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

ARCTIC VILLAGE COUNCIL *et al.*,

Plaintiffs,

v.

KEVIN MEYER *et al.*,

Defendants.

Case No. 3AN-20-07858 CI

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

INTRODUCTION

Every eligible Alaskan should be able to vote—even during a pandemic. But Defendants, despite acknowledging the unprecedented circumstances created by the COVID-19 global pandemic, are forcing Plaintiffs, and others like them, to choose between their health and their right to vote. Instead of accommodating voters to ensure that all who are eligible can vote, Defendants are insisting on enforcing the unconstitutionally burdensome Witness Requirement. That is the core of this case.

And the case is simple: during the pandemic, Plaintiffs should not be forced into personal contact with others, when public health officials are recommending that personal contact be limited. Defendants raise a host of objections to this commonsense objective, none of which have merit. Defendants first assert that Plaintiffs' relief would require them to reprint the general election absentee ballots, but the solution is far less complicated. Plaintiffs simply want Defendants to notify voters of the suspended Witness Requirement and count unwitnessed ballots.

Defendants also argue, in their Motion to Dismiss, that laches bars this action. [1] But 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. Had Plaintiffs filed any sooner, Defendants would have argued that it was too early.

Ultimately, this case reduces to balancing the burden on voters of having to choose

[1] This is the only argument Defendants raise in their Motion to Dismiss. Any further briefing by Defendants is limited to the issue of laches.

between their health and their vote against Defendants' justifications for not easing those burdens. On the one hand, the injury occasioned by the burden is irreparable; on the other hand, the interests asserted by Defendants are minimal and can be met by other means.

Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss and grant an injunction allowing the most vulnerable Alaskans to vote in this election without risking their life or health.

ARGUMENT

I. Laches Does Not Bar This Action.

The Court should deny Defendants' Motion to Dismiss based on laches.[2] "Laches is an equitable defense available 'when a party delays asserting a claim for an unconscionable period.'"[3] The defendant must establish "two 'independent' elements before the equitable defense of laches will be applied."[4] The defendant must establish: "(1) that the plaintiff has unreasonably delayed in bringing the action, and (2) that this unreasonable delay has caused undue harm or prejudice to the defendant."[5] Determining

---

[2] A complaint should not be dismissed for failure to state a claim upon which relief can be granted "*unless it appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253–54 (Alaska 2000) (emphasis in original, citation omitted). "Because complaints must be liberally construed, [such a motion] is viewed with disfavor and should rarely be granted." *Id.* To survive a motion to dismiss, a complaint need only allege "a set of facts consistent with and appropriate to some enforceable cause of action." *McGrew v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 106 P.3d 319, 322 (Alaska 2005). Moreover, a complaint may be dismissed because of an affirmative defense such as laches only when the defense clearly appears on the face of the pleading. *Martin v. Mears*, 602 P.2d 421, 427–28 (Alaska 1979).

[3] *Kollander v. Kollander*, 322 P.3d 897, 903 (2014) (quoting *Burke v. Maka*, 296 P.3d 976, 979 (2013)) (internal quotation marks omitted).

[4] *City & Borough of Juneau v. Breck*, 706 P.2d 313, 315 (1985) (quoting *Moore v. State*, 553 P.2d 8, 15 (Alaska 1976)).

[5] *Id.*

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

whether an action is barred by laches is a fact-and case-specific inquiry. As the Alaska Supreme Court has explained, "[t]he point in time at which plaintiffs must exercise their remedies in court or lose their right to assert their cause of action depends on the facts and equitable considerations in each case[.]"[6] These considerations include "the knowledge of the plaintiffs, the conduct of defendants, the interests to be vindicated, and the resulting prejudice."[7] The party asserting the defense of laches bears the burden of establishing both elements of the defense.[8]

A. Plaintiffs Did Not Unconscionably Delay in Asserting Their Claims.

"The essence of laches is not merely the lack of time, but also a lack of diligence in seeking a remedy, or acquiescence in the alleged wrong and prejudice to the defendants."[9] Simply measuring the passage of time is insufficient in determining whether a plaintiff unconscionably delayed asserting a claim. As the Alaska Supreme Court articulated in *Moore v. State*:

> [I]n determining when laches should be applied, our concern is not so much with when the alleged wrong occurred, as it is with when, in light of any resulting prejudice to defendants, *it became reasonable to expect plaintiffs to act upon the wrong.* It is from the latter point onward that the plaintiffs' time begins to run.[10]

In other words, "[t]he ultimate questions are whether and when a reasonable person would have been galvanized into legal action."[11]

Although the Witness Requirement is not new in Alaska, this case is not a facial

---

6 *Moore*, 553 P.2d at 16.
7 *Id.*
8 *Kollander*, 322 P.3d at 903.
9 *Id.* (quoting *Schaub v. Schaub*, 305 P.3d 337 (2013)).
10 553 P.2d at 16 (emphasis added).
11 *Kohl v. Legoullon*, 936 P.2d 514, 517 (1997) (citing *Breck*, 706 P.2d at 316).

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

challenge to that Requirement. It is an as-applied challenge, and the unprecedented circumstances that have necessitated this suit did not appear fully until late August. First, 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.[12] From that point on, the only way for Arctic Village Council's members to vote in the primary election was by absentee ballot. And, in order to fulfill the Witness Requirement for absentee ballots, Tribe members who did not live with another resident at least eighteen-years-old would have needed to break quarantine to secure a witness. Other communities across the state experienced similar problems.[13] In Nunam Iqua, for example, the community was in lockdown because of COVID-19 cases and could offer only in-person absentee voting by appointment for the 2020 primary.[14] According to Defendants, only ten people voted through this method, in a community of over two hundred people.[15]

The true extent of the disenfranchisement caused by the enforcement of the Witness Requirement during the pandemic did not become fully apparent until the end of August, when the State acknowledged that 456 ballots were rejected due to "improper or insufficient witnessing."[16] Even now, it remains unclear how many people simply did not vote because they had to comply with the Witness Requirement and because of their

---

12 Aff. of Yatlin ¶ 9.
13 *See* Aff. of Horton ¶¶ 2–3.
14 *Id.* ¶ 3.
15 *Id.*
16 James Brooks, *More Than 1,200 Absentee Ballots Were Rejected in Alaska's Primary. Civil Rights Groups are Asking for A Fix.*, Anchorage Daily News (Sep. 3, 2020), https://www.adn.com/politics/2020/09/02/more-than-1200-absentee-ballots-were-rejected-in-the-primary-civil-rights-groups-are-asking-for-a-fix/.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

concerns about COVID-19. It is clear, however, that the Witness Requirement is burdening voters and preventing votes from being counted.[17]

The 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. By their terms, Governor Dunleavy's first stay-at-home order and limits on intrastate travel were to be reevaluated by April 11.[18] The initial suspension of certain court proceedings in March was only through April 3.[19] Had Plaintiffs filed suit then, Defendants would have argued that the suit was premature. By mid-May, there were only thirty-five active cases in Alaska, and it looked as if Alaska had dodged a bullet.[20] Summer camps and schools reopened and, as late as July 9, the Anchorage School District anticipated classes would begin in person two days a week on August 20 and move to full-time, in-person classes shortly thereafter.[21] The Alaska Supreme Court did not extend its suspension

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

---

[17] Many elections are decided by fewer than 456 votes. In the 2020 primary, Senate B was decided by 14 votes, House 1 by 8, House 2 by 39, House 23 by 4 and House 35 by 73. Alaska Div. of Elections, *2020 Primary Election: Election Summary Report: August 18, 2020: Official Results* (Aug. 31, 2020), https://www.elections.alaska.gov/results/20PRIM/data/sovc/ElectionSummaryReportRPT20.pdf.

[18] Office of Governor Mike Dunleavy, *Governor Issues COVID-19 Health Mandates on Social Distancing, Limiting Intrastate Travel* (Mar. 27, 2020), https://gov.alaska.gov/newsroom/2020/03/27/governor-issues-covid-19-health-mandates-on-social-distancing-limiting-intrastate-travel-2/.

[19] Alaska Supreme Court, *Special Order of the Chief Justice, Order No. 8131* (Mar. 19, 2020), https://public.courts.alaska.gov/web/covid19/docs/socj-2020-8131.pdf.

[20] *COVID-19 Cases by Onset Date*, AK COVID-19 Cases Dashboard, https://experience.arcgis.com/experience/6a5932d709ef4ab1b868188a4c757b4f (last visited Sept. 23, 2020).

[21] Emily Goodykoontz, *Anchorage School District Will Likely Start With In-Person Classes Just 2 Days A Week but Soon Change to 5 Days*, Anchorage Daily News (July 10, 2020), https://www.adn.com/alaska-news/education/2020/07/09/anchorage-school-district-will-likely-start-with-in-person-classes-just-2-days-a-week-but-soon-change-to-5-

of jury trials until August 6.[22]

And it was not until August that the United States Postal Service ("USPS") publicized a policy change that prohibited its employees from serving as witnesses for absentee ballots.[23] As Defendant Fenumiai noted in a letter to the USPS: "Rural Alaska relies heavily on post officials as they are often [] the only option for a [ballot] witness."[24] While Plaintiff Elizabeth Jones was able to have her ballot signed by a mail carrier in the primary, the new USPS policy strips her of that option for the general election.

Defendants admit that they did not begin planning for increased absentee voting due to the pandemic until well into the summer. Defendant Fenumiai states that the Division of Elections ("Division") ordered only 64,500 absentee ballot envelopes in March, less than half those cast in the 2016 and 2018 primary and general elections.[25] It was not until June and August that Defendants ordered 233,500 and 112,500 absentee ballot envelopes, respectively.[26] This is still nearly 56,000 less than the total votes cast in the 2018 primary

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

---

days/.

[22] Alaska Supreme Court, *Special Order of the Chief Justice, Order No. 8183* (Aug. 6, 2020), https://public.courts.alaska.gov/web/covid19/docs/socj-2020-8183.pdf.

[23] *See* James Brooks, *In Rule Change, Postal Service Forbids Employees From Signing Absentee Ballots as Witnesses*, Anchorage Daily News (Aug. 19, 2020), https://www.adn.com/politics/2020/08/18/in-rule-change-postal-service-forbids-employees-from-signing-absentee-ballots-as-witnesses/.

[24] *Id.*

[25] Aff. of Fenumiai ¶ 14; Alaska Div. of Elections, *Primary and General Election: Absentee and Questioned Ballots Statistics*, https://www.elections.alaska.gov/doc/info/statstable.php (last visited Sept. 23, 2020) (click "11/06/2018 General" and 8/21/2018 Primary" to see 2018 absentee voting statistics); Alaska Div. of Elections, *Primary and General Election: Absentee and Questioned Ballots Statistics*, https://www.elections.alaska.gov/doc/info/statstable.php (last visited Sept. 23, 2020) (click "11/08/2016 General" and 8/16/2016 Primary" to see 2016 absentee voting statistics).

[26] Aff. of Fenumiai ¶ 14.

and general elections (400,736),[27] and 64,000 less than the total votes cast in the 2016 primary and general elections (410,088).[28] Defendants' actions were understandable, as, unlike the experience with COVID-19 in the Lower 48, it looked as if Alaska's would be different.[29] In Alaska, thanks to an early lock-down and natural isolation, cases were

---

[27] Alaska Div. of Elections, *2018 General Election: November 6, 2018: Official Results* 1 (Nov. 26, 2018), https://www.elections.alaska.gov/results/18GENR/data/results18.pdf; Alaska Div. of Elections, *2018 Primary Election: Election Summary Report: August 21, 2018: Official Results* 1 (Sept. 4, 2018), https://www.elections.alaska.gov/results/18PRIM/data/results10.pdf.

[28] Alaska Div. of Elections, *2016 General Election: November 8, 2016: Official Results* 1 (Nov. 30, 2016), https://www.elections.alaska.gov/results/16GENR/data/results.pdf; Alaska Div. of Elections, *2016 Primary Election: Election Summary Report: August 16, 2016: Official Results* 1 (Sept. 6, 2016), https://www.elections.alaska.gov/results/16PRIM/data/Results.pdf.

[29] In this regard, Defendants' pointing to COVID-19 related suits filed by other state chapters of the League of Women Voters is decidedly misplaced. When the League of Women Voters ("LWV") of Virginia—a state with 11.5 times the population of Alaska—sued on April 17, Virginia reported 602 new cases that day alone, for a total of 7,491 since the outbreak began. Brian Reese, *Virginia April 17 COVID-19 Update: More Than 600 New Cases Friday, Highest Per Day Increase So Far, 23 New Deaths*, WAVY (Apr. 17, 2020), https://www.wavy.com/news/health/coronavirus/virginia-april-17-covid-19-update-more-than-600-new-cases-friday-highest-per-day-increase-so-far-23-new-deaths/. That same day, Alaska reported nine new cases, for a total of 309. Zaz Hollander & Morgan Krakow, *Both Nome and Kodiak's Sole COVID-19 Cases Involve Employees at GCI Stores*, Anchorage Daily News (Apr. 18, 2020), https://www.adn.com/alaska-news/2020/04/17/both-nome-and-kodiaks-sole-covid-19-cases-involve-employees-at-gci-stores/. When the LWV of North Carolina filed its case on May 22, North Carolina had 758 new cases and 21,618 total confirmed cases. *NC May 22 Covid-19 Update: 2nd Highest Daily Increase Ahead of 'Modest" Phase 2; Gov. Cooper Holds Briefing with Task Force,* WAVY (May 22, 2020), https://www.wavy.com/news/health/coronavirus/nc-may-22-covid-19-update-north-carolina-reports-second-highest-daily-case-increase-ahead-of-modest-phase-2-reopening/ (last visited Sept. 23 2020). That day, Alaska reported two new cases for a total of 404 confirmed cases. Cheyenne Matthews, *Two New COVID-19 Cases, No New Recovered Cases Friday*, Alaska's News Source (May 22, 2020), https://www.alaskasnewssource.com/content/news/Two-new-COVID-19-cases-no-new-recovered-cases-Friday-570713311.html. When the LWV of Rhode Island filed on July 23, Rhode Island had just passed 1,000 deaths and was already well into the decline of its first wave. Shaun Towne & Logan Wilber, *COVID-19 Death Toll Tops 1,000 in RI; 76 New Cases Reported*, WPRI (July 23, 2020), https://www.wpri.com/health/coronavirus/july-23-ri-coronavirus-update/. As of that day, only nineteen Alaskans had died. Zaz Hollander &

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

initially fewer and did not begin to grow exponentially until June.[30] As a recent news story explained: "Alaska's isolation and its travel policies have controlled spread better than in most other states, but six months in, it's clear that COVID-19 has swum the moat."[31] If Defendants did not fully appreciate the potential effect of the pandemic on voting until August, then Plaintiffs cannot be charged with that knowledge.

Astonishingly, Defendants assert that the obstacles to Plaintiffs' voting is a "problem . . . of Arctic Village's own making"[32] because the Council imposed a complete shelter-in-place regimen after social-distancing did not prevent outbreaks in the Village.[33] It is unfortunate that Defendants believe that a viable alternative to losing the right to vote is for Plaintiffs to risk their health and lives, and the health of their families and communities. Defendants' blame-the-victim theory cannot support a finding that Plaintiffs "unconscionably" delayed filing this action.

B. Defendants Are Not Unduly Prejudiced.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

Annie Berman, *A Shift in Alaska Seafood Plant Virus Outbreaks Means They May Be Harder to Contain,* Anchorage Daily NEws (July 27, 2020), https://www.adn.com/alaska-news/2020/07/23/a-shift-in-whos-involved-in-alaska-seafood-industry-outbreaks-means-virus-may-be-harder-to-contain/.

30 *See supra* note 20.

31 Ian Dickson, *Timeline: Looking Back at Six Months of COVID-19 in Alaska*, KTOO (Sep. 12, 2020), https://www.ktoo.org/2020/09/12/covid-19-retrospective/.

32 Defs.' Opp'n to Mot. for Prelim. Inj. & Cross-Mot. to Dismiss (hereinafter "Opp.") at 27.

33 Compl. ¶¶ 12, 47. Many other tribes have taken similar precautions. *See, e.g.*, Krysti Shallenberger, *Some Lower Yukon Villages are Going on Lockdown to Stop Spread of COVID-19*, KYUK (July 23, 2020), https://www.ktoo.org/2020/07/23/some-lower-yukon-villages-are-going-on-lockdown-to-stop-spread-of-covid-19/; Anna Rose MacArthur, *4 Y-K Delta Villages Lock Down to Protect Communities from Coronavirus*, KYUK (Aug. 25, 2020), https://www.kyuk.org/post/4-y-k-delta-villages-lock-down-protect-communities-coronavirus.

For laches to bar a claim, the Court must find not only that plaintiffs unconscionably delayed asserting their claims, but also "that this unreasonable delay has caused undue harm or prejudice to the defendant."[34] In determining whether a defendant has suffered undo prejudice, the Court must "weigh the importance of the public interest in question[]. . . as a part of the overall process of balancing the equities of a particular case to determine whether plaintiffs are guilty of inequitable delay."[35] Here, Plaintiffs' purported delay in bringing this action will not cause Defendants undue prejudice. Even 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.

Defendants' argument that they would suffer undue prejudice from the timing of Plaintiffs' claims is rooted in a fundamental mischaracterization of Plaintiffs' claims and requested relief. Defendants assert that Plaintiffs request Defendants re-print *all* absentee ballots before the mailing deadline. This is inaccurate. Plaintiffs' goal is for everyone to be able to vote without having to risk their own, their families', their friends', and their neighbors' lives. There are simple, practical ways to address the burden imposed by the Witness Requirement. That is why Plaintiffs request only two basic remedies.

First, Plaintiffs ask that Defendants count all absentee ballots received that lack a witness signature. This requires almost no effort on Defendants' part except informing those persons canvassing ballots to include non-witnessed ballots among those counted in

---

34 *Breck*, 706 P.2d at 315 (quoting *Moore*, 553 P.2d at 15).
35 *Moore*, 553 P.2d at 19 (internal citations omitted).

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

this election. And this work does not begin until at least 7 days before election day. Second, Plaintiffs request that Defendants either place a sticker over the witness signature printing on the ballot informing the voter it is no longer required,[36] or insert a sheet inside the envelope informing voters that they do not need to provide a witness signature for this election only. Defendants have done this on several occasions, for example when they forgot to include a ballot statement in the official election pamphlet in 2014.[37]

Moreover, in determining whether laches bars a claim, the Court must consider not only prejudice to Defendants, but also "the interests to be vindicated."[38] Here, any prejudice to Defendants is heavily outweighed by the public interest in protecting Plaintiffs'—and all Alaskans'— fundamental right to vote and ensuring that the public can vote safely in the general election, a right guaranteed by the Alaska Constitution.[39]

II. Plaintiffs' Are Entitled to a Preliminary Injunction Because the Balance of Hardships Tips Clearly in Their Favor.

---

[36] *See* Stipulation & Partial Consent Decree, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct., 2d Judicial Dist. Aug. 3, 2020), https://www.aclu-mn.org/sites/default/files/field_documents/62-cv-20-3149_stipulation_and_consent_decree_0.pdf.

[37] Pat Forgey, *Voter Pamphlet Omission May Have Affected Earliest-Mailed Ballots*, Anchorage Daily News (Oct. 17, 2014), http://www.adn.com/politics/article/voter-pamphlet-issue-may-have-affected-1900-ballots/2014/10/17. Indeed, just this month, Defendants sent absentee ballots to military and overseas voters that listed the wrong Democratic candidate for House District 28. James Brooks, *Some Absentee Ballots List the Wrong Candidate in an Anchorage House Race*, Anchorage Daily News (Sept. 21, 2020), https://www.adn.com/politics/alaska-legislature/2020/09/21/some-absentee-ballots-list-the-wrong-democratic-candidate-in-an-anchorage-house-race/.

[38] *Moore*, 553 P.2d at 16.

[39] Alaska Const. art. V., § 1; *accord Thomas v. Croft*, 614 P.2d 795, 798 (Alaska 1980) (recognizing "the strong public policy favoring" vindicating fair elections); *McCormick v. Smith*, 799 P.2d 287, 288 (Alaska 1990) (internal citation omitted) (determining that the plaintiff was a public interest litigant, the Court concluded that "Smith sought to maintain the procedural integrity of the election process. . . . To be sure, the benefit to the public had she prevailed would seem slight. It would nevertheless seem sufficient.").

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

A. The Balance of Hardships Does Not Invariably Tip Against Plaintiffs in the Elections Context.

In *State, Div. of Elections v. Metcalfe*, the Alaska Supreme Court reiterated that "[t]he showing required to obtain a preliminary injunction depends on the nature of the threatened injury."[40] Where the threatened injury to plaintiffs is irreparable and the opposing party is adequately protected, Alaska courts balance the hardships; otherwise, Plaintiffs must make a "clear showing of probable success on the merits."[41] Because the State's interests are adequately protected, the balance of the hardships test is applicable.

Defendants would have this Court over-read *Metcalfe* to hold that every challenge implicating an election law requires the "clear showing" standard.[42] Although, as set forth below, Plaintiffs easily meet that standard too, Defendants misconstrue *Metcalfe*. *Metcalfe* was a facial challenge to a statute regulating ballot access. Because the State's interest in requiring a political group to first demonstrate some political support before compelling the State to recognize it as a political party and bestow upon it the benefits concomitant with that recognition . . . "cannot be guaranteed by a bond" and was not "slight" when compared with the plaintiff's interests, the Alaska Supreme Court ruled that the balance of the hardships test was not applicable.[43]

Here, to the contrary, Plaintiffs are not challenging application of the State's Witness Requirement in all respects, but only in the context of the November 2020 election during the pandemic. Moreover, while in *Metcalfe,* there was no way to protect the State's

---

40 110 P.3d 976, 978 (Alaska 2005).
41 *Id.*
42 Opp. at 37–38.
43 *Metcalfe*, 110 P.3d at 979.

interests once the plaintiff was put on the ballot, here, as set forth below, there are many other ways that the State's interests are safeguarded. When weighed against Plaintiffs' fundamental right to vote, the balance here clearly tips in Plaintiffs' favor and in favor of a preliminary injunction.

1. Plaintiffs Face Certain and Irreparable Harm.

The risk of serious, lasting illness or death is an irreparable harm.[44] The right to vote is fundamental[45] and the loss of that right in a single election is an irreparable harm.[46] Unless this Court enjoins Defendants from enforcing the Witness Requirement, Plaintiffs will face a choice between these two immediate and irreparable harms: risk their life and health or forego their fundamental right to vote. In *League of Women Voters of Virginia v. Virginia State Board of Elections*, which led to the suspension of Virginia's witness requirement for the presidential primary, a federal court in Virginia explained that the U.S. Constitution "does not permit a state to force such a choice on its electorate."[47] Neither should the Alaska Constitution, which is no less protective.

During this extraordinary time in which the pandemic has necessitated social

---

[44] *Thakker v. Doll*, 451 F.Supp.3d 358, 365 (M.D. Pa. Mar. 31, 2020) (noting that there "can be no injury more irreparable" than the "very real risk of serious, lasting illness or death.").

[45] *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) ("*Vogler I*"); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

[46] *See, e.g.*, *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020) ("The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm."); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (noting that "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law").

[47] 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) (citing *Harper*, 383 U.S. at 670).

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

distancing, lock-downs, and self-quarantines, the Witness Requirement imposes a substantial burden on Plaintiffs' right to vote. Courts across the country have recognized as much.[48] For those who are at risk of developing serious or life-threatening complications from COVID-19, "every potential exposure is a risk—even when taking appropriate precautions, such as wearing a face mask, frequently washing one's hands, and complying with social distancing guidelines."[49] Obtaining a witness signature risks potential exposure.

i. The Witness Requirement Risks Plaintiffs' Health.

As detailed in Plaintiffs' earlier briefing, COVID-19 has had an especially disproportionate impact on Alaska Natives.[50] The COVID-19 pandemic necessitated swift and direct action from Arctic Village Council. Given the community's small population and its limited access to health care, Arctic Village Council took every precaution necessary to stem the spread of COVID-19. As explained in earlier briefing, the Witness Requirement imposes a substantial burden on Arctic Village Council's members, given the

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

---

48 *See, e.g., id.* ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times. In our current era of social distancing-where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household-the burden is substantial for a substantial and discrete class of Virginia's electorate."); *Thomas v. Andino*, 2020 WL 2617329, at *19 (D.S.C. May 25, 2020) (finding "burdens inflicted by the Witness Requirement, which are at least of sufficient magnitude to warrant the injunction" given the COVID-19 pandemic and Plaintiffs' particularized risk factors for contracting COVID-19, including age and underlying medical conditions); *Middleton v. Andino*, 2020 WL 5591590, at *1 (D.S.C. Sept. 18, 2020) (pending *en banc* review) (enjoining enforcement of South Carolina's witness signature requirement in the November 2020 general election enjoining enforcement of South Carolina's witness signature requirement in the November 2020 general election recognizing due to the risks of COVID-19).

49 *League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 4927524, at *9 (W.D. Va. Aug. 21, 2020).

50 *See* Mem. in Support of Mot. for Prelim. Inj. ("Mem.") at 10–12.

efforts it implemented to protect the health and safety in the community.[51]

Although one tribal leader was able to offer door-to-door in-person voting during the primary election, the possibility that COVID-19 spread could decimate this tribal community cautions the Council against making another exception to its lockdown. Every person-to-person exposure poses a risk to the vulnerable community members of this remote village—which lies 233 air miles from the nearest hospital facilities in Fairbanks.[52] Moreover, this one-day exception from the lock-down used in the primary election could not possibly address the concerns of those members of the community who are immunocompromised or have underlying medical conditions and simply do not wish to be forced to encounter another person unnecessarily.

Furthermore, while individual Plaintiffs Elizabeth Jones and Barbara Clark have come into distanced, masked contact, often outdoors, with other individuals, and were able to vote in the primary, they undertook these efforts at great risk to themselves. Elizabeth Jones was only able to vote because her mail carrier witnessed her ballot, an option no longer available to her due to new USPS policy. As the court found in *League of Women Voters of Virginia*, "every potential exposure is a risk[]" to those like Ms. Jones and Ms. Clark who have underlying medical conditions "[]even when taking appropriate precautions, such as wearing a face mask, frequently washing one's hands, and complying with social distancing guidelines."[53] Some risks, like shopping for groceries, are necessary,

---

51 *See* Mem. at 18–19; Aff. of Yatlin ¶¶ 6–11.

52 *League of Women Voters of Va.*, 2020 WL 4927524, at *9 ("[E]very potential exposure is a risk—even when taking appropriate precautions[.]").

53 *Id.*

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

"but the burden one might be forced to accept to feed oneself differs in kind from the burden that the First and Fourteenth Amendments tolerate on the right to vote."[54] Even using all of the precautions available, "many would be dissuaded from exercising their vote both because of the risk of illness and the efforts involved in mitigating that risk—especially those who are elderly, immunocompromised, or otherwise at grave risk from the virus."[55] Indeed, Defendant Meyer's chief of staff, Josh Applebee, recognized that "high-risk" voters such as those who are "65 and older must be particularly careful to avoid exposure to COVID-19," and that these "voters may therefore wish to avoid going to the polls, standing in close proximity, and using touch screens or handling ballots."[56]

Although Defendants heeded the advice of "public health officials"[57] to mail a "paper absentee ballot application form" to all "voters 65 and older,"[58] and thus enable these "high-risk" voters to "avoid exposure to COVID-19,"[59] Defendants would have these same elderly and immunocompromised individuals undertake extraordinary risks to have their absentee ballots witnessed. Defendants cite CDC guidelines to bolster this remarkable proposition; yet, those guidelines, as Defendants point out, begin with the admonition to "limit your interactions with other people as much as possible."[60] Because one must assume some risk to carry on with one's life simply does not justify the assumption of

54 *Id.*
55 *Id.*
56 Decl. of Applebee ¶ 7, *Disability Law Ctr. of Alaska v. Meyer*, No. 3:20-cv-00173-JMK (D. Alaska Aug. 3, 2020) (Dkt. No. 25).
57 *Id.*
58 *Id.* ¶ 6.
59 *Id.* ¶ 7.
60 Opp. at 33.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

greater, additional risk to avail oneself of one's fundamental constitutional rights.

ii. The Witness Requirement Risks Plaintiffs' Votes.

More than 400 absentee ballots were rejected in the primary due to failures to comply with the Witness Requirement.[61] Defendants cannot dispute that the number of absentee ballots will increase substantially for the November election. In fact, as of September 25, and with another month left to meet the absentee paper ballot request deadline, sixteen percent of registered voters, a "record high," had signed up to vote absentee.[62] That amounts to over 94,000 voters[63] already needing to procure witnesses.

Even if the rate of rejections of ballots for failure to comply with the Witness Requirement remains stable, the number of such rejections promises to be in the thousands. The rate of rejections for this reason are likely, however, to be higher than normal because more voters will be voting absentee for the first time, and many of them are likely to refrain from obtaining a witness because of fear of personal contact during the pandemic.

B. Defendants Will Be Adequately Protected If the Court Grants an Injunction.

Defendants will be adequately protected if an injunction is granted because they have failed to show that they will suffer any appreciable harm if the Witness Requirement is not enforced for this one election. Nowhere have Defendants asserted that the

---

61 Brooks, *supra* note 16.

62 James Brooks, *8 Alaskans are the First To Vote in the State's General Election,* Anchorage Daily News (Sept. 25, 2020), https://www.adn.com/politics/2020/09/25/eight-alaskans-are-the-first-to-vote-in-the-states-general-election/;

63 Alaska Div. of Elections, *Number of Registered Voters by Party Within Precinct* (Sept. 3, 2020), https://www.elections.alaska.gov/statistics/2020/SEP/VOTERS%20BY%20PARTY%20AND%20PRECINCT.htm.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

Requirement is of any *actual* value in detecting fraud. Defendants have not described any way in which it evaluates the legitimacy of a witness's signature, nor have Defendants asserted that the Division has excluded ballots or refused to count votes based on fraudulent or questionable witness signatures.

On the other hand, Defendants have described methods they have in place and employ to combat and prevent fraud. The Division may, for example, ensure that a voter's identifier matches the voter's record, and reject the ballot if it does not.[64] The Division may determine whether a voter has already voted by another method and reject their absentee ballot if it determines they have.[65] The Division may also determine whether a voter was ineligible for a ballot, registered to vote too late, or failed to register at all, and reject ballots for any of those reasons as well.[66] In light of all of these practical safeguards, and in the absence of any evidence that Defendants actually rely on the Witness Requirement to detect or combat fraud, Defendants cannot show that it safeguards the integrity of the election, or that election integrity will be compromised by a preliminary injunction.

Defendants also claim that the additional administrative burden of temporarily lifting the Witness Requirement would constitute irreparable harm. This significantly overstates the steps the Division would need to take if enjoined. First, Plaintiffs have requested that the Court order Defendants to "modify election materials, including mail-in ballots, to reflect the elimination of the Witness Requirements[.]"[67] This does not require

---

64 Opp. at 16.
65 *Id.*
66 *Id.*
67 Compl. at 28, ¶ iv.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

the reprinting of ballot envelopes as Defendants suggest.[68] Instead, the Division could modify the envelopes already printed by placing a sticker over the box for a "Witness Affidavit,"[69] explaining no witness signature is required, and instructing the voter to date the envelope. Similarly, the Division could use a sticker to modify the "cover flap" of the ballot envelope by, instead of asking "Did you . . . Have your signature witnessed?," reminding the voter to include a date under their signature.

Alternatively, or in conjunction with the use of modifying stickers, the Division could include printed notices mailed with absentee ballots that inform voters that their ballots will be counted even without witness signatures. The notice could make clear that dating the ballot envelope would be a satisfactory alternative to having a witness sign.

These modest steps would take minimal effort to implement and would require little training. Far from the "severe" consequences Defendants predict,[70] the Division could simply announce, on its website and elsewhere (on television, radio, and social media), that the Witness Requirement has been suspended due to COVID-19. Such a simple statement is unlikely to lead to any confusion, since it lessens, rather than increases, any potential burden on the voter. And any confusion that leads to a voter unnecessarily procuring a witness signature will not result in voter disenfranchisement. Furthermore, it would require simple instructions to Division staff to count absentee ballots without regard to the witness requirement since this too represents one *less* step in the ballot counting process. Therefore,

---

68 Opp. at 36.

69 *Id.* at 5; *see* Minn. Stipulation & Partial Consent Decree, *supra* note 41 (ordering the defendants to inform all state officials to count otherwise validly cast absentee ballots that do not have witness signatures).

70 *Id.* at 36–37.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

because the harm imposed on Plaintiffs by the Witness Requirement is irreparable and Defendants' interests are adequately protected, the Court should issue a preliminary injunction allowing voters to vote absentee by mail or electronic transmission in November's general election without having to comply with the Witness Requirement.

III. Plaintiffs Have Established Probable Success on the Merits of Their Claims.

The Court can evaluate Plaintiffs' claims under the "clear showing of probable success on the merits" standard, if it finds that Plaintiffs have not met the "balance of hardships" standard.[71] Applying the "probable success on the merits" standard requires the Court to evaluate the underlying legal claims of the case and determine that the moving party is "more likely than not" to prevail.[72] Plaintiffs have shown that here.

A. Plaintiffs Have Established Clear Probable Success on the Merits of Their Right to Vote Claim.

The Alaska Supreme Court has articulated a test that when evaluating the burdens on constitutionally-protected rights: "[A]s 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." [73] Here, Defendants concede the Alaska Constitution requires the State to provide for absentee voting by law and that Plaintiffs have a constitutionally protected right to absentee voting under the Alaska Constitution.[74] Under these circumstances, the Alaska Supreme Court

---

71 *Metcalfe*, 110 P.3d at 978.

72 *Id.*

73 *See State, Div. of Elections v. Green Party of Alaska*, 118 P.3d 1054, 1061 (Alaska 2005)

74 Opp. at 40; *see* Alaska Const., art. V, § 3.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

would apply strict scrutiny and require the State to show a compelling interest to justify infringement.[75]

Nevertheless, Defendants argue that strict scrutiny should not apply to this case, claiming that *Metcalfe*'s application of strict scrutiny should be limited to ballot access cases.[76] The express language in *Metcalfe* argues otherwise. In explaining why strict scrutiny applied in that case, the court stated: "At least two fundamental rights are implicated—the right to vote and the right to associate freely in pursuit of political beliefs."[77] Similarly, the Court in *Green Party* considered whether restrictions on who could vote in a party primary violated the fundamental right to vote.[78] Defendants' assertion that strict scrutiny only applies in ballot access cases is simply incorrect.[79]

Even if the Court found that these cases do not apply strict scrutiny beyond the ballot access realm, Alaska's Constitution accords broad protections to fundamental rights reaching beyond the rights protected under the U.S. Constitution.[80] At a minimum, they

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

---

75 *Metcalfe*, 110 P.3d at 979; *Vogler I*, 651 P.2d at 3 (1982); *Vogler v. Miller*, 660 P.2d 1192, 1194 (1983) ("*Vogler II*").

76 Opp. at 41.

77 *Metcalfe*, 110 P.3d at 979.

78 *Green Party*, 118 P.3d at 1061.

79 *Metcalfe*, 110 P.3d at 979 ("[W]e have recognized that restrictions on ballot access interfere with the rights of candidates *and* voters."); *see e.g.*, *Green Party*, 118 P.3d at 1060 n.29 (clarifying that presumption of strict scrutiny in ballot access cases is a particularized application of the general balancing framework); *Vogler I*, 651 P.2d at 2 ("Restrictions on ballot access impinge not only on the rights of the potential candidates, but on those of the voters as well."); *Vogler II*, 660 P.2d at 1195 ("The precise question thus presented is whether the 10% definitional requirement contained in AS 15.60.010(20) impinges on the rights to vote and associate freely to the least degree possible consistent with the achievement of any compelling state goals.").

80 *Green Party*, 118 P.3d at 1060–61 ("To be sure, the United States Constitution as interpreted by the Supreme Court sets "national minimal constitutional standards" with which Alaska election laws must comply. But we have often held that Alaska's constitution

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

suggest that the interest the state must show to justify the burdens on the right to vote in this case approach the "more compelling" part of the balancing scale. More to the point, given that Plaintiffs are being forced to choose between their votes and their lives, Defendants have no legitimate interest that outweighs those burdens. Thus, even if the Court applied heightened scrutiny—that the Witness Requirement imposes a substantial, as opposed to severe, burden on Plaintiffs' and Plaintiffs' members' right to vote—the state's interests do not justify such an infringement.

1. The Witness Requirement Severely Burdens the Right to Vote.

Defendants' argument that they themselves did not create the pandemic is of course not the issue here.[81] Nor is it relevant that voters might have to have personal contact to get life-sustaining food or health care.[82] Whether it be a natural disaster like an earthquake or a pandemic, Defendants are responsible for administering elections in a fair, equitable manner and ensuring that its election administration does not disenfranchise voters.

In *Democratic Nat'l Committee v. Bostlemann*, a federal court in Wisconsin found, just days ago, that the pandemic presented such unique circumstances as to enjoin enforcement of a state statute that prevents electronic delivery of absentee ballots to civilian voters.[83] The court concluded that "the evidence is nearly overwhelming that the pandemic does present a unique need for relief in light of: (1) the experience during the Spring

---

is more protective of rights and liberties than is the United States Constitution . . . . We therefore stress that the results we derive under the Alaska Constitution need not correspond with those the Supreme Court might reach under the federal constitution.").

81 Opp. at 42.

82 *Id.* at 50–51.

83 2020 WL 5627186, at *4 (W.D. Wis. Sept. 21, 2020).

election, (2) much greater projected numbers of absentee ballot requests and votes in November, and (3) ongoing concerns about the USPS's ability to process the delivery of absentee ballot applications and ballots timely."[84] Other courts have held the same, requiring states lift statutory requirements that place substantial burdens on the fundamental right to vote during the pandemic.[85] These courts have also applied a lesser standard than strict scrutiny and found that the burden on the right to vote was substantial enough such that no state interests could justify potentially disenfranchising voters.

As discussed above, that Plaintiff Arctic Village Council was compelled to institute a lock-down does not make the burden less severe, as Defendants would have it.[86] Nor is it relevant, let alone seemly, for Defendants to lay the blame for the burden on Plaintiffs' "personal characteristics," such as age, race, or underlying conditions.[87]

---

84 *Id.* at *23.

85 *See, e.g., League of Women Voters of Va.*, 2020 WL 2158249, at *8 ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times."); *Garbett v. Herbert*, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020) ("On balance, considering the current pandemic and the totality of the State's emergency measures to combat it, Utah's ballot access framework as applied this year imposed a severe burden . . . ."); *Thomas*, 2020 WL 2617329, at *20 (witness requirements for absentee ballot significantly burdened the plaintiffs' right to vote); *Frederick v. Lawson*, 2020 WL 4882696, at *16 (S.D. Ind. Aug. 20, 2020) (state's rejection of absentee ballots for signature-matching without notice and opportunity to cure placed significant burden on the right to vote, especially during a pandemic); *Harding v. Edwards*, 2020 WL 5543769, at *4, *18 (M.D. La. Sept. 16, 2020) (ordering state to expand who can vote absentee and early voting period during COVID-19 pandemic); *Texas v. Hollins*, 2020 WL 5584127, at *4 (Tex. App. Dist. Sept. 18, 2020) (affirming county's decision to mail all registered voters absentee ballot applications during pandemic).

86 Opp. at 27.

87 *Middleton*, 2020 WL 5591590 at *35 (D.S.C. Sept. 19, 2020) (pending en banc review) (enjoining enforcement of South Carolina's witness signature requirement in the November 2020 general election recognizing, in particular, "that adherence to the Witness Requirement in November would only increase the risk of contracting COVID-19 for members of the public with underlying medical conditions, the disabled, and racial and ethnic minorities"). *Thomas*, 2020 WL 2617329 at *19 (D.S.C. May 25, 2020) (enjoining

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

Finally, Defendants create a heretofore unknown requirement that Plaintiffs must provide "statistical" evidence of the disenfranchisement. Opp. at 42. Even the inapposite case they rely upon, *Crawford v. Marion County Election Board,*[88] requires no such thing. *Crawford* was a *facial* challenge to a statute, seeking to strike down the voter ID law challenged in that case in all its applications. To prove their case, plaintiffs had produced statistical evidence, but failed to introduce evidence of any individuals who were unable to vote because of the law. The Court found the plaintiffs' proofs were lacking under the circumstances.[89] No general rule as to the necessity of statistical evidence was announced in that case as to facial challenges, let alone to "as-applied" challenges such as this case.

Here, Plaintiffs are not seeking invalidation of the Witness Requirement in all its applications, but only for this election, and only because of the pandemic. Even if "statistics" were needed to support their case, Plaintiffs have shown that 456 voters were disenfranchised because of the witness requirement in this year's primary election,[90] and it is beyond dispute that more will be disenfranchised in November if the Witness Requirement is not preliminarily enjoined.

And *Crawford*, of course, is not a case brought under the Alaska Constitution. It is

---

enforcement of South Carolina's witness signature requirement in the 2020 primary election and noting, "In terms of other burdens, the individual Thomas Plaintiffs, have individual characteristics or conditions that are regarded by the CDC as placing them, at a higher risk for contracting COVID-19, including being over 65 years of age, having underlying medical conditions (including scleroderma, interstitial lung disease, hypertension, gout, history of breast cancer, emphysema, infection), being disabled, and/or being African-American.").

88 553 U.S. 181, 199 (2008).

89 *Id.* at 185.

90 Brooks, *supra* note 16.

a federal case brought under the United States Constitution. As noted above, Alaska's safeguards of voting rights are more protective than those under federal law.

1. The State Has No Countervailing Interests That Outweigh the Severe Burden on Voters.

Defendants attempt to justify the burdens on voters with two state interests: preventing voter fraud and public confidence in the election results.[91] Whether subject to strict scrutiny or lesser scrutiny under the balancing test, neither outweighs the burdens imposed on Plaintiffs' constitutional right to vote.

Defendants argue that the Witness Requirement prevents fraud because it serves as the only independent verification mechanism to ensure the person completing the absentee ballot is the person they claim to be. This is difficult to believe, because, as noted above, the only thing the witness requirement does is show that some person is reputed to have witnessed the signature – without requiring that the voter's identity is known to the witness, or any attempt by the State to verify who the witness is, and indeed whether the witness actually exists. Moreover, Alaska has other much more effective validation mechanisms: voters are required to provide identification and sign absentee ballots under penalty of perjury, which carries a criminal penalty of up to ten years of incarceration.[92]

Furthermore, while protecting against fraud is a legitimate interest, it is a minor one, given the virtual complete absence of voter fraud in Alaska.[93] The court in *Thomas*

---

91 Opp. at 45–49.

92 AS 12.55.125(d).

93 Defendants cite to an instance of irregularities in absentee ballot applications in one house district in 2014, 2016, and 2018. Opp. at 8–10. The Division allegedly noticed these irregularities by comparing signatures and finding that they appeared to the same

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

concluded that while voter integrity is a compelling interest, the state must provide "evidence that such an interest made it necessary to burden voters' rights."[94] Defendants have not shown how the Witness Requirement serves to prevent fraud, or why it is necessary to burden Plaintiffs' fundamental right to vote during a pandemic.[95]

Defendants next argue that the Witness Requirement is paramount to safeguarding voter confidence because any last minute, temporary changes would compromise the integrity of the system.[96] But here the changes are simple: inform voters they do not need

---

handwriting and began at a uniform distance from the pre-printed colon on the signature line. *Id.* at 9. Based on these comparisons, the Division was able to follow-up with the applicants and ultimately track their absentee ballots. *Id.* The Division did not count the ballots confirmed as fraudulent. *Id.* Defendants claim that these incidents illustrate the need for the Witness Requirement. But they fail to explain how the Witness Requirement was used to prevent fraud in these instances—Defendants provide ample evidence of how effective its signature comparisons were in detecting fraud. Defendants also argue that Alaska's Witness Requirement is a proxy for the State's lack of uniform standards around signature matching. *Id.* at 45. But again, Defendants do not explain how the Witness Requirement, as practically applied, is a proxy for signature matching given that they concede that a "determined fraudster might simply forge a witness signature." *Id.* at 44.

[94] *Thomas*, 2020 WL 2617329, at *20 (quoting *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020)) (affirming injunction against Kansas's documentary proof of citizenship requirement for voter registration).

[95] As the Court noted in *Green Party*, "while the state may anticipate likely problems in the electoral process, it cannot justify imposing significant constitutional burdens merely by asserting interests that are compelling only in the abstract. . . . [T]he bare assertion of an abstract interest is insufficient to support restricting constitutionally protected rights." 118 P.3d at 1066–68. Defendants heavily rely on *Democracy North Carolina v. North Carolina State Board of Elections*, 2020 WL 448406 (M.D.N.C. Aug. 4, 2020), to support their arguments. Opp. at 48, n.144. That case is distinguishable because it was brought under the federal constitutional standard, different from the standard applied by Alaska courts considering the Alaska constitution. It is also distinguishable because the "[t]he court . . . f[ound] Defendants' stated interest in preventing voter fraud [was] stronger than the government's in *Andino* for one substantial reason: North Carolina experienced a serious case of voter fraud involving absentee ballots in the 2016 General Election." *Democracy N.C.*, 2020 WL 4484063, at *36. Specifically, the court noted an instance where the state had received 1,265 duplicative voted ballots.

[96] Opp. at 46–47.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

witnesses on their absentee ballot, and do not reject ballots that lack a witness signature.

Defendants also argue that a temporary suspension of the Requirement and future enforcement has the potential to cause voter confusion. However, if Defendants fulfill their duty to appropriately educate voters ahead of each election, this problem should be easily mitigated. At worst, some voters might not get the message, and may be able to get a witness signature and vote, or may cast a ballot without a witness signature and will have their vote counted.

Further, this is not the first instance in which the State has had to make last minute changes to election-related materials, so voters should be able to adapt.[97]

Contrary to Defendants' argument,[98] Plaintiffs' reliance on cases where states entered into consent judgments or conceded to lifting their Witness Requirements is highly relevant.[99] The defendants in those cases recognized the laws' burden on voters during the pandemic, and agreed to a temporary remedy, such as the one being sought here, to mitigate the potential harm. But the supporting case law is not limited to voluntary cessation of the unconstitutional requirement. In *Middleton v. Andino,* after the district court preliminarily enjoined the state's witness requirement as probably unconstitutional, and after that order was stayed by a panel of the Fourth Circuit, the Fourth Circuit reinstated the injunction and ordered the case be heard en banc.[100]

---

97 Brooks, *supra* note 37; Forgey, *supra* note 37.

98 Opp. at 47.

99 *League of Women Voters of Va*, 2020 WL 4927524 at *3; *Common Cause R.I. v. Gorbea*, 2020 WL 4365608, at *3 (D.R.I. July 30, 2020), *judgment entered* 2020 WL 4460914 (D.R.I. July 30, 2020).

100 *See, e.g., Middleton*, 2020 WL 5591590, at *35 (D.S.C. Sept. 19, 2020).

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

B. Plaintiffs Have Clearly Proved the Probable Success on the Merits of Their Equal Protection Clause claim.

Article 1, Section 1 of the Alaska Constitution guarantees that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[101] When there is an alleged violation of equal rights, Alaska courts analyze the issue on a sliding scale with the most fundamental rights (*e.g.*, right to vote) receiving strict scrutiny—and requiring the state to show that the law serves a compelling governmental interest and is narrowly tailored to serve that interest.[102]

Defendants argue that the equal protection clause does not apply in this instance because the law is facially neutral and Plaintiffs' inability to comply has to do with their own personal circumstances.[103] But Defendants ignore that a facially neutral law can result

---

101 *See Vogler II*, 660 P.2d at 1193 (stating that if the right to vote or the right to associate is implicated, all other rights are illusory). Defendants also rely on the legislative history in favor of upholding the witness requirement. Opp. at 44–45. Defendants assert that the legislature viewed the Witness Requirement as a meaningful one because, in the absence of uniform signature matching, the Witness Requirement provides independent verification that the absentee voter is who he or she claims to be. *Id.* at 44. But this ignores the alternate mechanisms that Alaska has in place to verify the identities of absentee voters. The Division can ensure that a voter's identifier matches the voter's record, and reject the ballot if it determines a mismatch or the Division can determine whether a voter has already voted by another method and reject the voter's absentee ballot if it determines that the voter has or the Division can also determine whether a voter was ineligible for a ballot, registered to vote too late, or failed to register at all, and reject ballots for any of those reasons. Relying on the legislative history also ignores the nature of Plaintiffs' as-applied claim during a pandemic. The legislature did not enact the Witness Requirement during a global pandemic, nor could it have contemplated the burdens Alaskans would face for having to comply with the Witness Requirement.

102 *See Peloza v. Freas*, 871 P.2d 687, 691 (Alaska 1994) (holding that an issue of residency was enough to trigger equal protection analysis as it could unconstitutionally burden the right of voters and a potential candidate given the "right of qualified voters to cast their votes effectively"); *Alaska Pac. Assur. Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984).

103 Opp. at 51.

in disparate impact.[104] That is the case here. The Witness Requirement burdens certain classes of voters more than it does others. Plaintiffs who are above sixty-five-years-old, must isolate, have underlying health conditions, or are part of racial groups at a higher risk of experiencing death from COVID-19 face severe burdens when it comes to exercising their right to vote.[105] For individuals who live alone in these communities who are either high risk and self-isolating or under shelter-in-place orders, finding someone to act as a witness risks exposure to COVID-19. As Plaintiffs have stated in their declarations, having to locate a witness and sign their ballots in the witness's presence prevents them from voting at all.

The Witness Requirement's disparate treatment of voters who are more affected by the pandemic triggers strict scrutiny, necessitating that the state articulate a "sufficiently compelling" interest.[106] As explained above at length, Defendants' asserted interests do not meet an even lesser standard, let alone strict scrutiny.

---

[104] Defendants cite to *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 536 (Alaska 2015) (citing *Alaska Fish & Wildlife Conservation Fund v. State, Dep't of Fish & Game, Bd. of Fisheries*, 289 P.3d 903, 910 (Alaska 2012)). *Manning* held that disparate regulations on users would trigger an equal protection issue, but that the issue of what a person could hunt did not substantially change the right to subsistence hunting as it only changed the uses, not the rights of the users. This is different from this case as the COVID-19 pandemic has changed what communities are safely able to do. Thus, those living alone, senior citizens, and people under shelter-in-place orders have been substantially limited in how they can safely use their right to vote and has created an unequal application of the Witness Requirement. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005) (holding that laws that have disparate treatment of similarly situated individuals cans violate the Equal Protection Clause of the Alaska Constitution).

[105] *See Common Cause R.I. v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (holding that the witness requirement would not be upheld during the pandemic because some communities facing a higher risk of complications from COVID-19 like senior voters faced a higher burden in finding witnesses and that even if they could find one, there is no guarantee that person could verify who the person was or even that they could find a second witness at the same time).

[106] *Peloza*, 871 P.2d at 691.

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

CONCLUSION

For these reasons, Plaintiffs request that the Court deny Defendants' motion to dismiss and grant Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 28th day of September, 2020, in Anchorage, Alaska.

Natalie A. Landreth
(AK Bar No. 0405020)
Matthew N. Newman
(AK Bar No. 1305023)
Wesley James Furlong
(AK Bar No. 1611108)
NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
landreth@narf.org
mnewman@narf.org
wfurlong@narf.org

Counsel for Plaintiff Arctic Village Council

Ezra D. Rosenberg*
Pooja Chaudhuri*
Natasha Chabria*
LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW
1500 K Street Northwest, Suite 900
Washington, DC 20005
Tel. (202) 662-8600
erosenberg@lawyerscommittee.com
pchaudhuri@lawyerscommittee.com
nchabria@lawyerscommittee.com

Counsel for all Plaintiffs

Stephan Koteff
(AK Bar No. 9407070)
Joshua A Decker
(AK Bar No. 1201001)
Aadika Singh*
ACLU OF ALASKA FOUNDATION
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99503
Tel. (907) 263-2007
skoteff@asluak.org
jdecker@acluak.org
asingh@aclu.org

Dale E. Ho*
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
Tel. (212) 519-7866
dho@aclu.org

Counsel for Plaintiffs League of Women Voters Alaska, Elizabeth Jones, and Barbara Clark

* *Pro Hac Vice* forthcoming

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2020, I mailed and emailed a true and correct copy of the foregoing to:

Margaret Paton-Walsh
Lael Harrison
Alaska Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov
lael.harrison@alaska.gov

Wesley James Furlong
(AK Bar No. 1611108)

NATIVE AMERICAN RIGHTS FUND
745 West 4th Avenue, Suite 502
Anchorage, AK 99501
Tel. (907) 276-0680
Fax (907) 276-2466