. Furlong
Native American Rights Fund
nlandreth@narf.org
mnewman@narf.org
wfurlong@narf.org

Stephen Koteff
Joshua Decker
Aadika Singh
ACLU of Alaska Foundation
skoteff@acluak.org
jdecker@acluak.org
asingh@acluak.org

Ezra D. Rosenberg
Pooja Chaudhuri
Natasha Chabria
Lawyers' Committee for Civil Rights Under
Law
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
nchabria@lawyerscommittee.org

Dale E. Ho
American Civil Liberties Union
dho@aclu.org


Virginia Bozeman Date
Litigation Assistant

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